California Constitutional Law: Separation of Powers

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Introduction

WHILE THERE IS A WEALTH of scholarship on the Constitution of the United States, there has been no serious attempt at a comprehensive treatment of California constitutional law since it became the thirty-first state in 1850.[1] In particular, the subject of separation of powers in California government has been largely neglected.[2] The California Constitution merits development of its own scholarship. This Article contributes to that process by describing the development and current state of the separation of powers doctrine under the California Constitution and by proposing a further development of that doctrine.

California's government warrants a different separation of powers analysis than does the federal government. This is due not only to differences in language between the Federal and California Constitutions but also to the intrinsic differences between the powers of the state and federal government. The federal government is restrained by the limited powers enumerated in its Constitution, by principles of

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1. The primary works are 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 137–176 (10th ed. 2005), and JUSTICE JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, A REFERENCE GUIDE (1993).

2. The sole attempt is Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079 (2004). On the value of developing an independent body of state constitutional law generally, see Randall T. Shepard, *The Maturing Nature Of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421–22 (1996) (citing William J. Brennan, Jr., S*tate Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

federalism, and by individual rights protected in the Bill of Rights and elsewhere. State governments, by contrast, have plenary power, limited only by the federal supremacy clause and by individual rights otherwise protected in the state constitution. These fundamental differences—including the greater power of the state government to regulate the lives of its citizens—warrants a different approach from the federal approach to maintaining the always-fluctuating balance of power between California's three branches of government.

Recognizing this, California courts have developed their own separation of powers jurisprudence based on the unique features of the California Constitution—which has been described as the "core powers" analysis. Under that analysis, a violation of the California separation of powers doctrine occurs only if an act by one branch "materially impairs" the core powers or functions of another branch. Incidental impairments do not constitute a violation, and reasonable regulation is permissible. In developing this core powers analysis, California courts have attempted to forge a middle ground between formalism and functionalism, the two schools of thought that dominate discussions of the federal separation of powers doctrine. This Article discusses the evolution of California's effort to forge a middle ground and places it in the context of the federal separation of powers doctrine. It then describes the core powers analysis as currently articulated by the California Supreme Court and offers a clarification of that analysis. Although the core powers analysis has been evolving and developing since the birth of the state in 1850, California courts have not articulated a standard for determining whether an act by one branch materially impairs the core powers of another branch. This Article takes the first step in filling that void by proposing the following standard: an act by one branch violates the separation of powers doctrine when that branch eliminates or controls—rather than regulates—the other branch's discretion in exercising its core powers. In other words, a branch may participate in and regulate the exercise of another branch's core powers but may not prevent the other branch from exercising its discretion.

This proposed standard—which focuses the core powers analysis on the discretionary aspect of the power itself, regardless of its source—has two benefits. First, the standard follows logically from existing California separation of powers decisions and therefore requires no substantive departure from existing case law. Second, the standard gives meaning to the relevant language of the California Constitution without sacrificing the flexibility that the three branches of California

government need in order to operate in an efficient and effective manner. It does so by recognizing that that the crux of a branch's essential power is its ability to exercise its discretion and protects that power and no more. Thus, this Article does not propose a substantive change in the California core powers analysis; instead, it argues for a clarification and an incremental advancement in the existing analysis to provide greater guidance to California courts.

I. Basic Principles

A. The Separation of Powers Doctrine and Its Purpose

The separation of powers doctrine articulates a basic philosophy of the U.S. constitutional system of government: "it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch."[3] The doctrine was not simply an abstract concept in the minds of the framers; instead, it was woven into the design of the Federal Constitution and the very structure of the articles defining, delegating, and separating the powers of the three branches of the federal government.[4] The nation's founders divided the government into three separate branches to avoid "[t]he accumulation of all powers legislative, executive and judiciary in the same hands . . . ."[5] The separation of powers doctrine, even more than the Bill of Rights, is the primary protection for personal liberty.[6] It secures liberty in the fundamental political sense of the term, by placing structural limits on the ability of any branch of the government to influence basic political decisions.[7] The Federalist Papers made this point by quoting Montesquieu:

3. Bixby v. Pierno, 481 P.2d 242, 249 (Cal. 1971).

4. INS v. Chadha, 462 U.S. 919, 946 (1983).

5. THE FEDERALIST, NO. 47 (James Madison); Mistretta v. United States, 488 U.S. 361, 380 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

6. *See* Clinton v. City of N.Y., 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. . . . So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary."); THE FEDERALIST NO. 84, at 431–35 (Alexander Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 536–43 (1969). It was at Madison's insistence that the First Congress enacted the Bill of Rights. It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991).

7. *Clinton*, 524 U.S. at 450–51 (Kennedy, J., concurring).

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."[8]

The framers' inherent distrust of governmental power, both because of its potential for tyranny and because of its threat to individual liberty, was the driving force behind the constitutional plan that divided powers among three independent branches.[9] As Madison himself explained, the accumulation of power without divided responsibility is "the very definition of tyranny." Dividing the powers of government is "the central guarantee of a just government."[10] Thus, adoption of the separation of powers doctrine not only made government accountable, it also safeguarded individual liberty.[11]

B. The Conceptions of the Separation of Powers Doctrine: *Formalism vs. Functionalism*

The practical reality of managing the relationship between three separate but equal branches of government leads to tension and conflict. But this is intentional.[12] As Justice Jackson explained over fifty years ago, "the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government."[13] In resolving the inevitable conflicts that would arise between the three branches of government, separation of powers jurisprudence strives to maintain the system of checks and balances, to prevent fragmented

8. THE FEDERALIST NO. 47, at 247 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) (emphasis in original). *See also Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

9. Boumediene v. Bush, 553 U.S. 723, 742 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring) ("Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid").

10. Freytag v. Commissioner, 501 U.S. 868, 870 (1991) (citation omitted).

11. *Boumediene*, 553 U.S. at 742–43 (separation of powers was a defense against tyranny); *see also* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (purpose of separation of powers is to protect individual liberty by preventing one branch from concentrating power); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty").

12. *See, e.g.*, *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

13. *Id.*

powers from reconstituting, and to keep the branches separate. In particular, the doctrine seeks to prevent one branch from aggrandizing its power at the expense of another branch.[14]

Two primary theoretical models for resolving conflicts among the three branches of government have arisen in the literature: formalism and functionalism. Formalism assumes that a power's nature as legislative, executive, or judicial is readily identifiable. In other words, it believes that it is possible to classify every governmental act as legislative, executive, or judicial.[15] The U.S. Supreme Court has applied this model in a number of recent separation-of-powers cases.[16] As one scholar explained:

> Formalists treat the Constitution's three "vesting" clauses as effecting a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive and judicial institutions. Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such a deviation. The separation of powers principle is violated whenever the categorization of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such a blending.[17]

By contrast, functionalism simply requires the maintenance of an approximate balance of power between the branches. Instead of relying on clear demarcations of government powers, functionalism prohibits "too much" giving or taking of any power by any one branch.[18] Unlike the formalist system of rule creation and application, a functionalist approach resolves separation of powers issues "not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers."[19] Thus, functionalism uses a more practical approach to maintain the

14. *Freytag*, 501 U.S. at 878.

15. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1734–35 (1996).

16. *See, e.g.*, Clinton v. City of N.Y., 524 U.S. 417 (1998); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

17. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 857–58 (1990). *See also* Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective On Why The Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989) ("A formalist decision uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive or judicial. It assumes that all exercises of power must fall into one of these categories and takes no ostensible account of the practicalities of administration in arriving at this determination.").

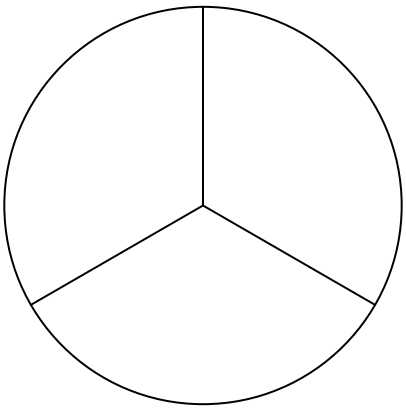
18. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 381–82 (1989).

19. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231 (1991).

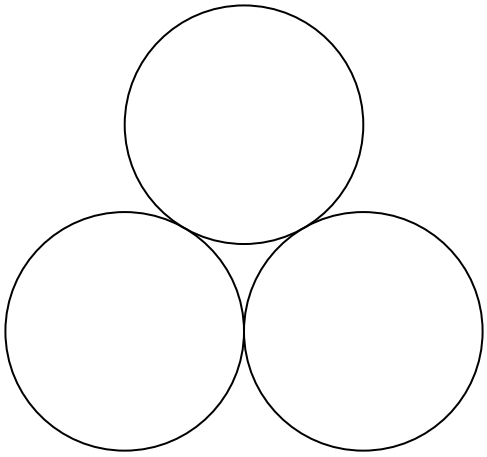
appropriate balance of power among the three branches.[20] Some recent U.S. Supreme Court cases have used a functional analysis but without expressly adopting that approach by name.[21]

The difference between the two views may be depicted as follows.

Functional Model



Formal Model



The debate between the formalist and functionalist schools largely replicates the long-running and broadly applicable debate be-

20. *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1142 (2000).

