NOTES

ON THE SEPARATION OF POWERS CHALLENGE TO THE CALIFORNIA COASTAL COMMISSION

DAVID R. CARPENTER*

Since 1976, the California Coastal Commission has been charged with protecting California's 1100-mile shoreline. The Commission has been both celebrated for protecting California's coastal resources and denounced for exerting totalitarian control over private property rights and commercial development. Recently, a California appellate court found the Commission in violation of the state constitution's separation-of-powers doctrine because of the California legislature's ability to appoint and remove at will two-thirds of the Commission's twelve members. In a special assembly, the legislature rushed to amend the Commission's composition and provide the legislative appointees with fixed terms. The California Supreme Court must now determine whether the ad hoc response alleviates the constitutional concerns.

In this Note, David R. Carpenter argues that the California Supreme Court still should find the Commission unconstitutional because of the legislature's continued ability to appoint two-thirds of the commissioners. Examining two recent California Supreme Court decisions, the Note identifies two approaches to the separation-of-powers inquiry. One approach asks whether the legislature's appointment power defeats or materially impairs the governor's inherent authority to supervise the Commission's executive powers. The second approach, and that taken by this Note, frames the issue primarily in terms of limitations on legislative power and the problems created when legislators operate beyond their statutory role. This Note argues that appointment power enables and encourages legislators to impose arbitrary influence while abdicating their responsibility to make good law. Utilizing principles from public choice theory, this Note argues that separation of powers should guard against "the twin problems" of faction and governmental self-interest. Those concerns are heightened in this case by the scope of the Commission's authority and jurisdiction, along with the powerful interests it regulates. Instead of minimizing political influence over Commission actions, the appointment structure has had the opposite effect. By enforcing the separation-of-powers doctrine, the California Supreme Court would take an important and principled action that would not destroy the Commission, but rather potentially would improve its integrity and independence.

 Law Clerk to the Honorable John G. Koeltl, United States District Judge for the Southern District of New York. A.B., Princeton University, 2000; J.D., New York University, 2003. I am eternally grateful to the entire staff of the *New York University Law Review*, and particularly to the members of the 2002–2003 Senior Board who were great colleagues and even better friends. I want to thank David Ball, Jack Fitzgerald, Lawrence Lee, and Steve Yuhan for their help in bringing this Note to print. Extra special thanks are owed to Radha Natarajan, without whom this Note never would have seen the light of day. And, of course, I must thank my parents for their devotion, support, and constant inspiration.

INTRODUCTION

For over twenty-five years, the California Coastal Commission has been the "guardian angel" of the state's 1100-mile coastline—"a force in protecting the California coastline from offshore oil and gas exploration, maintaining public access to the Pacific Ocean and restricting coastal development."[1] Both heralded and denounced for its aggressive protection of coastal resources, the Commission has become a central figure in California's administrative state and in debates over the balance between environment and industry, private property rights, and public resources.[2] The subject of significant media attention, the Coastal Commission has also been entangled in

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[1] "'No symbol of the California spirit is more widely recognized or revered than our magnificent coast,' declared former California Governor Gray Davis. 'Since its creation, the Coastal Commission has been the guardian angel of this precious natural resource.'" Dan Berman, *Davis Signs Bill to Save California Coastal Commission,* LAND LETTER, Feb. 27, 2003, *available at* LEXIS, Nexis Library, News Group File. The Coastal Commission has described the object of its mission in similarly awe-inspired terms:

> From the misty Redwood forests of the north to the white sand beaches of the south, California's coast extends for 1,100 magnificent miles across ten degrees of latitude. It is the priceless natural heritage of all the people, and a unique geography where conservation and certain kinds of development have priority.

Cal. Coastal Comm'n, CALIFORNIA COASTAL COMMISSION: WHY IT EXISTS AND WHAT IT DOES 2, http://www.coastal.ca.gov/publiced/Comm_Brochure.pdf (last visited Nov. 19, 2003) [hereinafter Commission Brochure].

In 1976, the legislature enacted the California Coastal Act, creating the California Coastal Commission with jurisdiction over the state's 1100-mile shoreline. California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000–30900 (West 2003), *available at* http://www.coastal.ca.gov/ccatc.html. The California Coastal Act recognizes that "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people . . . ." § 30001(a). It seeks to provide "permanent protection of the state's natural and scenic resources," § 30001(b), by ensuring that "existing developed uses, and future developments . . . are carefully planned and developed," § 30001(d).

For information about the origins of the Coastal Act, see STANLEY SCOTT, GOVERNING CALIFORNIA'S COAST (1975). In 1972, California voters passed Proposition 20, which created the California Coastal Zone Conservation Act. CAL. PUB. RES. CODE §§ 27000–27650 (added by initiative measure, Nov. 7, 1972; repealed Jan. 1, 1977). The proposition provided for a temporary body—the California Coastal Zone Conservation Commission—and six regional coastal commissions to "develop a comprehensive plan for . . . orderly long-range conservation and management . . . ." SCOTT, *supra*, at 293. The state commission was directed to create a final report and coastal plan by 1976, as well as "recommend a successor agency or agencies." *Id.* at xiii, 293. The study conducted by Scott was "undertaken . . . at the request of the California Coastal Zone Conservation Commission" in 1975 in preparation for legislation to be passed a year later. *Id.* at xiii.

[2] *See, e.g.*, Carl Ingram, *Davis Urged to Act on Coastal Panel*, L.A. TIMES, Jan. 3, 2003, at B6 (describing Commission as "praised by conservationists as a vigilant protector of the natural environment and criticized by detractors as a ruthless oppressor of private property rights"); Howard Mintz, *Ruling Derails Coastal Control*, SAN JOSE MERCURY NEWS, Dec. 31, 2002, at A1 ("Critics say the commission puts too many limits on private property rights, while environmentalists credit the group with protecting a signature state landmark."); Nancy Vogel & Kenneth R. Weiss, *Coast Panel Bill Clears Legislature*, L.A. TIMES, Feb. 19, 2003, at B1 (calling agency "both beloved and loathed for its broad license

national legal issues, including the role of state agencies in federal programs[3] and what constitutes a regulatory taking of property.[4]

As with many high-profile regulatory bodies, the Coastal Commission often finds itself being attacked from all sides.[5] Critics of the Commission have employed arguments typically used against

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to grant and deny development permits on land, as well as its ability to regulate oil drilling and other industrial activities offshore").

During the recent California gubernatorial recall election, the *Los Angeles Times* posed a series of questions to the gubernatorial candidates, including this inquiry about the Commission: "Do you think the California Coastal Commission's current regulations on coastal development and public access to the beach are too burdensome on property owners or too weak for the public?" *Voter Guide: A Roundup of Candidates' Answers to Fiscal and Societal Questions*, L.A. TIMES, Sept. 28, 2003, at S10. The responses typified the range of reactions toward the Commission. Then Governor Gray Davis responded, "Our beaches are a precious public resource, and all Californians should be able to freely enjoy them. Increasing public access has been a hallmark of my administration." *Id.* Lieutenant Governor Cruz Bustamante similarly replied that the Commission "should be strengthened to ensure coastal preservation and increase public access to the beaches." *Id.* The leading conservative candidate, Tom McClintock, took the property-rights position: "If the Coastal Commission wishes to provide access through private property, it should purchase that property at an agreeable price." Finally, now-Governor Arnold Schwarzenegger took the moderate, if politically convenient, approach of praising the Commission's goals while criticizing its politicization: "California's coast is recognized worldwide as one of our most precious resources, and it must be protected. The California Coastal Commission should not be subject to political interference in commission decisions that has characterized the Davis administration." *Id.*

[3] For example, a clash between the Bush administration and the Coastal Commission has arisen over the Commission's power to review and delay offshore oil drilling licenses granted by the federal government. *See* Kenneth R. Weiss, *U.S. Appeals Ruling on Offshore Drilling*, L.A. TIMES, Jan. 10, 2002, at B8 (discussing lawsuit by U.S. Department of Interior challenging Commission's power to review federal plans for offshore oil drilling in federal waters); *see also infra* note 43 (providing more information on dispute between Bush administration and Commission and broader impact on balance of power between federal and state governments in environmental regulation).