21. *See, e.g.*, *Mistretta*, 488 U.S. 361; Morrison v. Olson, 487 U.S. 654 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974).

tween bright-line rules and balancing tests. As shown by the wealth of scholarship discussing their merits, each has its limitations.[22] As a result, courts, for the most part, have not consistently adopted one model over the other. Instead, they have struggled to create a cohesive analytical approach for resolving separation of powers issues.

II. The Separation of Powers Doctrine Under the Federal Constitution

Like the principle of the separation of church and state, there is no actual separation of powers clause in the Federal Constitution. Instead, the doctrine is derived from the design of the Federal Constitution and the provisions granting powers to the individual branches.[23] The Federal Constitution divides the delegated powers of the federal government into three categories: legislative, executive, and judicial. It further assures, as nearly as possible, that each branch will confine itself to its assigned responsibility.[24] While a government comprised of "opposite and rival interests" may sometimes inhibit its own smooth functioning,[25] the framers recognized that, "in the long term, structural protections against abuse of power were critical to preserving liberty."[26] In a system of checks and balances, power abhors a vacuum, and one branch's handicap is another's strength.[27]

The text and design of the Federal Constitution determines the powers of the three branches.[28] Many of those powers are also functionally identifiable.[29] For example, the Federal Constitution vests the appointment power in the executive, not as an enumerated power,

22. *See, e.g.*, Flaherty, *supra* note 15; Liberman, *supra* note 17; Magill, *supra* note 20; Merrill, *supra* note 19.

23. Miller v. French, 530 U.S. 327, 341 (2000) ("The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers"); United States v. Lopez, 514 U.S. 549, 575–76 (1995) (noting that the Federal Constitution has four structural elements: separation of powers, checks and balances, judicial review, and federalism).

24. INS v. Chadha, 462 U.S. 919, 951 (1983).

25. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009).

26. Bowsher v. Synar, 478 U.S. 714, 730 (1986).

27. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010).

28. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006) (the power to make the necessary laws is in Congress; the power to execute in the President); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (it is "emphatically the province and duty of the judicial department to say what the law is").

29. *Chadha*, 462 U.S. at 951.

but as a power inherent in the nature of the executive office that cannot be delegated.[30] Each branch must in the first instance determine for itself what the extent of its constitutional powers might be[31] and give "great respect" to another branch's interpretation of its powers.[32] Ultimately, however, the judiciary has the final word and determines the proper scope of any branch's powers.[33]

In providing each branch with its specific powers, the framers sought to create a system that structurally preserved the powers' separation.[34] For example, Congress may legislate, may override an executive veto,[35] has the power of the purse,[36] and can exercise impeachment[37] powers over the executive and judiciary. The President has the appointment power,[38] the power to veto congressional enactments,[39] and the broad power to execute the laws of the Nation[40]—including the power to prosecute criminal charges against members of the other branches.[41] The judiciary has the power to interpret and declare the law[42] but is limited principally by the constitutional requirements for federal court jurisdiction.[43]

To further preserve the balance between the branches, powers expressly assigned to one breach may still be subject to the powers of another branch. For example, the President's war power[44] is subject to the power of Congress to first declare war.[45] Indeed, even after Congress has declared a war, all three branches play a role: the president conducts the conflict, the Congress controls it through funding, and

30. *Free Enter. Fund*, 130 S. Ct. at 3151 (quoting Madison: "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.").

31. United States v. Nixon, 418 U.S. 683, 703 (1974).

32. *Id.*

33. *Id.* at 704.

34. Thus, the framers gave each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others." THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009).

35. U.S. CONST. art. I, § 7, cl. 2.

36. *Id.* art. I, § 8, cls. 1–2, 18.

37. *Id.* art. I, § 3, cls. 6–7; *id.* art. II, § 4.

38. *Id.* art. II, § 2, cl. 2.

39. *Id.* art. I, § 7, cl. 2.

40. *Id.* art. II, § 1, cl. 1.

41. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974) (Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case).

42. U.S. CONST. art. III, § 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

43. U.S. CONST. art. III, § 2; Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 611 (2007).

44. U.S. CONST. art. II, § 2, cl. 1.

45. *Id.* art. I, § 8, cl. 11.

even the judiciary may become involved to preserve individual liberties.[46] Viewed collectively the three branches exist in a kind of Newtonian perpetual motion, each constantly pressing against the limits of its boundaries and responding to corresponding pressure from the other branches in a rhythm of action and reaction between opposing and interacting forces.

Thus, under the Federal Constitution, the three branches of government are not "hermetically" sealed from one another.[47] Such a sealing would preclude the nation from governing itself effectively. As a result, however, each branch has a tendency to push the outer limits of its power. That tendency must be curbed even when it accomplishes desirable objectives;[48] a branch may not arrogate the power of another to itself, or impair another branch in the performance of its constitutional duties.[49] For example, because deciding criminal cases is a primary constitutional duty of the judiciary, the executive branch may not withhold essential documents in a criminal proceeding. Otherwise, the judiciary's ability to fulfill that duty would be impaired.[50] Similarly, Congress may not place the responsibility for executing one of its enactments in the hands of an officer who is subject to removal only by Congress, because it is an unconstitutional intrusion into the executive function.[51] Neither may a branch give away its powers wholesale:

> The judicial power of the United States vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of

46. Hamdi v. Rumsfeld, 542 U.S. 507, 525, 535–36 (2004) (writ of habeas corpus is a "critical check on the Executive, ensuring that it does not detain individuals except in accordance with law"); *cf.* Dep't of Navy v. Egan, 484 U.S. 518, 529 (1988) (foreign policy is the province and responsibility of the executive where the courts have traditionally shown the utmost deference to presidential responsibilities and reluctance to intrude on the authority of the executive in military and national security affairs).

47. Loving v. United States, 517 U.S. 748, 756 (1995).

48. INS v. Chadha, 462 U.S. 919, 951 (1983); Buckley v. Valeo, 424 U.S. 1, 121 (1976). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

49. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010); Clinton v. Jones, 520 U.S. 681, 701 (1997).

50. United States v. Nixon, 418 U.S. 683, 707 (1974).

51. Bowsher v. Synar, 478 U.S. 714, 733–34 (1986).

> powers and the checks and balances that flow from the scheme of a tripartite government.[52]

Nor may a branch of the federal government agree to an encroachment on its powers.[53] For example, Congress may not delegate the power to make laws.[54]

Despite these structural restrictions, the federal separation of powers doctrine is not immutable; instead, it allows the three branches to respond to changing conditions and "exigencies" that at the time of the founding could be seen only "dimly," or perhaps not at all.[55] The framers recognized that the federal government needed some flexibility to adapt to changing circumstances. That is why the powers conferred upon the federal government by the Constitution were phrased in language broad enough to allow for the expansion of the federal government's role over time.[56] Thus, Congress may delegate *some* of its powers, as long as it sets "by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform . . . ."[57] Although forcing a responsibility on another branch is forbidden,[58] ministerial functions related to a branch's powers may be given and accepted.[59]

In *Mistretta v. United States*,[60] the Supreme Court reviewed the constitutionality of the Sentencing Reform Act. Under the Act, Congress created a Sentencing Commission within the federal judiciary, delegated to it the authority to create sentences for federal crimes, and required federal judges to serve on the commission. Rejecting a separation of powers challenge, the Supreme Court held that although the commission was "unquestionably . . . a peculiar institution," the principle of separated powers is "not violated, . . . by mere anomaly or innovation."[61] Instead, separation of powers analysis is primarily concerned with encroachment and aggrandizement:

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52. *Nixon*, 418 U.S. at 704 (citation and quotation omitted).

53. *Free Enter. Fund*, 130 S. Ct. at 3155. (separation of powers does not depend on the views of individual presidents nor on whether "the encroached-upon branch approves the encroachment").

54. Loving v. United States, 517 U.S. 748, 771 (1996).

55. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

56. New York v. United States, 505 U.S. 144, 157 (1992).

57. Mistretta v. United States, 488 U.S. 361, 372 (1989) (citation and quotation omitted).

58. Hayburn's Case, 2 U.S. (1 Dall.) 408, 410 n.† (1792).

59. *Mistretta*, 488 U.S. at 388 ("Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary").

60. *Id.*

61. *Id.* at 384–85.

> Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch . . . . By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment.[62]

Under that standard, the Act was constitutional because it posed no such danger. "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."[63] Federal separation of powers doctrine does allow for participation between the branches; it simply draws the line when one branch seeks to control the exercise of discretion by another branch.

III. The Separation of Powers Doctrine Under the California Constitution

A. The Differences Between the California and Federal Governments

The separation of powers principles the Federal Constitution imposes upon the national government do not apply against the states.[64] Nonetheless, California, like many other states, has adopted a tripartite system of government analogous to the federal system. Like the federal government, California has a legislative branch, an executive branch, and a judicial branch. Its constitution also describes the basic roles of the three branches in generally the same way as the Federal Constitution does for the national government: "the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality."[65] The California Constitution also recognizes the importance of keeping the branches separate and independent by avoiding "the concentration of power in a single branch of government" and "the overreaching by one branch against the others."[66] And like the United States Supreme Court, the California Supreme Court is the final arbiter of any dis-

62. *Id.* at 382.

63. *Id.* at 388.

64. Stop the Beach Renourishment, Inc. v. Fla Dept. of Envtl. Prot., 130 S. Ct. 2592, 2605 (2010) (citing Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902)).

65. Lockyer v. City and Cnty. of S.F., 95 P.3d 459, 463 (Cal. 2004).

66. People v. Bunn, 37 P.3d 380, 390 (Cal. 2002).

putes between the branches.[67] As the California Supreme Court explained long ago, "[t]he judiciary, from the very nature of its powers and the means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . ."[68]

Although the California Constitution creates a system of governance that is similar to the federal system, California's government is not a smaller version of the federal government. This is due in part to the intrinsic differences between the federal and state systems. The federal government has only the powers delegated to it by the states through the enumerated powers in the Federal Constitution.[69] Thus, the "Federal Constitution restricts the federal government both by imposing prohibitions on the government and by granting the government only limited powers."[70]

In contrast, "State governments possess all the powers incident to political government, and not delegated to the United States,"[71] and

67. Nougues v. Douglass, 7 Cal. 65, 69 (1857).

68. *Id.* at 70. *See also* People *ex rel.* Smith v. Judge of the Twelfth Dist., 17 Cal. 547, 551 (1861) ("There is no question at this day of the power of the Courts to pronounce unconstitutional acts invalid, for this power results from the duty of the Courts to give effect to the laws—of which the Constitution is the highest—and which could not be administered at all if nullified at the will or by the acts of the Legislature"); Bourland v. Hildreth, 26 Cal. 161, 179 (1864) ("As to the power and the duty of the judicial department of the Government to set aside a legislative Act if found to be in conflict with the Constitution, there can be no question").

69. U.S. CONST. amend. IX (enumeration of rights does not deny or disparage others "retained" by the people); U.S. CONST. amend. X (powers not delegated to the federal government are "reserved" to the states, and to the people); Cook v. Gralike, 531 U.S. 510, 519 (2001) (Constitution draws a basic distinction between the powers of the newly created federal government and the powers retained by the preexisting sovereign states); United States v. Morrison, 529 U.S. 598, 618 n.8 (2000) (careful enumeration of federal powers and explicit reservation by the states of all other powers supports principle that the constitution created a federal government of limited powers while reserving a generalized police power to the states); The Prize Cases, 67 U.S. (2 Black) 635, 641 (1862); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819) ("[I]t was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument"); THE FEDERALIST NO. 45, at 237 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) (assurance to the people of New York that the "powers delegated" to the federal government are "few and defined," while those of the states are "numerous and indefinite").

70. Marine Forests Soc'y v. Cal. Coastal Comm'n, 113 P.3d 1062, 1076 (Cal. 2005).

71. *Nougues*, 7 Cal. at 69. *See also Smith*, 17 Cal. at 552 ("The [California] Constitution is not, as in the case of the Federal Government, a grant of power to the Legislature, but from the organization of a State of all its powers not elsewhere vested or expressly interdicted, become lodged in the Legislature, which is its general head and representative."); *Bourland*, 26 Cal. at 183 ("[T]he Constitution is not a grant of power or an enabling Act to the Legislature. It is a limitation on the general powers of a legislative character, and re-

exercise plenary legislative power.[72] The plenary powers of the state reside primarily in the people, who have delegated those powers to the legislative, executive, and judicial branches, except where the people have expressly or by necessary implication reserved that power for themselves.[73] As a result, the California Constitution, unlike the Federal Constitution, does not grant power to the state government; instead, it places limits on the sovereignty of the state government.[74] In other words, the California Constitution only defines the outer limits of the otherwise plenary lawmaking power of the legislature.[75] This is reflected in the provisions of the California Constitution that define the branches and their powers and establish the separation of powers doctrine in a manner that is different from the Federal Constitution.[76]

Because of these fundamental differences between the two systems, California courts have often declined to follow federal constitutional jurisprudence and, instead, have developed their own jurisprudence for interpreting the California Constitution.[77] California courts have not hesitated to chart their own course when construing their constitution because of the "radical difference in the law of their organization, as well as in the rules that apply to the construction of the powers of Congress, and the powers of the State legislatures."[78] This is certainly true in the separation of powers arena.

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strains only so far as the restriction appears either by express terms or by necessary implication"); Fitts v. Superior Court, 57 P.2d 510, 512 (Cal. 1936) (legislature may do anything not prohibited).

72. *Marine Forests Soc'y*, 113 P.3d at 1076.

73. *Nougues*, 7 Cal. at 69.

74. Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 731 (Cal. 1978); *Smith*, 17 Cal. at 552 (powers of government are no further restrained than by express terms of the constitution).

75. State Pers. Bd. v. Dep't of Pers. Admin., 123 P.3d 169, 175 (Cal. 2005); *Bourland*, 26 Cal. at 183 (state constitution is not a grant of power; it limits the general legislative powers and restrains the legislature by express terms or necessary implication).

76. *See, e.g.*, CAL. CONST. art. III, § 1 (separation of powers); CAL. CONST. art. IV, § 1 (defining legislative power); CAL. CONST. art. V, § 1 (defining executive power); CAL. CONST. art. VI, § 1 (defining judicial power).

77. In *Carmel Valley Fire Protection District v. State*, 20 P.3d 533 (Cal. 2001), the California Supreme Court did not decide whether the federal separation of powers rule in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), should be applied to a claim under the state constitution. *Carmel Valley*, 20 P.3d at 541 n.4. Noting that it previously declined to apply the *Nixon* standard in *Butt v. State*, 842 P.2d 1240 (Cal. 1992), the court observed that subsequently in *Chadha* and *Bowsher* the high court applied a different rule. *Carmel Valley*, 20 P.3d at 541 n.4. Accordingly, California courts remain free to use a California-specific separation of powers analysis.

78. People v. Wells, 2 Cal. 198, 211–12 (1852). Because the state constitution limits the exercise of the judicial power to the enumerated courts, federal law is not controlling. Laisne v. State Bd. of Optometry, 123 P.2d 457, 466 (Cal. 1942). *See also Carmel Valley*, 20

The California Supreme Court recently made this clear:

> [T]he flaw in [relying] upon these federal decisions lies in the implicit assumption that the separation of powers doctrine embodied in the federal Constitution is equivalent to the separation of powers clause of the California Constitution. As we shall see, . . . the federal and California Constitutions are quite distinct, rendering inapposite the federal authorities upon which Marine Forests relies.[79]

As the court explained, whereas the Federal Constitution imposes prohibitions and grants only limited powers, the California Constitution concentrates power in the legislature and is not designed to "balance" power among the branches of government.[80] The California Legislature possesses plenary lawmaking power except as specifically limited by the California Constitution.[81] Consequently, in disputes between different branches of California government, federal separation of powers decisions are merely persuasive authority and should be relied upon only when there are no fundamental differences between the constitutional provisions at issue.[82] This "necessarily depends on upon the nature of the particular separation of powers question that is at issue in a given case."[83]

When deviating from federal separation of powers jurisprudence, California courts typically acknowledge that the interplay among the three branches of California government may differ from their federal

P.3d at 541 n.4 (expressly not adopting federal rule regarding legislative encroachment on the executive); People v. Bunn, 37 P.3d 380, 394 (Cal. 2002) (adopting federal analysis only because it reaches the same conclusion as would core powers analysis).

79. Marine Forests Soc'y v. Cal. Coastal Comm'n, 113 P.3d 1062, 1075 (Cal. 2005). The Supreme Court has also held that federal and state separation of powers rules are distinct: "The Constitution does not impose on the States any particular plan for the distribution of governmental powers." Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 615 n.13 (1974).

80. *Marine Forests Soc'y*, 113 P.3d at 1076. As support for its historical view of the doctrinal and structural differences between the federal and state constitutions, the court relied on G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003).

81. *Marine Forests Soc'y*, 113 P.3d at 1073–74, 1077–78; Fitts v. Superior Court, 57 P.2d 510, 512 (Cal. 1936) ("[T]he Legislature is vested with the whole of the legislative power of the state."); People v. Tilton, 37 Cal. 614, 626 (1869) (state constitutions are not grants of legislative power).

82. *Marine Forests Soc'y* 113 P.3d at 1076–77. *See also* People v. Bunn, 37 P.3d 380, 394 (Cal. 2002) (finding the decision in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), to be "persuasive for purposes of interpreting California's separation of powers clause" and applying it because it is "[c]onsistent with the California principles and authorities . . . [and] properly preserves and balances the respective 'core functions' of" the branches in conflict).

83. *Marine Forests Soc'y*, 113 P.3d at 1077.

counterparts. Specifically, these courts "recognize[ ] that the three branches of government are interdependent" and are not wholly independent entities.[84] As a result, they "permit[ ] actions of one branch that may 'significantly affect those of another branch'" but "limit[ ] the authority of one of the three branches of government to arrogate to itself the core functions of another branch."[85] In other words, "the separation of powers doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent functions of another branch."[86] In adopting this "core powers" or "core functions" analysis, California courts have combined the elements of the formalist and functionalist models embodied in federal separation of powers jurisprudence. The core powers analysis is derived in part from relevant provisions of the California Constitution and partly by borrowing concepts from federal law, and the analysis has gradually evolved over the years to take a middle path between form and function.