[4] One of the Coastal Commission's prime missions has been to guarantee public access to beaches. To this end, it has aggressively sought easements and dedications from beachfront property owners, including music mogul David Geffen. *See* Timothy Egan, *Owners of Malibu Mansions Cry, This Sand Is My Sand*, N.Y. TIMES, Aug. 25, 2002, at 1 (describing Coastal Commission's fight against wealthy property owners to guarantee beach access as part of "populist campaign" that has led to over 1300 access deals); *see also* Karen Brandon, *Battle Rages over Beach Access; National Debate Pits Homeowners Against the Public*, CHI. TRIB., Feb. 15, 2002, § 1, at 8 (reviewing coastal property disputes in California and North Carolina).

The Commission's exploitation of its permitting power to increase beach access famously came under legal scrutiny in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (ruling that imposing permit condition with no rational relationship to governmental purpose behind development ban was unconstitutional taking of property).

[5] *See, e.g.*, Eric Bailey, *Coastal Panel Weathers Waves of Change*, L.A. TIMES, Mar. 2, 1998, at A1 ("After a tumultuous youth, the Coastal Commission nears middle age battered and bruised, a bureaucratic survivor with a mixed record and plenty of critics. Even boosters acknowledge room for improvement, saying that changes are needed to protect California's magnificent shoreline—a sort of Coastal Act II.").

administrative agencies: The Commission's power is too broad and discretionary, and the unelected commissioners exert arbitrary, tyrannical, and bureaucratic control over individual rights.[6] While environmental advocates generally have defended the Commission against such assaults, they also have criticized the Commission as too compromising in the face of industry and development.[7] Both sides, however, have questioned whether the Commission is "more influenced by politics than by concerns over what to do with valuable land along the coast."[8]

The Coastal Commission is now under constitutional attack, not for its substantive policies or particular actions, but for its composition. Although the 1976 Act made the Commission an administrative body in the executive branch, it gave the legislature power to appoint and remove at will two-thirds of the Commission's voting members.[9]

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[6] *Id.* (relating view of property-rights advocates that Commission operates like "a Romanian tribunal" and should be disbanded because it imposes unreasonable restrictions on development). For various harsh critiques of the Commission, see http://www.marinehabitat.org/battle.html (last visited Feb. 29, 2004), a website maintained by the Marine Forests Society, the plaintiff in the case that is the focus of this Note. The site links, for example, to an editorial that calls the "imperial" Coastal Commission "the poster child for government power run amok." Editorial, *Reinventing the Coastal Commission*, CARMEL PINE CONE, Jan. 3, 2003, http://www.marinehabitat.org/articles/carmre.html. Another piece blasts the Commission for possessing "all the hallmarks of a third-world government, replete with arrogance, corruption, and a total lack of accountability." James Burling, *The Disgraceful Coastal Commission: Legally Constituted or Not, the Agency is Corrupt—and Far Too Powerful*, ORANGE COUNTY REGISTER, Jan. 9, 2003, http://www2.ocregister.com/ocrweb/ocr/article.do?id=19811&section=COMMENTARY&year=2003&month=1&day=9; *see* Wade Major, Commentary, *Out-of-Step Bureaucracy Roams California's Shores*, L.A. TIMES, Jan. 23, 2003, at A11 (deriding Commission as "rogue organization" controlled by "environmental extremists" whose propaganda about "ruthless developers hellbent" on destroying coast has covered up Commission's "[r]ampant abuse of [its] permitting authority").

[7] *Compare* Berman, *supra* note 1 (quoting one environmentalist as saying, "For nearly 30 years, the California Coastal Commission is the only thing that has stood between our beautiful coastline and the type of unplanned development that threatened to destroy it . . . ."), *with* Peter H. King, *The Endless Job of Saving the Coast*, L.A. TIMES, May 24, 2001, at B1 (noting that Commission is criticized both by "developers and private property rights champions" and by "environmentalists who complain that the Coastal Commission has become a rubber stamp for any buckaroo with oceanfront property and a blueprint"). One reporter, Eric Bailey, noted that while developers claim that the Commission "is stingy with building permits, the agency has approved 98% of the proposals that have come before it." Bailey, *supra* note 5. He further quoted the Sierra Club coastal program director as saying, "Unfortunately, the debate at the commission is about how to develop the coast, not how to save the coast. . . . Anyone who says the Coastal Commission is slowing growth doesn't know what they're talking about." *Id.*

[8] Jeff Chorney, *Supreme Court to Mull Coastal Panel's Makeup*, RECORDER (Cal.), Apr. 10, 2003, http://www.law.com/jsp/pubarticleCA.jsp?id=1048518275789. *See* Bailey, *supra* note 5 (reporting opinions of Commission supporters that "the Coastal Commission should be better insulated from political pressure").

[9] *See infra* Part I.A.

In the spring of 2001, in the case of *Marine Forests Society v. California Coastal Commission*, a superior court judge found the Coastal Commission to be unconstitutional under California's separation-of-powers doctrine.[10] The judgment was then affirmed unanimously on appeal, with the appellate court finding a separation-of-powers violation because "a majority of the Commission's voting members are appointed by the legislative branch and *may be removed at the pleasure of the legislative branch* and there are no safeguards protecting against the Legislature's ability to . . . interfere with the Commission members' executive power to execute the laws."[11]

Many feared that the decision, if left to stand, would jeopardize the Commission's pending and future projects, causing chaos along the coast.[12] But the decision so heavily emphasized the legislature's "wholly unfettered" removal power,[13] that within two months the legislature responded: In a special assembly, the legislature amended the Coastal Act to give legislative appointees fixed terms, and it expanded those terms from two years to four years.[14]

The legislature's action undoubtedly helped to address a significant problem with the Coastal Act. But it has not necessarily resolved the constitutional question. The question now certified by the California Supreme Court is whether giving the commissioners fixed terms

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[10] Marine Forests Soc'y v. Cal. Coastal Comm'n, No. 00AS00567, slip op. at 3–4 (Cal. Super. Ct. May 8, 2001), *available at* http://www.marinehabitat.org/kob.html, *aff'd*, 128 Cal. Rptr. 2d 869 (Ct. App. 2002), *cert. granted*, 65 P.3d 1285 (Cal. 2003); *see infra* Part I.

[11] Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 884 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93, at *1–*4 (Ct. App. Jan. 23, 2003) (addressing specific points raised by Commission while denying motion for rehearing).

[12] For a thorough discussion of the appellate court decision written the day after it was announced, see Kenneth R. Weiss, *Court Ruling Jeopardizes Coastal Panel*, L.A. TIMES, Dec. 31, 2002, at A1.

[13] *Marine Forests*, 128 Cal. Rptr. 2d at 881–82; *see* Weiss, *supra* note 12 (quoting law professor who noted that appellate court "almost invite[d] the Legislature to lop off" removal provision).

[14] A.B. 1B, 2003 Leg., 2d Extraordinary Sess., ch. 1XX (Cal. 2003). *See, e.g.*, Berman, *supra* note 1 (explaining how Governor Gray Davis signed legislation passed by Democrat-controlled houses meeting in special legislative sessions); Kenneth R. Weiss & Gregg Jones, *Davis Signs Coastal Commission Bill*, L.A. TIMES, Feb. 21, 2003, at B3. Immediately following the appellate court decision, legislators announced that they would attempt to amend the Coastal Act to address the court's concerns. *See* Kenneth R. Weiss & Carl Ingram, *Legislators Seek to Save Coastal Panel*, L.A. TIMES, Jan. 1, 2003, at B1. Initial suggestions were simply to "lop off the 'removal at will' clause so that their appointees [would be] given fixed terms of two years." *Id.* (quoting legislative leaders and their aides as saying, "The tricky part . . . will be drafting a narrow bill to satisfy the court's concerns that does not invite tinkering by a variety of different interests who have grievances with the powerful commission."). Perhaps thinking that two-year terms were too short to give commissioners meaningful independence, the legislature eventually amended the bill to provide the legislative appointees with staggered four-year terms. *See* A.B. 1B, *supra*; Berman, *supra* note 1.

resolves the separation-of-powers inquiry, or whether the Commission is still unconstitutional because of the legislature's appointment power.[15] While California awaits the supreme court's response, the *Marine Forest* decisions have placed the Commission in a class of heavily disputed state agencies similarly challenged for their legislative appointment schemes.[16] This Note seeks to use the California Coastal Commission as a case study for the ongoing national debate over legislative appointments; discussing the Coastal Commission more broadly raises basic concerns about the framework and principles underlying separation of powers, as well as the allocation of responsibility over the administrative state.