B. The Relevant Provisions of the California Constitution

1. Separation of Powers: Article III, Section 3

Unlike its federal counterpart, the California Constitution contains an express separation of powers clause that was borrowed from the Iowa Constitution.[87] Originally, the clause was found in article III of the 1849 California Constitution and provided that:

> The powers of the government of the state of California shall be divided into three separate departments—the legislative, executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted.

The current version of the clause was adopted in 1972. Although the language is different than its 1849 counterpart, both clauses are sub-

84. Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 538 (Cal. 2001).

85. *Id.*

86. *In re* Rosenkrantz, 59 P.3d 174, 208 (Cal. 2002).

87. People v. Provines, 34 Cal. 520, 538 (1868). Thus, any attempt to determine the intent of the California framers must consider the construction given to the original term by the original authors—but California considers this to be only a rebuttable presumption, and the clear intent of the California framers will override the meaning used by the original drafters. Nougues v. Douglass, 7 Cal. 65, 76 (1857). Early cases interpreting the 1849 constitution remain good law after the 1879 constitution, because the separation of powers clause was readopted in the identical terms of the 1849 constitution. People *ex rel.* Waterman v. Freeman, 22 P. 173, 236 (Cal. 1889). *See also* Pac. Tel. & Tel. Co. v. Eshleman, 137 P. 1119, 1122 (Cal. 1913); JOSEPH R. GRODIN, CALVIN R. MASSEY & RICHARD B. CUNNINGHAM, THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 77 (1993).

stantively similar.[88] Currently, article III, section 3 provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." This provision is mandatory and prohibitory.[89] Powers conferred upon a branch cannot be delegated or taken by another branch, and a constitutional officer cannot be excused from performing his or her constitutional duties.[90]

2. The Legislature: Article IV, Section 1

Section 1 of article IV of the California Constitution provides: "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."

This section vests the lawmaking power of the state in the legislature, with some exceptions. Thus, the legislature has all lawmaking powers not prohibited expressly or by necessary implication.[91] Although the legislature's powers are not unlimited, any limitations must be found in the state constitution.[92] Because this vesting clause is exclusive, the legislature cannot delegate legislative power.[93] The core powers of the legislature include enacting laws, levying taxes, and ap-

88. Strumsky v. San Diego Cnty. Emps. Ret. Ass'n, 520 P.2d 29, 34 n.4 (Cal. 1974).

89. State Bd. of Educ. v. Levit, 343 P.2d 8, 18 (Cal. 1959). Article I, section 26, formerly article 1, section 22, provides that the rule of construction is that its provisions are "mandatory and prohibitory, unless by expressed words they are declared to be otherwise." In *Levit*, the court held:

> This rule is an admonition placed in this the highest of laws in this State, that its requirements are not meaningless, but that what is said is meant, in brief, "we mean what we say." Such is the declaration and command of the highest sovereignty among us the people of this State, in regard to the subject under consideration. . . . [I]t is the duty of this court to give effect to every clause and word of the constitution, and to take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people use plain language in their organic law to express their intent in language which cannot be misunderstood, and we must hold that they meant what they said. . . . This declaration applies to all sections of the Constitution alike, and is binding upon any department of the state government, legislative, executive or judicial.

Id. at 18–19.

90. *Id.* at 19.

91. Methodist Hosp. v. Saylor, 488 P.2d 161, 165 (Cal. 1971).

92. People *ex rel.* Smith v. Judge of the Twelfth Dist., 17 Cal. 547, 556 (1861).

93. Sandstrom v. Cal. Horse Racing Bd., 180 P.2d 17, 23–24 (Cal. 1948) (holding legislature-assigned lawmaking function by constitution, non-delegable except as constitutionally authorized).

propriating funds.[94] The legislature cannot exercise any core judicial or executive functions.[95] Furthermore, the legislature's core power of setting policy and enacting laws is subject to the reserved powers of the electorate, which may overrule the legislature without raising a separation of powers issue.[96]

3. The Executive: Article V, Section 1

Section 1 of article V of the California Constitution provides: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."

Unless permitted by the constitution, the governor may not exercise legislative powers.[97] Although the governor acts in a legislative capacity when vetoing legislation, because article VI, section 10 of the constitution allows the governor to exercise a veto power, there is no separation of powers violation.[98] And, of course, the governor cannot exercise judicial power.[99] The powers that the constitution specifically confers on the governor cannot be reassigned by the legislature.[100] And the governor cannot be excused from performing any of the governor's constitutionally assigned functions.[101]

4. The Judiciary: Article VI, Section 1

Section 1 of article VI of the California Constitution provides: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record."[102] This clause exclusively vests courts with the judicial power of

94. *Carmel Valley Fire Prot. Dist. v. State,* 20 P.3d 533, 539 (Cal. 2001). *See also* Strumsky v. San Diego Cnty. Emps. Ret. Ass'n, 520 P.2d 29, 33 n.2 (Cal. 1974) (stating that legislative action is the formulation of a rule to be applied to all future cases).

95. *Carmel Valley*, 20 P.3d at 539; Pryor v. Downey, 50 Cal. 388, 403 (1875).

96. Prof'l Eng'rs v. Kempton, 155 P.3d 226, 244–45 (Cal. 2007); *see* Aylett v. Langdon, 8 Cal. 1, 15–16 (1857).

97. Harbor v. Deukmejian, 742 P.2d 1290, 1292 (Cal. 1987).

98. *Id.*

99. *Compare* People v. Mabry, 455 P.2d 759, 770 (Cal. 1969), *with* Kaiser Land & Fruit Co. v. Curry, 103 P. 341, 348 (Cal. 1909) (noting that the Secretary of State, an executive officer, given by the constitution the judicial power to determine corporate delinquencies, such determination being merely incidental to his ministerial duty of reporting to the governor, there is no separation of powers violation).

100. State Bd. of Educ. v. Levit, 343 P.2d 8, 19 (Cal. 1959).

101. *Id.*

102. Article VI, section 1 has been amended several times after 1950 to its current form to reflect the reorganization of trial courts and elimination of justice and municipal courts. 2002 Cal. Stats., resol. ch. 88, § 1 (Prop. 48, approved Nov. 5, 2002, operative Nov. 6, 2002); 1996 Cal. Stats., resol. ch. 36 (Prop. 220, approved June 2, 1998, operative June 3,

the state. As a necessary corollary, the legislature may not vest judicial power in any other body unless expressly permitted by the California Constitution.[103] Generally, the judicial power is to interpret the law,[104] to apply the law to a specific set of existing facts,[105] and to resolve specific controversies with final judgments.[106] The legislature cannot expand or limit the jurisdiction of the courts,[107] nor can the legislature burden the judiciary with non-judicial duties.[108]

Article VI, section 1 vests "the judicial power" of the state in the courts of record.[109] Since the state charter created the courts with no limitations on their power, they have all of the inherent and implied powers necessary to properly and effectively perform their judicial functions.[110] The inherent powers of the courts are derived from the state constitution, exist even in the absence of explicit constitutional

1998); 1994 Cal. Stats., resol. ch. 113 (Prop. 191, approved Nov. 8, 1994, operative Jan. 1, 1995). Prior to the 1950 amendment, article VI, section 1 allowed the Legislature to establish inferior local courts. This was the basis for an argument that the legislature could vest judicial power in local agencies. But after the "inferior courts" language was deleted, article VI, section 1 is "no longer available as a basis for the exercise of judicial powers by 'local agencies'" and consequently the legislature had no authority to vest inferior local courts with judicial power. Strumsky v. San Diego Cnty. Emps. Ret Ass'n, 520 P.2d 29, 35, 37–38 (Cal. 1974); *see* Lockyer v. City and Cnty. of S.F., 95 P.3d 459, 481–82 (Cal. 2004).

103. Tulare Water Co. v. State Water Comm'n, 202 P. 874, 878 (Cal. 1921) (Shaw, C.J., concurring).

104. Bodinson Mfg. Co. v. Cal. Emp't Comm'n, 109 P.2d 935, 939 (Cal. 1941).

105. *Strumsky*, 520 P.2d at 34 n.2.

106. Mandel v. Myers, 629 P.2d 935, 944 (Cal. 1981). *See also* Francois v. Goel, 112 P.3d 636, 642 (Cal. 2005) ("One of the core judicial functions that the Legislature may regulate but not usurp is the essential power of the judiciary to resolve specific controversies between parties.") (citations and internal quotations omitted).

107. Pac. Tel. & Tel. Co. v. Eshleman 137 P. 1119, 1120 (Cal. 1913) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). *See also* Pryor v. Downey, 50 Cal. 388, 403 (1875); City of Tulare v. Hevren, 58 P. 530 (Cal. 1899); Glide v. Superior Court, 81 P. 225, 228 (Cal. 1905); Chinn v. Superior Court, 105 P. 580, 581 (Cal. 1909); Pac. Coast Cas. Co. v. Pillsbury, 153 P. 24, 26 (Cal. 1915); W. Metal Supply Co. v. Pillsbury, 156 P. 491, 493–94 (Cal. 1916); Yuba River Power Co. v. Nev. Irrigation Dist., 279 P. 128, 129 (Cal. 1929).

108. Epperson v. Jordan, 82 P.2d 445, 447 (Cal. 1938). The *Epperson* court relied on Abbott v. McNutt, 22 P.2d 510, 512 (Cal. 1933), for this proposition, which held that article VI, section 18, prohibiting judicial officers from holding other public employment "is intended to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions." *Abbott*, 22 P.2d at 512.

109. CAL. CONST. article VI, § 1; Merco Constr. Eng'rs, Inc. v. Mun. Court, 581 P.2d 636, 638 n.5 (Cal. 1978).

110. Superior Court v. Cnty. of Mendocino, 913 P.2d 1046, 1054 (Cal. 1996); Hustedt v. Workers' Comp. Appeals Bd., 636 P.2d 1139, 1142 (Cal. 1981); Brydonjack v. State Bar, 281 P. 1018, 1020 (Cal. 1929) (state courts are set up by state constitution without any special limitations, therefore courts have all the inherent and implied powers necessary to effectively function).

or statutory authorization, and are not confined by or dependent on statutory law.[111] The courts have the power of self-preservation, including "the power to remove all obstructions to [their] successful and convenient operation."[112]

C. California's Core Powers Analysis

1. The Development of the Core Powers Analysis

Early in the State's existence, California courts discussed the separation of powers doctrine in formalistic terms. For example, the California Supreme Court stated in 1857 that:

> The three great departments are essentially different in their constitution, nature, and powers, and in the means provided for each by the Constitution, to enable each to perform its appropriate functions.
>
> . . .
>
> The legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them.[113]

Consistent with this formalistic conception of the separation of powers doctrine, the California Supreme Court in *People v. Wells*[114] rejected the argument that the California Constitution only separated and defined the *powers* of the three branches. The court instead held that the branches themselves were

> intended to be kept separate and distinct, within their proper spheres; and it never was designed that the legislature should intrude upon any of the co-ordinate branches in any way whatever. . . . The powers of the different branches of our government are defined and classified by the constitution. . . . [T]he framers of that instrument intended something more than a mere division of powers . . . .[115]

According to the court, article III, section 3 was "intended to preserve the balance of power, and prevent the invasion of the rights of one department by another, and also to restrict each within its prescribed limits."[116]

Despite this apparent adoption of a more formalistic conception of the separation of powers doctrine, other language in *Wells* sug-

111. *Cnty. of Mendocino*, 913 P.2d at 1054; Walker v. Superior Court, 807 P.2d 418, 423–24 (Cal. 1991).

112. Millholen v. Riley, 293 P. 69, 71 (Cal. 1930).

113. Nougues v. Douglass, 7 Cal. 65, 69–70 (1857).

114. 2 Cal. 198 (1852).

115. *Id.* at 213.

116. *Id.* at 232.

gested that the division was not so rigid and that the branches should work in concert. "It is the harmony and concert of movement in the several parts, and their non-disturbance of the rights and powers of each other, that can alone preserve [our system of government]."[117] This became clear in subsequent decisions. In *MacCauley and Tevis v. Brooks*,[118] the California Supreme Court observed that:

> "When we speak," says Story, "of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence the one upon the other in the slightest degree. The true meaning is, that the whole power of one of these departments shall not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.[119]

One year later, the court recognized that the branches were interdependent and could exert some power over each other:

> It is true that the Legislature cannot do Executive acts; but it can regulate the executive office, and with certain qualifications . . . prescribe laws to the Executive, which that department is bound to obey. So the Legislature cannot decide cases, but it can pass laws which furnish the bases of decision, and which laws the Judiciary are bound to obey. The Legislature cannot dictate to the Courts how they shall decide a particular case, but it can dictate the law to the Judges, and the Judges are bound to decide the given case in pursuance of the law thus dictated.[120]

And soon thereafter, the California Supreme Court abandoned any pretense of adhering to a formal separation of executive, legislative, and judicial powers.

> The characteristics of many powers and duties are so marked that there can be no difficulty in determining whether they belong to the Legislative, Executive or Judicial Departments of the Government. But the lines between the several departments are not defined with precision, and there are other powers and duties that partake of the nature of duties pertaining to more than one of these departments, and may as properly be referred to one as the other, or may not strictly belong to either.[121]

117. *Id.* at 235.

118. 16 Cal. 11 (1860) *overruled on other grounds by* Stratton v. Green, 45 Cal. 149 (1872).

119. *Id.* at 40.

120. People *ex rel.* Smith v. Judge of the Twelfth Dist., 17 Cal. 547, 558–59 (1861).

121. People v. Provines, 34 Cal. 520, 540–41 (1868) (Sawyer, J., concurring).

Since then, the doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government.[122]

Although California courts moved away from a formalist approach, that did not mean that they moved towards the kind of "whatever works best in practice" that characterizes the functional approach. Instead, California courts have attempted to forge a middle ground between formalism and functionalism. Rather than adopt the Platonic ideal of three independent branches of government or describe all of the rods in each bundle of powers, California courts have held that each branch has some exclusive powers that are expressly or impliedly conferred by the California Constitution and some shared powers and areas of responsibility. As the California Supreme Court explained in 1868:

> [T]he Constitution only forbids persons charged with the exercise of powers belonging to one department from the exercise of functions pertaining to the other. The powers, thus referred to, must be powers which, in their essential nature, strictly belong to one department, or which are, in express terms, devolved upon one department. For there are many acts that have features at the same time pertaining to more than one department, and which cannot be separated, and each part of the act distributed to its appropriate department. To attempt to do it would be to render the administration of the Government and the laws impracticable.[123]

Sixty-eight years later, the court further clarified that simply because one branch performs some act, it does not *necessarily* mean that another branch cannot do that same act. "The triune powers of the state . . . are thoroughly independent in certain of their essential functions, and at the same time mutually dependent in others."[124] Consequently, separation of powers doctrine does not require that courts "classify . . . incidental governmental duties, and . . . thereafter limit such activity to the particular branch of the government first selected. Such subsidiary duties may properly be performed by a variety of gov-

122. Parker v. Riley, 113 P.2d 873, 876–77 (Cal. 1941). The one exception appears to be a supplemental opinion issued by a Court of Appeal decision in 1928. In *In re Cate*, 273 P. 617, 625 (Cal. Dist. Ct. App. 1928), the Court of Appeal appeared to espouse a formalistic conception of the separation of powers doctrine: "The preservation of the complete separation of the functions of the legislative, judicial, and executive branches of government is too fundamental to the maintenance of the American democracy to allow its slightest infringement." But this decision appears to be an outlier and has never been followed.

123. *Provines*, 34 Cal. at 543–44 (Sawyer, J., concurring). *See also* Laisne v. State Bd. of Optometry, 123 P.2d 457, 473 (Cal. 1942) (Gibson, C.J., dissenting) ("Although the basic power of any one of the three co-ordinate branches of the government can be exercised by the individual branches only, there are incidental governmental activities which may appropriately be exercised by any or all of the agencies of the government.").

124. Lorraine v. McComb, 32 P.2d 960, 961 (Cal. 1934).

ernmental agencies. . . . Nor does the Constitution prohibit the delegation of such incidental and subordinate tasks."[125]

What the California Constitution does prohibit is the material impairment of the essential or core powers or functions of one branch by another.[126]

> That there can be no rigid line over which one department cannot traverse has been recognized since the first test of the doctrine of separation of powers. There still remains, however, this unalterable fact: When one department or an agency thereof exercises the complete power that has been by the Constitution expressly limited to another, then such action violates the implied mandate of the Constitution.[127]

In taking this middle ground, California courts have harmonized the separation of powers clause in article III, section 3 of the California Constitution with the practical realities of government. Article III, section 3 requires some division between the branches.[128] But a truly formal model would preclude much of the interbranch cooperation and administrative delegation that are such prominent features of the pre-

125. Parker v. Riley, 113 P.2d 873, 877 (Cal. 1941). Those subsidiary duties included factfinding, summoning witnesses, punishing contempt, and policymaking, each normally associated with one branch but appropriate for some use by the others. *Id.*

126. As with all separation of powers analytical models, core powers has some obvious problems. Chief among them is its vulnerability to becoming a sorites paradox, which is a logic puzzle attributed to the Megarian logician Eubulides of Miletus: A large collection of grains of sand makes a heap, and a large collection of grains of sand minus one grain makes a heap. Repeated iterations, each time starting with one less number of grains, eventually forces one to accept the conclusion that a heap may be composed by just one grain of sand. And in reverse, if one is prepared to admit that ten thousand grains of sand make a heap then one can argue that one grain of sand also does, since the removal of any one grain of sand cannot make the difference. In other scenarios there may be a real threshold (such as the straw that broke the camel's back), but in reality an arbitrary choice was at some point made (such as the choice of that particular camel). Core powers avoids this by declining to conclusively define a Platonic model of "judge" or "executive" and instead limit the choice to whether in a given case a power at issue is core or incidental. *See* PLATO, THE REPUBLIC, 514a–520a (Richard W. Sterling & William C. Scott trans., Norton paperback ed. 1996) (c. 380–360 B.C.E.) (allegory of the cave).