When state courts analyze the issue of legislative appointments, they often frame the violation in terms of interference with, or impairment of the executive's core powers and responsibilities.[17] So, in the Coastal Commission's case, the issue might be framed as whether the legislature's appointing a majority of commissioners interferes with

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[15] *See* Marine Forests Soc'y v. Cal. Coastal Comm'n, 65 P.3d 1285 (Cal. 2003) (granting review of Coastal Commission case and requesting briefing on separation-of-powers issue). To check on the progress of the case before the California Supreme Court, search for "Marine Forests Society v. California Coastal Commission, No. S113466," at http://appellatecases.courtinfo.ca.gov (last visited Feb. 29, 2004). The supreme court actually certified three questions for review, though this Note focuses solely on the issue of "whether a hasty piece of legislation . . . solves the commission's constitutional problems." Chorney, *supra* note 8.

[16] *See generally* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993). Devlin's article has conducted probably the most extensive review of state cases regarding legislative appointments, including *Parcell v. State*, 620 P.2d 834, 837 (Kan. 1980) (finding no violation where legislature appointed majority of Governmental Ethics Commission), and *Louisiana Board of Ethics for Elected Officials v. Green*, 566 So. 2d 623, 624 (La. 1990) (finding no violation because "appointees are not subject to such significant legislative control"). For legislative appointment cases arising since 1993 (the year of Devlin's article), see *State* ex rel. *Woods v. Block*, 942 P.2d 428, 429, 437 (Ariz. 1997) (invalidating provision where legislature appointed members of commission with duty to initiate lawsuits to protect state sovereignty); *Seymour v. Elections Enforcement Commission*, 762 A.2d 880, 896–97 (Conn. 2000) (finding no violation where legislature appointed majority of members because power to appoint is not inherently executive); *Phelps v. Sybinsky*, 736 N.E.2d 809, 816 (Ind. Ct. App. 2000) (noting unconstitutionality under Indiana law for legislature to "appoint members to executive branch boards or commissions, a distinctly executive function"); and *Almond v. Rhode Island Lottery Commission*, 756 A.2d 186, 196–97 (R.I. 2000) (permitting General Assembly to appoint members to state lottery commission).

[17] *See, e.g.*, Devlin, *supra* note 16, at 1253–54; *cf.* Obrien v. Jones, 999 P.2d 95, 97 (Cal. 2000) (discussing California's "defeat or materially impair" standard in context of judicial power). *Obrien* will be discussed *infra* Part II.A as a key California precedent that, if applied to the Coastal Commission's case, would lead the court to ask whether supervising the Commission is a core executive function impaired by legislative appointment power.

the governor's duty to supervise enforcement of the Coastal Act.[18] A second view sees the violation as the legislature overstepping limitations on its power, not necessarily at the expense of the executive, but at the expense of the quality of the law generally.[19] From this perspective, legislative appointment power is troubling because legislators are able to influence executive action without having to fulfill the procedural requirements associated with passing a law.[20]

While many courts talk in terms of interference with executive power,[21] this Note looks at the Coastal Commission's case primarily in terms of limitations on legislative power and the arbitrariness created when legislators operate beyond their statutory role. This Note does not mean to exclude or criticize the utility of examining encroachment upon executive power, but it does argue that the executive branch is only one form of constitutional check on legislative power. The procedural requirements associated with the lawmaking process impose a check on legislative power, striving to promote deliberation and consensus in the law. If legislators are able to influence the Commission's actions without having to go through the lawmaking process, it raises serious separation-of-powers concerns that are not necessarily related to its interference with executive power.[22] Instead, the concern is that

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[18] *See Obrien*, 999 P.2d at 97 (applying material impairment standard in judicial context); *Marine Forests*, 128 Cal. Rptr. 2d at 884 (declaring that Coastal Act's appointment mechanism "materially impairs the executive power's ultimate authority over the execution of the laws").

[19] *See* Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533 (Cal. 2001); *see also id.* at 539 ("The purpose of the doctrine is to prevent one branch from exercising the complete power constitutionally vested in another . . .; it is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch." (quoting Younger v. Superior Court, 21 Cal. 3d 102, 117 (1978))).

[20] *Id.* at 539 (referring to bicameralism requirement, CAL. CONST. art. IV, § 8(b), and presentment requirement, CAL. CONST. art. IV, § 10(a)). *Cf.* U.S. CONST. art. I, § 7 ("Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States.").

[21] *See* Devlin, *supra* note 16, at 1253–55 (discussing potential domination of legislative branch over executive branch resulting from agency's unfettered discretion).

[22] *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003) (focusing on administrative arbitrariness rather than political accountability in discussing tension between administrative state and constitutional structure). Professor Bressman argues that *INS v. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar*, 478 U.S. 714 (1986)—two cases repeatedly cited in California precedent, see *infra* Part II.B—"can be understood either to depict a congressional struggle for executive power or a congressional grab for ad hoc power." Bressman, *supra*, at 523. Bressman argues that we should adopt the second view because it better fits with historical and modern concerns about government arbitrariness. This Note draws heavily on Bressman's framework, which resonates with California Supreme Court precedent, particularly *Carmel Valley Fire Protection District v. State*, 20 P.3d 533 (Cal. 2001). Discussed infra Part II.B, the *Carmel Valley* decision analyzes a separation-of-

the legislators' vested interest in the Commission may distort their incentives in supervising the Commission and, by extension, in ensuring the effectiveness of the Coastal Act. That is, appointment power enables and encourages legislators to impose arbitrary influence while abdicating their responsibility to make good law.

This Note argues that legislative appointments create serious separation-of-powers concerns, and that those concerns are heightened by the scope of the Coastal Commission's authority and jurisdiction, along with the powerful interests it regulates. It is precisely in a situation like this that courts should be wary of political self-interest leading legislators to diverge from the procedures that promote good law and help protect individuals from arbitrary policymaking.[23] The goal of this Note is not to denigrate the Coastal Commission or lobby for it to be reformed in ways favorable to developers and property owners. Instead, this Note postulates that the appointment structure has in fact increased political pressure on commissioners while diminishing the quality of Coastal Act enforcement.[24] The hope is that by striking down the current appointment structure, the courts will force the legislature to reform the structure of the Commission in ways that will promote integrity and stability in the protection of California's most precious resource.[25]

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powers question in terms of the limits on legislative power, including the bicameralism and presentment clauses. *See* CAL. CONST. art. IV, §§ 8(b), 10(a) (requiring legislature to pass laws through both houses and present to governor for veto or approval); cf. U.S. CONST. art. I, § 7 (requiring Congress to pass laws through both Houses and present to President for veto or approval and providing for reconsideration by both Houses).

[23] *See* Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271–72 (1986) (describing self-interested representation as central theme in administrative law's development); *see also* Bressman, *supra* note 22, at 497 (discussing "twin problems of faction and governmental self-interest—the principal components of governmental tyranny"); *infra* Part III.A.