127. Laisne v. State Bd. of Optometry, 123 P.2d 457, 460 (Cal. 1942).

128. *See* CAL. CODE CIV. PROC. § 1858 (West 2010) ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."); CAL. CODE CIV. PROC. § 1859 (West 2010) ("In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.").

sent government. As the California Supreme Court explained in *Superior Court v. County of Mendocino*:[129]

> Although the language of California Constitution article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government, California decisions long have recognized that, in reality, the separation of powers doctrine does not mean that the three departments of our government are not in many respects mutually dependent, or that the actions of one branch may not significantly affect those of another branch. Indeed, upon brief reflection, the substantial interrelatedness of the three branches' action is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. Such interrelationship, of course, lies at the heart of the constitutional theory of "checks and balances" that the separation of powers doctrine is intended to serve.[130]

Thus, California courts have developed a core functions analysis that parts ways with strict formalism. In developing this analysis, however, California courts have resisted the temptation to create a lodestone definition of the core powers of any of the three branches or a comprehensive list of those powers.[131] Instead, courts have largely avoided the formalist/functionalist debate by classifying on a case-by-case basis the particular power presented based on whether it is identified as an express power in the text of the California Constitution or is a necessarily implied power.[132] California courts have, at times, attempted to define the core powers of a branch. *Marin Water & Power Co. v. Railroad Commission*[133] described the judicial function as declaring the law and defining the rights of parties under the law, citing

129. 913 P.2d 1046 (Cal. 1996).

130. *Id.* at 1051 (citations and quotation omitted).

131. The motivation away from that trap must be the same behind Justice Stewart's famous statement "I know it when I see it" regarding another legal concept that similarly escaped ready definition. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (declining to create a bright-line rule between art and obscenity).

132. For example, determining the rights and titles of individuals to private real property is acting judicially. Tuolomne Cnty. v. Stanislaus Cnty., 6 Cal. 440, 442 (1856). Determining the existence of debts, and the necessity of a sale to satisfy them, is a judicial question that the legislature cannot decide. Pryor v. Downey, 50 Cal. 388, 409 (1875). The power of appointment to office is not exclusively executive, so far as not regulated by constitutional provision. People *ex rel.* Waterman v. Freeman, 22 P. 173, 174 (Cal. 1889). Fixing the amount of damages a claimant is entitled to is a judicial function. Ray v. Parker, 101 P.2d 665, 672–73 (Cal. 1940); Jersey Maid Milk Prods. Co. v. Brock, 91 P.2d 577, 594 (Cal. 1939).

133. 154 P. 864, 866 (Cal. 1916).

numerous variations on that theme.[134] But for the most part, courts have largely defined the powers in a piecemeal fashion. Indeed, early California cases recognized that some overlap and interaction between the departments was necessary and inevitable, and as a result, an attempt at a wholesale categorizing of one branch's powers was unnecessary to resolving the basic separation of powers questions:

> In the distribution of powers, the Constitution only contemplates that different persons shall administer the different departments—that is, for example, that the Governor . . . shall not at the same time be a Judge or a member of the Legislature. . . . "The true meaning is, that the whole power of one of these departments shall not be exercised by the same hands which possess the whole power of either of the other departments . . . ."[135]

2. Current Core Powers Analysis

Under the modern view of California's separation of powers doctrine, "it is well understood that the branches share common boundaries and no sharp line between their operations exists."[136] Each branch must, to some extent, exercise the functions of the others.[137] Indeed,

> [T]he substantial interrelatedness of the three branches' actions is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. Such interrelationship, of course, lies at the heart of the constitutional theory of "checks and balances" that the separation of powers doctrine is intended to serve.[138]

Consequently, although the state constitution ostensibly requires a system of three largely separate powers, the state separation of powers doctrine does not create an absolute or rigid division of functions; instead, the California view assumes that there will be some mutual

134. *Id.*

135. McCauley and Tevis v. Brooks, 16 Cal. 11, 40 (1860), *overruled on other grounds by* Stratton v. Green, 45 Cal. 149 (1872) (citation omitted).

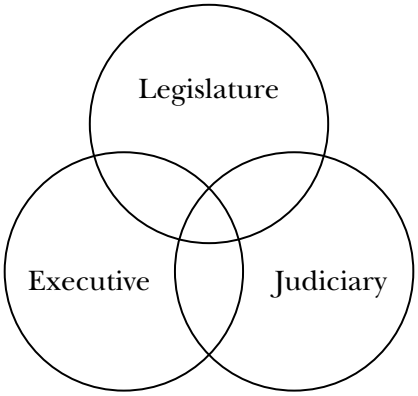
136. People v. Bunn, 37 P.3d 380, 388 (Cal. 2002) (citation omitted). *See also In re* Attorney Discipline Sys., 967 P.2d 49, 56 (Cal. 1998) ("Although article III, section 3 of the California Constitution defines a system of government in which the powers of the three branches are to be kept largely separate, it also comprehends the existence of common boundaries between the legislative, judicial, and executive zones of power thus created. Its mandate is to protect any one branch against the overreaching of any other branch.") (citations and internal quotations omitted).

137. Younger v. Superior Court, 577 P.2d 1014, 1024 (Cal. 1978).

138. Superior Court v. Cnty. of Mendocino, 913 P.2d 1046, 1051 (Cal. 1996).

oversight and influence between the branches.[139] Ultimately, the purpose of the California separation of powers doctrine is "'is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government[,]' as well as to avoid the overreaching by one governmental branch against another."[140]

As a result, the core powers analysis can best be depicted as a trefoil:



The overlapping areas represent only incidental effects by one branch on another, with the remaining separate areas representing the reserved core powers of each branch. The union may fairly describe the state administrative agencies, which have evolved to exercise some incidental, delegable powers of each branch.

To determine the boundaries of those overlapping areas, California courts have adopted the core powers analysis. In *Carmel Valley Fire Protection District v. State*,[141] the California Supreme Court described the separation of powers doctrine as limiting the ability of one branch to take the "core functions" of another branch.[142] Actions by one branch that significantly affect another are permitted, but not where those actions materially impair the core functions of the other branch.[143] In other words, the state constitution vests each branch with certain core powers that cannot be usurped by another branch.[144]

139. Lockyer v. City and Cnty. of S.F., 95 P.3d 459, 463 (Cal. 2004); *Bunn*, 37 P.3d at 388–89.

140. Case v. Lazben Fin. Co., 121 Cal. Rptr. 2d 405, 414 (Ct. App. 2002) (alteration in original) (citation omitted) (quoting Manduley v. Superior Court, 41 P.3d 3 (Cal. 2002)).

141. 20 P.3d 533 (Cal. 2001).

142. Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 538 (Cal. 2001).

143. *Id.*

144. *Bunn*, 37 P.3d at 388–89; *Carmel Valley*, 20 P.3d at 538.

This was the first instance where the California Supreme Court clearly distinguished between the material impairment of the core powers of a branch and the incidental effects on a branch's powers. In doing so, the court did not cast its analysis in terms of the federal doctrinal questions of functional impairment or formal definitions of *types* of power. This is hardly surprising. Just nine years earlier, the court had rejected "a 'pragmatic' and 'flexible' case-by-case balancing test, in which the derogation of one branch's powers by another may be warranted to promote overriding objectives within the 'constitutional authority' of the latter."[145] At the same time, the court did not indicate any intent to adopt a formalistic view of separation of powers.

The California Supreme Court clearly staked out this middle ground between formalism and functionalism in subsequent decisions. In *In re Rosenkrantz*, the court explained "that the separation of powers doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent functions of another branch."[146] And in *Marine Forests Society v. California Coastal Commission*, the court explained that a violation of the separations doctrine occurs only if "the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair . . . [a] branch's exercise of its constitutional functions."[147]

Under the core powers analysis, courts first determine whether the acts of one branch implicate the "core zone of authority" or powers of another branch.[148] If the allegedly infringed-upon power or function is not assigned by the constitution's text or by necessary implication to any branch, then control of that function may be shared, and actions by a branch in that area do not intrude on any core zone of another branch.[149] For example, the appointment power is not assigned to any branch by the constitution and may therefore be shared by the legislative and executive branches.[150] But if a core power is implicated, then courts determine whether that power has been materially impaired. Reasonable regulation or participation does not constitute a material impairment; on the contrary, such interaction is

145. Butt v. State, 842 P.2d 1240, 1263 (Cal. 1992).

146. 59 P.3d 174, 208 (Cal. 2002) (quoting Obrien v. Jones, 999 P.2d 95, 100–08 (Cal. 2000)).

147. 113 P.3d 1062, 1067 (Cal. 2005).

148. *Id.* at 1067.

149. *Id.* at 1073–77 (unlike core judicial power over attorney discipline, coastal regulation is not a core power of legislature or governor); Kasler v. Lockyer, 2 P.3d 581, 594–95 (Cal. 2000).

150. *Marine Forests Soc'y*, 113 P.3d at 1084; Aylett v. Langdon 8 Cal. 1, 15–16 (1857).

expected.[151] Stated differently, when determining whether one branch is encroaching on the core powers of another, the key inquiry concerns "the substance of the power and the effect of its exercise."[152]

A fair criticism of this approach is that it ducks the question of how the boundaries of the three branches should be defined.[153] This criticism rests on the false premise that marking sharp boundaries is actually required in a separation of powers analysis. Certainly, the task of mediating the common boundary between the legislative, executive, and judicial zones of power is a formidable one.[154] But a bright-line rules that defines the divisions between the branches is neither necessary nor advisable. In fact, the creation of bright line rules may be an impossible task, as the emergence of the administrative state has shown.[155] As the California Supreme Court explained over 80 years ago, "we are not . . . required to set the stakes along the common boundary between these zones of power."[156] By accepting that a functioning government requires some interaction and overlap between all departments, the core powers analysis accommodates practical reality, permits flexible government, and remains faithful to the fundamental principle of preventing wholesale invasion of one branch's essential functions. The core powers must be described to some degree but not to the extent required by the formalist view. The task that remains, however, is to clearly articulate the standard for determining when a core power is materially impaired.

151. Hustedt v. Workers' Comp. Appeals Bd., 636 P.2d 1139, 1144 (Cal. 1981). *See, e.g.*, Francois v. Goel, 112 P.3d 636, 635 (Cal. 2005) ("Only if a legislative regulation truly defeats or *materially impairs* the courts' core functions . . . may a court declare it invalid."); Obrien v. Jones, 999 P.2d 95, 104 (Cal. 2000) (invalidating laws only on "rare occasions" when a core power is materially impaired); Superior Court v. Cnty. of Mendocino, 913 P.2d 1046, 1055 (Cal. 1996) (as long as legislative enactments do not defeat or materially impair the constitutional functions of the courts, a reasonable degree of regulation is allowed).

152. People v. Superior Court (*On Tai Ho*), 520 P.2d 405, 411 (Cal. 1974).

153. Or it may be argued that anything short of pure functionalism necessarily requires some level of formal definition. In other words, even the semiformal core powers analysis requires defining the core powers of each branch as a predicate to determining whether a core power is being impaired. *See, e.g.*, *Francois*, 112 P.3d at 642 ("The Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that power.").

154. *Hustedt*, 636 P.2d at 1145.

155. *See, e.g.*, Rachel E. Barkow, *Separation Of Powers And The Criminal Law*, 58 STAN. L. REV. 989, 999 (2006).

156. Brydonjack v. State Bar, 281 P. 1018, 1020 (Cal. 1929).

IV. A Proposed Framework for Determining Whether a Material Impairment Has Occurred

Although the California Supreme Court has defined the standard for determining whether a separation of powers violation has occurred as "material impairment," it has provided no further guidance. To fill this void, this article proposes the following standard: a material impairment occurs when one branch eliminates or controls the discretion of another branch in exercising its core power. Under this proposed standard, reasonable regulation of another branch's core power is permitted so long as the other branch retains full discretion in exercising that power. Likewise, one branch may delegate some of its core powers to another branch so long as the delegating branch maintains control of the discretion of the other branch in exercising that power.

This proposed standard comports with California case law and applies to encroachments by any of the three branches of California government. Where one branch takes over the core power of another branch, it has eliminated that branch's discretion in exercising that core power at least in that particular instance.[157] For example, the power to issue final judgments is a core judicial power, and the legislature may not usurp that power by setting aside a judgment, as by attempting to overturn a fees award with a specific appropriation provision.[158] Likewise, one branch cannot, under the guise of regulation, take away a constitutional function of another branch.[159]

But even if a regulation or act does not take over or take away a core power of another branch, it may still constitute a material impairment if it, as a practical matter, eliminates or controls another branch's discretion in exercising that power. For example, California courts have prohibited the legislature from replacing a sitting Supreme Court justice in *People v. Wells*[160] and from requiring the court to issue written opinions in *Houston v. Williams.*[161] In each of these

157. People v. Bunn, 37 P.3d 380, 390 (Cal. 2002); McCauley and Tevis v. Brooks, 16 Cal. 11, 40 (1860), *overruled on other grounds by* Stratton v. Green, 45 Cal. 149 (1872) (separation of powers means the whole power of a department cannot be exercised by another).

158. Mandel v. Meyers, 629 P.2d 935, 944–46 (Cal. 1981); Guy v. Hermance, 5 Cal. 73, 74 (1855) (stating that the legislature cannot exercise judicial functions).

159. *In re* Cate, 273 P. 617, 624 (Cal. 1928).

160. 2 Cal. 198 (1852).

161. 13 Cal. 24 (1859). Note, however, that the California Supreme Court subsequently upheld legislative regulation of written court opinions following the adoption of article VI, section 14 on November 8, 1966. *See* Schmier v. Supreme Court, 93 Cal. Rptr. 2d 580 (Ct. App. 2000), *reh'g denied, rev. denied, cert. denied* 531 U.S. 958 (upholding rules of court gov-

cases, the court concluded that allowing the legislative enactment could ultimately lead to legislative control over the court's discretion in interpreting the law and resolving disputes through judgment:

> To accede to [the legislative enactment] any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. . . . And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?
>
> The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammeled by any legislative restrictions.[162]

Conversely, courts have found no material impairment when the legislature enacts laws that the judiciary must follow.[163] Laws typically guide the court in exercising its core powers, but they do not control the court in exercising those powers. And the legislature may even enact laws that affect the courts so long as it does not seek to control the courts' discretion.[164] For example, the legislature is free to establish rules and regulations governing the admission of attorneys to the bar, but the judiciary may impose additional conditions and must make the final decision regarding admission.[165] The legislature may

erning publication of appellate opinions as consistent with statutory scheme under which Supreme Court is required to publish opinions and given selective publication discretion).

162. Houston v. Williams, 13 Cal. 24, 25 (1859).

163. Brydonjack v. State Bar, 281 P. 1018, 1019 (Cal. 1929).

164. Superior Court v. Cnty. of Mendocino, 913 P.2d 1046, 65–66 (Cal. 1996) (noting that legislature may even designate days on which the courts will be open for business without intruding on the independence of the judiciary); Solberg v. Superior Court, 561 P.2d 1148, 1154 (Cal. 1977) (procedure by which that jurisdiction is exercised may be prescribed by the legislature). In *Solberg* the court concluded that a statute allowing a party to challenge a trial judge on mere belief of bias did not substantially impair or practically defeat the exercise of the constitutional jurisdiction of the trial courts, because it operated only to remove an individual judge and not to deprive the court of the power to hear the case after reassigning it to another judge. *Id.* at 1161 n.22. *But see* People v. Superior Court (*Greer*), 561 P.2d 1164, 1169 (Cal. 1977) (executive control over charging function not threatened when trial court disqualifies district attorney, as disqualification affects only identity of state's representative not viability of charges).

165. Case v. Lazben Fin. Co., 121 Cal. Rptr. 2d 405, 415 (Ct. App. 2002) (restricting courts' ability to reconsider their own rulings is not merely a reasonable regulation on judicial functions, as it materially impairs the core judicial power of discretionary decision-making); Mandel v. Myers, 629 P.2d 935, 944–45 (Cal. 1981); *In re* Lavine, 41 P.2d 161, 162 (Cal. 1935). *See In re* Attorney Discipline Sys., 967 P.2d 49, 56–57 (Cal. 1998); Merco Constr. Eng'rs, Inc. v. Municipal Court, 581 P.2d 636, 638 (Cal. 1978); Brydonjack v. State Bar, 281 P. 1018, 1020 (Cal. 1929); *see also* Lockyer v. City and Cnty. of S.F., 95 P.3d 459, 481

also appoint state bar judges and alter the composition of the review department of the state bar without running afoul of the separation of powers doctrine because the judiciary retains "ultimate authority over the attorney admission and discipline process."[166] The contempt power is another core judicial power that the legislature cannot take away. The legislature can, however, define the rules of procedure that govern the judiciary's exercise of its contempt power because it does not invade the judiciary's discretion in adjudicating claims of contempt.[167]

There are numerous other examples of judicial powers that the legislature is prohibited from exercising under any circumstances.[168] Yet nearly all remain subject to reasonable legislative regulation that does not seek to control judicial discretion.[169] The power to decide cases is a core judicial power that the legislature cannot exercise,[170] but the legislature may regulate "within reasonable limits" the procedures by which judicial matters are to be resolved.[171] The jurisdiction of the courts is fixed by the state constitution, and the legislature can neither limit nor extend that jurisdiction.[172] Yet the legislature may reasonably regulate the exercise of jurisdiction by the courts, and rea-

(Cal. 2004) (local executive official has no power to determine what statutes are constitutional). A similar result applies to attempts by local legislative bodies to disregard judicial orders. In *Corenevsky v. Superior Court*, 682 P.2d 360 (Cal. 1984), the court held that as in *Mandel v. Myers*, rather than violating the separation of powers by compelling local compliance with a judgment, to hold otherwise "would be to encourage and facilitate local government intrusion into exclusive powers of the judiciary." *Corenevsky*, 682 P.2d at 371.

166. Obrien v. Jones, 999 P.2d 95, 97 (Cal. 2000).

167. *Ex parte* Garner, 177 P. 162, 163–65 (Cal. 1918).

168. Superior Court v. Cnty. of Mendocino, 913 P.2d 1046, 1057 (Cal. 1996).

169. *See* CAL. CONST. art. VI, § 6; People v. Superior Court (*Mudge*) 62 Cal. Rptr. 2d 721, 723–24 (Ct. App. 1997) (act prohibiting retired judge from hearing criminal case on parties' stipulation invalid); *Cnty. of Mendocino*, 913 P.2d at 1059.

170. Case v. Lazben Fin. Co., 121 Cal. Rptr. 2d 405, 415 (Ct. App. 2002); People v. Superior Court (*On Tai Ho*), 520 P.2d 405, 410 (Cal. 1974); W. Metal Supply Co. v. Pillsbury, 156 P. 491, 493 (Cal. 1916).