[24] Although dividing appointments between the governor and two legislative houses was intended to increase the Commission's independence, the Commission, as even its strongest supporters recognize, has had a history of corruption and "coastal cronyism." *See* Commentary, *Separate Legislature, Coastal Commission*, SACRAMENTO BEE, Jan. 6, 2003, at B6; *see also* Chorney, *supra* note 8 (noting that both environmentalists and developers believe that Commission is heavily influenced by politics); Steve Lopez, Editorial, *Coast Decommissioned, It's Sand Aid Time*, L.A. TIMES, Jan. 1, 2003, at B1, B10 (disagreeing with attacks on Commission but admitting that "the Coastal Commission isn't exactly a model of integrity or efficiency"); Kenneth R. Weiss, *Coastal Panel Challenge Aired*, L.A. TIMES, Dec. 19, 2002, at B6 (stating that problem of influence "has long swirled around the Coastal Commission" as commissioners have faced "strong pressure from the people who appointed them").

[25] Indeed, many have expressed the hope that the constitutional attack, initiated by property-rights advocates and long-time Commission opponents, will backfire and result in a more independent and strengthened Commission. *See, e.g.*, *Separate Legislature, Coastal Commission*, *supra* note 24 ("The best thing for the coast and for good governance is for the Legislature to give up this political perk and to empower the governor to nominate all

Part I gives the background to the Coastal Commission's powers and appointment structure, along with the court decisions challenging the agency's constitutionality and the subsequent response by the California legislature. Part II introduces the two California Supreme Court cases most relevant in the *Marine Forests* case, and it uses them to demonstrate how the executive-centered and legislative-centered perspectives would apply in the Coastal Commission's case. Part III explores the principles underlying separation of powers and administrative law and applies them in showing why legislative appointments, both generally, and particularly in the Coastal Commission's case, raise serious separation-of-powers concerns.

I
BACKGROUND TO THE SEPARATION-OF-POWERS CHALLENGE TO THE CALIFORNIA COASTAL COMMISSION

The goal of this Part is to provide a brief background to the Coastal Commission and the case against it. Part I.A discusses the background to the Commission's power and its role in California's administrative state. Part I.B summarizes the *Marine Forests* appellate court decision, while Part I.C discusses the public reaction and the legislative response to the decision, as well as the legal and political questions that remain.

A. Background to the California Coastal Commission

In 1976, the California legislature created the California Coastal Commission,[26] tasking it with "primary responsibility" for carrying out the Coastal Act's goals of balancing private rights with the need to

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of the Coastal Commission's appointees."); Kenneth R. Weiss, *Coastal Commission Asks Judges for Second Opinion*, L.A. TIMES, Jan. 9, 2003, at B8 (quoting Sierra Club's coastal programs director Mark Massara as saying, "The irony is that this case, which was brought to undermine the commission, may end up strengthening it."); *see also* Jack Allen, Letter to the Editor, *Coastal Commission's Appointment Process*, L.A. TIMES, Jan. 6, 2003, at B10 (stating that while "on the surface" appellate court ruling favors developers and property rights advocates, "in the end it may boomerang on them" by restraining "[p]owerful lobbyists acting on behalf of wealthy clients" who "all too often were able to wield their influence in Sacramento" to affect Commission's membership); Kevin Feldman, Letter to the Editor, *Coastal Commission's Appointment Process*, L.A. TIMES, Jan. 6, 2003, at B10 (commenting that appellate case created "a much-needed opportunity to revisit the appointment process" and stating that while "[t]here's no doubt that the overall goals of the commission . . . are still popular among Californians, . . . a more independent and locally accountable commission would better achieve these goals").

[26] California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30300–30900 (West 1996) (amended 2003).

protect environmental resources for the public.[27] Its power within the designated coastal zone "is broad and applies to all private and public entities and covers virtually all manner of development activities."[28]

Located in the Resources Agency of California's executive branch,[29] the Commission has powers that, though extensive, typically are delegated to administrative bodies. The Commission has the "quasi-legislative" power to adopt implementing regulations, setting formal standards with the effect of law.[30] The Commission investigates and prosecutes violations of the Coastal Act, and has the ability to invoke the use of the Attorney General's Office in initiating lawsuits on behalf of the state.[31] The Commission also possesses "quasi-judicial" powers to adjudicate permits for development and use, levy civil penalties, and issue cease-and-desist orders.[32]

The Commission's policies and programs include promoting environmental education and sponsoring school trips to coastal parks.[33] But the Commission's authority over development in the coastal zone also gives it power over billions of dollars in commerce and industry as well as over the property rights of millions of people.[34] Through its

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[27] For example, section 30210 demands that "maximum access . . . and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."

[28] *See* California Coastal Commission, *at* http://www.coastal.ca.gov/la/overview.html (last visited January 15, 2004) [hereinafter Coastal Commission Website] (listing powers and responsibilities); *see also* § 30321 (defining Commission's jurisdiction as encompassing "any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan . . . or any quasi-judicial matter requiring commission action"). The Coastal Act includes specific policies relating to public access (§§ 30210–30214), recreation (§§ 30220–30224), terrestrial and marine habitat protection (§§ 30230–30237), agricultural lands (§§ 30241–30244), commercial fisheries (§§ 30233–30234.5), industrial uses (§§ 30260–30265.5), water quality (§§ 30230–30237), offshore oil and gas development (§§ 30260–30265.5), power plants (§ 30264), ports (§§ 30700–30721), and universities (§ 30605).

[29] § 30300.

[30] § 30333.

[31] § 30334(b) ("The Attorney General shall represent the commission in any litigation . . . ."); *see also* § 30808 (allowing lawsuits for violations of "urban exclusion" conditions); *cf.* Buckley v. Valeo, 424 U.S. 1, 138–40 (1976) (describing power to initiate lawsuits as purely executive function); State *ex rel.* Woods v. Block, 942 P.2d 428, 434–37 (Ariz. 1997) (declaring that legislature may not appoint majority of agency empowered to initiate lawsuits to protect state sovereignty).

[32] *See* § 30600(a) ("[A]ny person wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit."); § 30601 (specifying situations where development permits must be obtained from Commission); §§ 30809, 30810 (cease-and-desist orders); §§ 30820–30824 (civil penalties).

[33] *See* Coastal Commission Website, *supra* note 28.

[34] *See, e.g.*, Bailey, *supra* note 5 (reporting that Commission is "[a]rmed with sweeping powers" to safeguard coast while feeding "a $27-billion coastal economy dominated by tourism, shipping, and agriculture"); Amy Ettinger, *How the California Coastal*

power to permit development and use in the coastal zone, the Commission aggressively has promoted beach access.[35] The now-infamous case of *Nollan v. California Coastal Commission*[36] involved the Commission's practice of requiring landowners to dedicate easements to the public.[37] The Commission has been applauded for its conservationist orientation, while property-rights advocates have denounced it for "embrac[ing] Soviet-style central planning, with an environmentalist bent."[38]

The Commission's authority, however, does not come merely from its powers; it also arises out of the Commission's central position in California's administrative state. Designated "the state coastal zone planning and management agency for any and all purposes,"[39] the Coastal Commission's jurisdiction involves all levels of government. It is in charge of approving, reviewing, and monitoring local coastal programs created by municipal governments, and it acts as a surrogate permitting board for the many counties lacking an approved plan.[40] The Commission's jurisdiction overlaps with over a dozen other state agencies, creating an atmosphere that supporters call "coordination" and critics call "coercion."[41] The Commission also

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Commission Operates, MONTEREY COUNTY HERALD, May 16, 2001, *available at* LEXIS, Nexis Library, News Group File (discussing many large commercial development projects in Monterey pending Commission approval, and writing that anyone who tries "building anything . . . [will] soon learn who holds the power over development in the state"); Mintz, *supra* note 2 ("The commission has long tangled with wealthy developers, stopping building projects or pushing property owners to provide beach access on their land.").

35 *See* Egan, *supra* note 4.

36 483 U.S. 825, 832–33 (1987) (citing California cases in finding that, under California law, imposing easement is exercise of eminent domain).

37 § 30607 ("Any permit . . . shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division.").

38 Bailey, *supra* note 5. Bailey questions whether the Commission has really been an environmental crusader, pointing out that it has, at times, "resembled a buddy to free enterprise." *Id.* In his thorough 1998 article on the Commission, Bailey also cited "more charitable observers [who] say that the agency has overcome a historically anemic budget and overwhelming political pressure to give California the best-planned shoreline in the nation, a balanced mix of alluring development and preservation with abundant public access to the waves." *Id.*

39 § 30330 (delegating to Commission power to "exercise any and all powers set forth in the Federal Coastal Zone Management Act of 1972").

40 §§ 30500–30526.

41 *See* §§ 30400–30420. Proponents of the Coastal Act intended for the Commission's position in California's bureaucracy to give it, in effect, a veto power over the other agencies. *See* SCOTT, *supra* note 1, at 207–08. While it is unclear that the Commission's power is so extensive, there are situations where it can effectively subvert the programs of other executive branch bodies, and it has conflicted with other agencies over the extent of its jurisdiction. *See, e.g.*, Kerri Ginis, *600 Rally for the Dunes: Enthusiasts Buck a Lawsuit to Ban Motorized Vehicles*, THE FRESNO BEE, Feb. 10, 2002, at B1 (describing how

conducts consistency review of federal programs.[42] For example, it can block leases for oil and gas drilling approved by the U.S. Department of Interior.[43]

Given the Commission's vast powers and extensive jurisdiction, the Commission's structure was debated heavily prior to the Coastal Act's passage.[44] Using the ad hoc commission created in 1972 as a model, drafters diffused appointment power among the governor and the two legislative houses to "neutralize" the "'political nature' of the appointment process."[45] The Coastal Act of 1976 codified a commis-

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Commission has restricted 2000 out of 3600 acres in Oceano Dunes State Vehicle Recreation Area and could revoke permit to operate park as vehicle recreation area).

[42] The California Coastal Commission website explains its review of federal programs as follows:

> Examples of such federal activities [under Commission jurisdiction] include: outer continental shelf oil and gas leasing; exploration and development; designation of dredge material disposal sites in the ocean; military projects at coastal locations; U.S. Army Corps of Engineers fill permits; certain U.S. Fish and Wildlife Service permits; national park projects; highway improvement projects assisted with federal funds; and commercial space launch projects on federal lands.

Coastal Commission Website, *supra* note 28.

[43] The Commission has asserted the authority under the Federal Coastal Zone Management Act, 16 U.S.C. § 1456 (2000), to review certain offshore-drilling federal leases to ensure compliance with state environmental regulations. *See* Weiss, *supra* note 3. The Bush Administration challenged the Commission's review power but lost in both the district court and on appeal before the Ninth Circuit. *See* California v. Norton, 311 F.3d 1162 (9th Cir. 2002), *aff'g* 150 F. Supp. 2d 1046 (N.D. Cal. 2001); Weiss, *supra* note 3. Following the court cases, the U.S. Department of Commerce proposed modifications to the Coastal Zone Management Act that would decrease the power of states over federal activity while increasing the deference given to the environmental impact findings of federal agencies. *See* Coastal Zone Management Act Federal Consistency Regulations, 68 Fed. Reg. 34,851 (proposed June 11, 2003) (to be codified at 15 C.F.R. pt. 930); Kenneth R. Weiss, *U.S. Is Seeking to Limit States' Influence on Offshore Decisions*, L.A. TIMES, Aug. 21, 2003, at B8 (quoting letter from California and U.S. legislators calling proposed modifications "a pernicious assault on states' rights"). The proposed rule was not solely enacted to avoid the result of the lawsuit; it was also made at the urging of Vice President Cheney's energy task force. *See* Coastal Zone Management Act Federal Consistency Regulations, 68 Fed. Reg. at 34,851; Weiss, *supra*.

[44] *See* SCOTT, *supra* note 1, at 74–79 (outlining criticisms leveled against the Act).

[45] *See id.* at 76. Ronald Reagan, governor of California from 1967 to 1975, helped thwart several attempts to pass a coastal plan prior to the voter initiative in 1972. *Id.* Many supporters of the Coastal Act feared that a Reaganesque, pro-development governor would destroy the Commission's powers. *See Separate Legislature, Coastal Commission*, *supra* note 24; Lance Williams, *Coastal Commission Ruled Illegal*, S.F. CHRON., Dec. 31, 2002, at A1, A9 (quoting co-author of 1972 initiative as stating that law was deliberately crafted to share power between governor and legislature because "[w]hen you had somebody like (George) Deukmejian or (Pete) Wilson (as governor), who were out to starve the commission because they didn't like it, you had a countervailing force from the speaker or the Senate Rules Committee and the commission could survive" (alterations in original)).

sion with twelve voting members and four nonvoting members.[46] Of the voting members, the Governor, Senate Rules Committee, and Speaker of the Assembly each appoint four.[47] The voting members serve two year terms at the will of their appointing authorities, and thus can be removed at any time.[48] The commissioners, by majority vote, appoint and remove the Executive Director to run the large staff.[49]

It is not clear, however, that the appointment structure has actually insulated commissioners from political influence, and in fact, the appointment process has been called the Commission's greatest flaw.[50] A *Los Angeles Times* investigation in 1987 revealed that "decisions governing projects worth billions of dollars have become tangled in a thicket of legislative politics and back-room maneuvering that the commission's creators had sought to avoid."[51] Over the Commission's history, one member was removed in the middle of a hearing and another was convicted for soliciting bribes from parties appearing before the Commission.[52] To this day, people recognize the politicized nature of Commission decisions and have criticized the appointment structure—and the removal power, in particular—as encouraging "coastal cronyism" that undermines the stability and integrity of the Commission.[53]

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[46] § 30301.

[47] § 30301(e)-(f) (including geographic requirements that six representatives be appointed from state at-large, and six representatives be chosen from six coastal regions). The four non-voting members are directors of executive branch agencies, including the Secretary of the Resources Agency, the department in which the Commission is located. § 30301 (a)-(d).

[48] § 30312(b).

[49] § 30335. Peter Douglas, a consultant for an Assembly committee on coastal resources at the time of the Scott study, is the current Executive Director. *See* SCOTT, *supra* note 1, at 394 (listing agency roster).

[50] *See* Kenneth J. Garcia, *Political Appointments a Built-in Problem, Commissioners Serve at Whim of Lawmakers*, S.F. CHRON., Nov. 3, 1992, at A7 (reporting on how then Assembly Speaker Willie Brown appointed Beverly Hills real estate agent and commenting that decision "underscores what critics say is one of the commission's biggest failings: Its appointments are subject to the political whims of legislators often at war among themselves and heavily dependent on the kindness of lobbyists").

[51] Robert W. Stewart & Ronald B. Taylor, *Coastal Commission—An Ideal Gone Astray*, L.A. TIMES, Sept. 7, 1987, at 1.

[52] *See* Garcia, *supra* note 50 (describing scandal involving former Commissioner Nathanson, who was imprisoned on extortion charges). In 1987, Senator David Roberti removed a commissioner in the middle of a hearing over a heavily disputed oil drilling permit. *Id.* The Senator openly admitted the political motivation behind the attempt to influence the commission's decision: "[I]t was a major public-policy decision. Everybody hates to do it that way, but sometimes it's necessary." *Id.*; *see* Carl Ingram, *Davis Pushes for Changes in Coastal Panel*, L.A. TIMES, Jan. 27, 2003, at B7.