171. People v. Bunn, 37 P.3d 380, 394 (Cal. 2002) (applying an existing statute that limits or conditions the finality of a judicial decision is a permissibly reasonable regulation that does not materially impair the judicial power).

172. Chinn v. Superior Court, 105 P. 580, 581 (Cal. 1909); City of Tulare v. Hevren, 58 P. 530, 531 (Cal. 1899). The exception to the rule that the legislature may not act to affect the jurisdiction of the courts is Article 12, which confers on the legislature the fullest possible powers to legislate concerning public utilities, and to create and confer on utility boards whatever powers the legislature sees fit; while this may be a unique provision in the state constitution, it clearly decrees that in all matters concerning public utilities the legislature is the supreme law of the state. Pac. Tel. & Tel. Co. v. Eshleman, 137 P. 1119, 1123, 1125 (Cal. 1913). Article XII empowers the legislature not only to restrict judicial review, as by eliminating the review jurisdiction of any state court, save the Supreme Court, but also to expand the Supreme Court's review powers beyond the jurisdiction provided in article

sonable regulation of the method and procedure of the courts' exercise of their powers is permissible up to the point of impairing judicial discretion.[173]

California courts have less experience with legislative encroachments on the executive, but the same principles apply.[174] Courts have held that a legislative act only has an incidental effect on the executive branch where it does not prevent the executive from exercising its discretion, and the legislature is carrying out one of its essential functions.[175] Executive encroachment on the judiciary is also uncommon, but to the extent it does arise, it may be resolved using the same principles.[176] While the judiciary must be "as vigilant to preserve from judicial encroachment those powers constitutionally committed to the executive as they are to preserve their own constitutional powers from infringement by the coordinate branches of government,"[177] even discretionary executive acts are properly subject to judicial review without violating the separation of powers doctrine.[178]

The same is true in cases involving judicial encroachment on the other branches. Chief Justice Harlan Stone once cautioned that, "[w]hile unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."[179] Generally,

VI. Cnty. of Sonoma v. State Energy Res. Conservation & Dev. Comm'n, 708 P.2d 693, 697 (Cal. 1985).

173. Solberg v. Superior Court, 561 P.2d 1148, 1153–54 (Cal. 1977).

174. *See* Younger v. Superior Court, 577 P.2d 1014, 1022 (Cal. 1978) ("[T]he constitutional statement of the doctrine of the separation of powers protects the executive branch from encroachment no less than the judicial branch. But the executive has invoked such protection less frequently than the courts, and the law on the topic remains sparse.") (citation omitted).

175. Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 539 (Cal. 2001) (citing *Younger*, 577 P.2d at 1024).

176. *See, e.g.*, *Solberg*, 561 P.2d at 1161 n.22 (prosecutorial veto over the power of a court to perform a discretionary judicial act, such as striking a prior conviction or rendering a lawful sentence, is an unconstitutional encroachment).

177. People v. Superior Court (*Greer*), 561 P.2d 1164, 1169 (Cal. 1977).

178. *In re* Rosenkrantz, 59 P.3d 174, 211 (Cal. 2002) ("[W]here the Constitution vests authority in the Governor to undertake certain actions, the judiciary properly can review a Governor's action to ensure that it complies with any constitutional limitations. Such review does not violate the separation of powers doctrine, but rather ensures that a Governor does not exceed the constitutional powers vested in the executive."). *See also* Davis v. Mun. Court, 757 P.2d 11, 22–23 (Cal. 1988) (discussing the overlap between executive, legislative, and judicial powers regarding a criminal defendant's eligibility for a diversion program); *Greer*, 561 P.2d at 1169 (disqualification of an individual representative affects only the identity of that branch's representative and does not the materially impair branch in exercising its core power).

179. Mandel v. Myers, 629 P.2d 935, 948 (Cal. 1981) (Richardson, J., dissenting).

then, the separation of powers doctrine itself obligates the judiciary to respect the separate constitutional roles of the executive and legislature.[180] As a result, courts will "affirm the Legislature's interpretive efforts unless they are disclosed to be unreasonable or clearly inconsistent with the express language or clear import of the Constitution."[181] Similarly, where executive action is concerned, judicial review to ensure compliance with constitutional limitations is appropriate and upholds, rather than violates, the separation of powers doctrine.[182] Indeed, judicial review of legislative and executive acts does not control the exercise of discretion by those branches; it merely limits that discretion in conformance with the California Constitution.

Consistent with this article's proposed standard, the judiciary may not direct the legislature to enact an appropriation law, because the judiciary would be controlling the legislature's exercise of one of its core powers—the power to make appropriations.[183] Similarly, the judiciary may not redirect funding from an appropriation specifically earmarked by the legislature for other purposes because it would countermand the legislature's exercise of its core powers.[184] The judiciary may, however, order payment of a judgment from funds that have already been appropriated by the legislature.[185] Once the legislature has appropriated funds, it no longer controls them.

This article's proposed standard provides a framework for understanding past California separation of powers decisions. More importantly, however, the standard promotes the underlying rationale behind the separation of powers doctrine. On the one hand, the doctrine is intended to prevent the "'concentration of power in a single branch of government,' and the 'overreaching' by one branch against the others."[186] On the other hand, the doctrine is not intended to take away the flexibility that the branches need to operate in an effec-

180. *See* Butt v. State, 842 P.2d 1240, 1259–60 (Cal. 1992).

181. Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 733 (Cal. 1978); *see also* Conn. Indem. Co. v. Superior Court, 3 P.3d 868, 872–73 (Cal. 2000) (separation of powers requires that the legislative branch is entitled to deference from the courts, which are not authorized to second-guess the motives of a legislative body; if reasonable, legislation will not be disturbed); *Cal. Hous. Fin. Agency*, 583 P.2d at 732–33; Glide v. Superior Court, 81 P. 225, 226 (Cal. 1905) (exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends).

182. *In re Rosenkrantz*, 59 P.3d at 211.

183. *Mandel*, 629 P.2d at 941.

184. Butt v. State, 842 P.2d 1240, 1263 (Cal. 1992).

185. *Mandel*, 629 P.2d at 941.

186. People v. Bunn, 37 P.3d 380, 390 (Cal. 2002) (citations omitted).

tive and efficient manner.[187] Focusing the question of material impairment on the branch's discretion to exercise its core powers allows for reasonable regulation while guarding against arrogation. Indeed, what is the essence of power but the ability to use it at will to its fullest extent without significant interference?[188] The proposed standard reflects this practical reality. And in doing so, it not only clarifies California's core analysis, it also promotes the ultimate purpose behind the separation of powers doctrine.

Conclusion

California's current core powers analysis forges a middle ground between formalism and functionalism. It recognizes that each branch has certain essential powers that must be safeguarded from encroachment by the other branches. At the same time, it recognizes that the branches are interdependent and that each branch must be able to affect another branch's exercise of its essential powers. In doing so, the core powers analysis strives to protect against tyranny without sacrificing the flexibility that the government needs to function, by recognizing that the mere distribution of the functions of government into several hands does not *necessarily* lead to a balanced government. Each branch needs to exercise self-restraint and respect the constitutional boundaries of the branches.[189] But when a branch fails to do so, the core powers analysis, as enforced by the courts, ensures that it will do not do so for long.

The judiciary, by adopting the core powers analysis, plays a critical role in preserving our liberties through the structure of government. And California courts have not hesitated to invalidate acts that either accrete to a single branch powers more appropriately diffused among separate branches, or that undermine the authority and independence of another branch.[190] Certainly, the judiciary has no easy task, but fidelity to its duty requires a measure of fortitude.[191] This is especially so in the separation of powers context—which, by definition, is concerned with "encroachment and aggrandizement" by one branch at the expense of another.[192] The separation of powers doc-

187. Case v. Lazben Fin. Co., 121 Cal. Rptr. 2d 405, 414–15 (Ct. App. 2002).

188. *See Ex parte* Siebold, 100 U.S. 371, 395–96 (1879) (nature of power is ability to execute it).

189. *See* Obrien v. Jones, 999 P.2d 95, 118 (Cal. 2000) (Brown, J., dissenting).

190. Kasler v. Lockyer, 2 P.3d 581, 594 (Cal. 2000).

191. *See Obrien*, 999 P.2d at 122 (Brown, J., dissenting) ("The preservation of a viable constitutional government is not a task for wimps.").

192. Mistretta v. United States, 488 U.S. 361, 382 (1989).

trine requires the judiciary to simultaneously protect judicial powers, give due regard to the powers of the other branches of government, and make reasoned calls on claims of encroachments; a tall order, and an impossible one without a good rule of decision.

By adopting the core powers analysis, California courts have started to develop that rule. But further clarification of the core powers analysis is necessary to accomplish the objectives behind the separation of powers doctrine: to prevent tyranny without sacrificing the flexibility needed for the government to function. This Article takes a first step in that direction by proposing a new standard for determining whether the act of one branch materially impairs the core powers of another branch. The proposed standard not only comports with existing case law, it also provides further guidance to the three branches on the boundaries of their powers while ensuring that California's government retains the flexibility it needs to function. In doing so, the proposed standard would enhance the legitimacy of the courts' important role in preserving the separation of powers.