[53] *See Separate Legislature, Coastal Commission*, *supra* note 24 (characterizing decision to give legislature control of majority of appointments as "a short term political calcula-

B. *The Coastal Commission Under Constitutional Attack: The* Marines Forests *Decision*

Prior to May 2001, no court had entertained a challenge to the Commission's structure,[54] but the case of *Marine Forests Society v. California Coastal Commission*[55] changed that. The case involved a cease and desist order issued by the Commission, preventing a "retired French aquaculture entrepreneur"[56] from building an artificial reef made of rubber tires, rope, and plastic jugs—a "precious experiment involving sea life."[57] A suit was brought on behalf of the Marine Forests Society by Ronald Zumbrun, the attorney who had spent much of his career fighting the Coastal Commission and who

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tion" and criticizing "this political maneuver" for "weaken[ing] the commission, both in its integrity and its constitutional standing"); *see also* Mintz, *supra* note 2 (noting that power to remove commissioners at will has been long criticized as enabling "political cronyism"). One piece complained that the Commission has "been a playground for the mischief-making political leaders who appoint its members." *Wounded Watchdog*, CAL. J., Mar. 1, 1997, *available at* LEXIS, Nexis Library, News Group File. In reporting on the "'push me/pull me' story of coastal commissioners," the piece described an incident where Cruz Bustamante, upon becoming assembly speaker in 1996, immediately fired and replaced all four commissioners appointed by his Republican predecessor. *Id.*; *see* Kenneth R. Weiss, *Shake-Up at Coastal Commission*, L.A. TIMES, Dec. 12, 2002, at B1 (discussing Sara Wan's abdication of her Coastal Commission chairmanship and political conflicts rocking Commission).

In the *Shake-Up* piece, Weiss recited the typical line that the "division of [appointment] power . . . was designed to make political meddling more difficult as the panel determines the fate of coastal developments proposed by people with easy access to the governor and the Legislature." Weiss, *supra*. The line contains a touch of irony: It appears in an article on "a 'very political, very divisive and very personal' chairmanship fight" where the governor and assembly speaker reportedly were pressuring their appointees to remove then chairperson Sara Wan. *Id.* The article ends with quotes saying that Wan was foolish not to support Davis's campaigns and that "[p]oliticians do pay attention to who endorses them." *Id.*

[54] Shortly after the voter initiative passed in 1972, the Coastal Zone Conservation Act—the predecessor to the Coastal Act—was challenged on numerous constitutional grounds, mostly focusing on the due process rights of property owners. CEEED v. Cal. Coastal Zone Conservation Comm'n, 118 Cal. Rptr. 315, 319 (Ct. App. 1974). The Act was upheld in all respects. *Id.* Ronald Zumbrun, the plaintiff's attorney and co-founder of the Pacific Legal Foundation, has been attempting to raise the separation-of-powers challenge for years, but in each case, his claim was dismissed on procedural grounds or on other legal issues. *See generally* Dan Berman, *Powerful California Coastal Commission Faces Demise After Court Ruling*, LAND LETTER, Jan. 9, 2003, *available at* LEXIS, Nexis Library, News Group File.

[55] No. 00AS00567, slip op. at 3–4 (Cal. App. Dep't Super. Ct. May 8, 2001), *available at* http://www.marinehabitat.org/kob.html, *aff'd*, 128 Cal. Rptr. 2d 869 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Jan. 23, 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2003).

[56] David Reyes, *Wanting Only Sea Solution, He's David to State Goliath*, L.A. TIMES, Jan. 3, 2003, at B1.

[57] *Id.* (quoting plaintiff Rodolphe Streichenberger's characterization of his artificial reef project, which he apparently hoped would produce colonies of mussels and solve world hunger).

had argued *Nollan* before the Supreme Court.[58] A superior court judge deemed the Coastal Act unconstitutional because the legislature's power to appoint and remove two-thirds of the voting members left no "adequate protection" to keep the legislature from controlling the Commission's "judicial and executive powers."[59]

The decision was stayed during appeal, but just before New Year's 2003, a three-judge panel unanimously affirmed the ruling.[60] The opinion began by characterizing the nature of the Commission's powers. "[T]here can be no doubt," the court stated bluntly, "that the Commission exercises executive powers."[61] It described the Commission's power to issue implementing regulations as "substantive lawmaking" power delegated by the legislature.[62] The court labeled as "executive in nature" powers to contract with private parties, investigate violations of the Coastal Act, and initiate lawsuits; it called the Commission's permitting power a "quasi-judicial" power incidental to execution of the law.[63] The Commission's role in the "interpretation and implementation" of the Coastal Act, the Court of Appeals held, "[is] the very essence of the power to execute the law."[64]

In reviewing the text and history of the California Constitution, the appellate court found that the legislature does have a general power to appoint administrative officers.[65] But it rejected the idea that the legislature's discretion was without limits,[66] and found that, in

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[58] *See* Berman, *supra* note 54; Weiss, *supra* note 25.

[59] *Marine Forests*, No. 00AS00567, slip op. at 3. Indicative of the separation-of-powers confusion created by the appointment scheme, the decision variously described the Commission as "an independent body," "[p]urportedly an executive agency," and "effectively a legislative agency." *Id.* at 2–3. The judge described the Coastal Commission as "unique in its composition," explaining that no party had identified a present-day state commission where the majority of the members are appointed by the legislature and are removable at will. *Id.* at 2.

Without explicitly stating that the executive branch should control an agency with such powers, the decision noted that the Commission is located in the Resources Agency, yet the secretary of that agency has no "jurisdiction" over Commission decisions. *Id.* The opinion continued, commenting that the Commission is "answerable to no one in the Executive . . . [and] not directly answerable to the voters." *Id.* at 3.

[60] Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Ct. App. Jan. 23, 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2003).

[61] *Id.* at 875.

[62] *Id.* (quoting Yamaha Corp. of Am. v. State Bd. of Equalization, 960 P.2d 1031 (1998)). *See supra* Part I.A (discussing statutory powers of Commission); *infra* Part III.C (describing why Commission's role in administrative state raises separation-of-powers concerns).

[63] *Id.* at 876.

[64] *Id.*

[65] *Id.* at 876–77.

[66] *Id.* at 878.

the Commission's case, the legislature had "excessive control" over those with executive duties.[67] The court criticized the appointment scheme, which gave "the Speaker of the Assembly and the Senate Rules Committee virtually unfettered authority over the appointment of a majority of the Commission's members, and wholly unfettered power to remove those members at the will of the Legislature."[68]

Citing *Bowsher v. Synar*,[69] the court was concerned that "[t]he presumed desire of those members to avoid being removed from their positions creates an improper subservience to the legislative branch of government."[70]

Without expressly saying that the governor or executive branch must be able to control the Commission, the court wrote that "the scheme contains no safeguards or checks to ensure that those Commission members are subject to the primary authority and supervision of the executive branch."[71] The decision ultimately declared that

> [t]he result is that the legislative branch not only has the ability to declare the law, but also to control the Commission's execution of the law and its exercise of quasi-judicial powers via the Legislature's control of the majority of the Commission's members. This contravenes the primary purpose of the separation of powers doctrine, which "is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government."[72]

The next Section deals with the public reaction and eventual legislative response to this conclusion, as well as the outstanding questions generated by the appellate court.

C. *Public Reaction, Legislative Response, and Remaining Questions*

The public reaction was swift and widespread. Many applauded the decision for reining in the "tyrant" of the coast.[73] Detractors argued that the decision threatened the "guardian angel" of California's most precious resource.[74] The Executive Director of the

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[67] *Id.* at 882.

[68] *Id.* at 881–82.

[69] 478 U.S. 714 (1986).

[70] *Marine Forests*, 128 Cal. Rptr. 2d at 882.

[71] *Id.*

[72] *Id.* at 882 (quoting Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 538 (Cal. 2001)).

[73] *See* Reyes, *supra* note 56 (conveying view of plaintiff in *Marine Forests* that he is fighting "the tyranny of the Coastal Commission"); *see also* Mintz, *supra* note 2 ("Critics of the commission, who maintain it has eroded property rights for years, applauded the ruling, saying it paves the way for creating fairer review of coastal development."); Williams, *supra* note 45 (noting Zumbrun's prediction that Commission would be forced to deal more fairly with property owners).

[74] *See* Berman, *supra* note 1.

Commission, Peter Douglas, suggested that declaring the Commission unconstitutional could invalidate thousands of permit decisions and bring government in California to a halt.[75]

Others saw a relatively easy way of solving the problem: Give the legislative appointees fixed terms.[76] In its concluding remarks, the court qualified its legal conclusion as "limited to the specific facts of this case, where a majority of the Commission's voting members are appointed by the legislative branch and *may be removed at the pleasure of the legislative branch.*"[77] It seemed that giving the appointees fixed terms would provide a "safeguard[ ] protecting against the Legislature's ability to use this authority to interfere with the Commission members' executive power to execute the laws."[78] Less than two months after the appellate court decision, the legislature responded. In a special session, it eliminated removal at will for legislative appointments and extended their terms from two years to four.[79]

Following the legislative response, the California Supreme Court certified the case for review and asked the petitioners to brief the following questions:

> (1) Assuming the [Commission's appointment scheme] is constitutionally defective . . . , what is the appropriate remedy available to Marine Forests Society?
> (2) What effect would the holding of the Court of Appeal have on past and other currently pending decisions of the California Coastal Commission?
> (3) Does the February 20, 2003 amendment to Public Resources Code section 30312 eliminate the separation-of-powers defect found by the Court of Appeal, or is the composition of the Coastal Commission still vulnerable to a separation-of-powers challenge?[80]

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[75] *See* Mintz, *supra* note 2 (quoting Executive Director Peter Douglas).

[76] *See* Weiss & Ingram, *supra* note 14 (reporting two days after decision that Democratic leaders of assembly and senate were planning on quickly pushing through legislation to cure any constitutional defects and that providing legislative appointees with fixed terms was main idea).

[77] *Marine Forests*, 128 Cal. Rptr. 2d at 884 (emphasis in original).

[78] *Id.*

[79] *See* A.B. 1, 2003–2004 Leg., 2d Extraordinary Sess. (Cal. 2003); Berman, *supra* note 1.

[80] Marine Forests Soc'y v. Cal. Coastal Comm'n, 65 P.3d 1285, 1285 (Cal. 2003) (granting petition for review and presenting additional questions to be briefed); *see Environmental Law: Coastal Zone Regulation*, CAL. SUP. CT. SERV., Apr. 11, 2003 (listing questions certified for review and providing background to case); Paul Shigley, *State Supreme Court Accepts Coastal Commission Case: Constitutionality of Appointments, Permitting Practices Under Review*, CAL. PLAN. & DEV. REP., at 7 (same). Some commentators have stated that the second question on the retroactivity of the decision is the most complex and interesting. *See* Chorney, *supra* note 8. Both sides of the case, however,

This Note will focus on the third question and argue that, because the legislature retains majority appointment power, the Commission is still vulnerable to a separation-of-powers challenge. The next Part will explore the two main precedents in California, which offer the supreme court two different, though not mutually exclusive, perspectives on the separation-of-powers question.

II
PERSPECTIVES ON THE SEPARATION-OF-POWERS QUESTION UNDER CALIFORNIA LAW

The California Constitution, since its conception, expressly has provided for separation of powers: "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."[81]

While the Federal Constitution explicitly and exclusively reserves for the President the power to appoint administrative officers,[82] California's constitution, like many states', is silent on the issue.[83] Moreover, there is no California precedent directly addressing whether the legislature can appoint members to an administrative agency that performs executive functions.[84]

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doubt that the court will throw out twenty-seven years of decisions. *Id.* This Note focuses solely on the third question because it is the only one that implicates broader theories of separation of powers and administrative law, as opposed to the more specific inquiries of how to fashion a remedy.

[81] CAL. CONST. art. III, § 3. Article IV, section 1 gives legislative power to the Senate and Assembly, while article V, section 1 vests "[t]he supreme executive power of this State" in the Governor to "see that the law is faithfully executed."

[82] U.S. CONST. art. II, § 2, cl. 2. The Appointments clause of the United States Constitution reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[83] *See generally* Devlin, *supra* note 16 (surveying state constitutions with regard to issue of legislative appointment of administrative agents).

[84] Peter Douglas, Executive Director of the Coastal Commission, responded to the superior court ruling with an article arguing that the decision was contrary to the purpose and history of California's separation-of-powers doctrine and that early case law supports the legislature's power to make appointments. Peter Douglas, *Coastal Catch: "Marine Forests" Ignores the History, Purpose of State's Separation of Powers Clause*, DAILY J., June 15, 2001, *available at* http://www.coastal.ca.gov/coastalcatch.pdf [hereinafter Coastal Catch]. Although it is beyond the scope of this Note, California's constitutional history and early case law is worth a comment.

The initial California Constitution of 1849, like the modern version, contained no appointments clause, and the legislature quickly assumed the power to appoint certain

state officers. *See, e.g.*, People *ex rel.* Casserly v. Fitch, 1 Cal. 519 (1851) (involving governor's ability to fill vacancy for state printer, who was appointed by legislature). In *People* ex rel. *Aylett v. Langdon*, 8 Cal. 1 (1857), the California Supreme Court permitted the legislature to elect the resident-physician of the state insane asylum, finding that the power to appoint was not inherently executive: "The power to fill an office is political, and this power is exercised in common by the Legislatures, the Governors, and other executive officers, of every State in the Union, unless it has been expressly withdrawn, by the organic law of the State." *Id.* at 16.

Some years later, in the last California Supreme Court case to deal directly with the legislature's power to appoint administrative officials, *People* ex rel. *Waterman v. Freeman*, 22 P. 173 (Cal. 1889), the court found no separation-of-powers violation where the legislature appointed the officers of the State Library Board. The court described the issue as "whether appointment to office is essentially an executive function." *Id.* at 174. The court stated that if the framers of the California Constitution wanted to restrict appointments to the governor, they would have said so. In the absence of such language, therefore, "the power of appointment to office, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and if the law so prescribes, may be exercised by the members of the legislature." *Id.*, *quoted in* Coastal Catch, *supra*.

Indeed, prior to *Freeman*, the California Supreme Court had observed: "It would seem that the evident intent and whole spirit of the Constitution of the State was to limit the patronage of the Executive within very narrow bounds." People *ex rel.* Ryder v. Mizner, 7 Cal. 519, 524–25 (1857) (involving dispute over governor's power to fill vacancies when legislature is in recess); *see also In re* Bulger, 45 Cal. 553, 559 (1873) ("The Constitution, as we have seen, authorized the appointment to be made 'as the Legislature may direct,' and in none of its provisions, so far as we know, is any limitation placed upon the exercise of this power."). Those rulings reflected the California Constitution's distribution of power at the time: The legislature was to be the dominant branch with plenary power, while the governor was to be relatively weak, and certainly not a "unitary" executive as envisioned in the federal design. *See* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 965 (1994) (citing debates during California Constitutional Convention); James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 819–24 (1991) (arguing that structure of many state constitutions in 1800s reflected ideals of Jeffersonian popular democracy, rather than Madisonian republicanism); *see also Langdon*, 8 Cal. at 16 (writing that power of legislature accords with "the theory and spirit of our institutions," because legislature is "immediate representative[ ] of the people").

The Commission has attempted to use those cases as precedent for the proposition that the legislature's power of appointment is unlimited. *See* Coastal Catch, *supra*. The Court of Appeals correctly rejected that argument. *See* Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 878 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Ct. App. Jan. 23, 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2003). First, the nineteenth-century cases reflect a formalistic, categorical framing of the separation-of-powers question: Is the power to appoint itself an executive power? Modern courts have taken a more functionalist, or pragmatic, approach, asking, in the context of the power held by the appointee, whether the legislature's power to appoint allows interbranch usurpation or interference. *See, e.g.*, Obrien v. Jones, 999 P.2d 95, 99–102 (Cal. 2000); State ex rel. Schneider v. Bennett, 547 P.2d 786, 792–93 (Kan. 1976) (creating four-factor pragmatic approach to determining separation of powers in modern complex administrative state); Devlin, *supra* note 16, at 1222–24, 1246–50 (comparing functionalist and formalist approaches).

Second, the early cases did not involve the power of the legislature to appoint officers with "core executive functions." *Freeman*, for example, involved the State Library Board, which, at that time, primarily served as a research aid for the legislature and court, and the

The appellate court in *Marine Forests*, however, cites two recent California Supreme Court cases that are the most relevant precedents for the Coastal Commission's case. *Obrien v. Jones*, a 2000 decision, examined the issue of interbranch appointments, but not in the context of executive functions.[85] A year later, *Carmel Valley Fire Protection District v. State*, which had nothing to do with appointments, presented a thorough review by the California Supreme Court of the purposes of separation of powers and the relationship between the legislative and executive branches in supervising the actions of administrative agencies.[86] While neither case directly addresses the problem involved in *Marine Forests*, each frames the issue of appointments from two different perspectives.

Part II.A will examine the decision in *Obrien*, showing that, if applied to the Coastal Commission's case, it would require asking whether the legislative appointments impair or interfere with the executive branch's duty to supervise the enforcement of the Coastal Act. Part II.B will then turn to *Carmel Valley*, in which the court upheld the power of the legislature to effectively nullify an executive regulation by withdrawing its funding. While the court found no separation-of-powers violation, it discussed in depth the limits on legislative power and cast doubt on the legitimacy of the legislative veto, or legislative removal power.[87] If applied to the Coastal Commission's case, this Note suggests, the question is whether the legislature can use its appointment power to effect a legislative veto. In discussing these two cases and their distinct perspectives, this Note hopes to set up the argument for a functionalist, legislative-centered approach designed

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California Supreme Court prior to *Freeman* had declared that the Library did not to pertain "to either the Legislative or Executive Departments." People *ex rel.* Att'y Gen. v. Provines, 34 Cal. 520, 532, 539 (1868) (overruling People *ex rel.* Simmons v. Sanderson, 30 Cal. 160 (1866), which stated that State Library Board was executive agency). Similarly, *Fitch* involved the state printer, which by constitutional provision was controlled by the legislature. *See* CAL. CONST. OF 1849, art. VI, § 14 (providing that legislature was responsible for "the speedy publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems expedient"). In neither *Freeman* nor *Fitch* did the office at stake involve executive powers, and thus there could be no encroachment of executive power, nor aggrandizement of the legislature. Moreover, *Freeman* and *Fitch*, read in light of their facts, may even suggest that the appointment of officers should depend on the powers and functions of the officers.

Finally, those early cases, which have not been cited in the modern era, fail to account for the dramatic changes in governmental structure and the distribution of powers that have occurred, especially since the rise of the administrative state. *See* Bixby v. Pierno, 481 P.2d 242, 250 (Cal. 1971) (calling development of modern bureaucracy "[p]ossibly the most significant structural change in our government since the date of its founding").

[85] Obrien, 999 P.2d 95.

[86] Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533 (Cal. 2001).

[87] *Id.* at 541–45.

to guard against threats of faction and arbitrariness, as discussed in Part III.

A. Obrien v. Jones, *Interbranch Appointments, and the "Defeat or Materially Impair" Standard*

In *Obrien v. Jones*, the California Supreme Court confronted the issue of legislative and executive appointments of hearing judges to the State Bar Court, which was empowered to conduct evidentiary hearings and submit decisions recommending whether attorneys should be disciplined.[88] In a 4–3 decision, the California Supreme Court upheld the structure. The court began by categorizing the power to discipline attorneys under California law as a core judicial function, a power "reserved, primary, and inherent [to] this court."[89] It then deduced that "this court's inherent authority over attorney admission and discipline includes the power of this court to appoint the judges of the State Bar Court."[90] The majority, however, recognized that other branches can hold appointment power, so long as that power did not "defeat or materially impair" judicial authority.[91]

In finding no violation, the majority opinion distinguished the function of State Bar hearing judges from other judicial "assistants" by noting that California's "unique" attorney discipline system is a "discrete arena . . . in which a significant degree of legislative regulation has been found permissible."[92] The court further found that the *appointment scheme left the judiciary with* "numerous structural and procedural safeguards."[93] For example, a body appointed by the judiciary had to approve the executive and legislative appointments.[94] Meanwhile, the hearing judges played an administrative role, limited to factual determination and recommendations that could be reviewed by the State Bar Review Department, whose members were

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[88] 999 P.2d at 98–99. The supreme court originally appointed the judges, but in 1999, the legislature passed an amendment providing that the five hearing judges would be appointed as follows: two by the supreme court, one each by the governor, assembly speaker, and Senate Rules Committee. *Id.* at 98–99 & nn.3–6.

[89] *Id.* at 100.

[90] *Id.* at 97; *see id.* at 101–03 (discussing court's inherent authority as final policymaker over attorney admission and discipline that extends to appointment of State Bar Court judges).

[91] *Id.* at 97; *see* Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 878 (Ct. App. 2002) (claiming that reasoning of *Obrien* defeated Commission's contention that early cases apply and that there are no limits on legislative appointment and removal power).

[92] *Obrien*, 999 P.2d at 104 (referring, by "judicial assistants," to special masters or referees who make findings directly for court without intermediate review).

[93] *Id.* at 97.

[94] *Id.* at 104.

appointed by the judiciary.[95] Because of this structure, the court found that the judiciary retained "ultimate control over all the admission and disciplinary functions of the State Bar Court."[96] The appointment structure thus represented a "cooperative endeavor" and did not "materially impair[ ]" judicial power.[97]

Judge Kennard vehemently dissented, arguing that interbranch appointments "raise serious separation of powers concerns" and should "be carefully scrutinized."[98] While the majority was willing to permit interbranch appointments, the dissent embodied the opposite presumption,[99] permitting them only if (1) "particular safeguards to protect the appointee from extrabranch influence after appointment"[100] were put in place or (2) "a special justification for the interbranch appointing mechanism" was supplied.[101]

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[95] *Id.* In addition, the State Bar Act provided that the judiciary would determine and approve the procedures and functions of the State Bar Court, and that the decisions of the State Bar Court would be reviewable by the courts. *Id.* In effect, the State Bar Court is more like an administrative adjudicative agency than a court.

[96] *Id.* at 103.

[97] *Id.* at 104; *see id.* at 97 ("[O]ther appointment mechanisms . . . are permissible so long as they are subject to sufficient judicially controlled protective measures to ensure that such appointments do not impair the court's primary and ultimate authority over the attorney admission and discipline process.").

[98] *Id.* at 114 (Kennard, J., dissenting). Judge Kennard criticized the "defeat and materially impair" standard as "vague," while warning that interbranch appointments would reduce public confidence in the attorney discipline system and that majority was "underestimat[ing] the incremental effect of interbranch intrusions." *Id.* at 117.

A second dissenting opinion, written by Judge Brown, similarly chastised the majority for "ced[ing] constitutional ground" to the legislature, whose acts showed "disrespect for this court as a coordinate branch of government." *Id.* at 118 (Brown, J., dissenting). Judge Brown's analysis (properly) focused on the particular role of the judiciary and its relationship to the legislative branch, and thus may be less applicable to the issue of legislative appointments to an executive agency. Thus, for the sake of brevity, this Note will primarily refer to Judge Kennard's opinion as the "*Obrien* dissent."

[99] *Compare id.* at 102 (George, J.) (writing that issue was whether circumstance "necessarily results in a material impairment of this court's inherent power"), *with id.* at 114 (Kennard, J., dissenting) (allowing interbranch appointments "only if there exists either a special justification . . . or particular safeguards").

[100] *Id.* at 114 (Kennard, J., dissenting). Judge Kennard noted, for example, that removal for cause is not a sufficient safeguard because legislators can make threats based on power to reappoint agents. *Id.*; *see infra* Part III.B.1.

[101] *Obrien*, 999 P.2d at 114 (Kennard, J., dissenting). The opinion gives two examples of "special justifications," and the examples reflect the two most common kinds of agencies with legislative appointments. The first is when "vesting the appointing power within the same branch in which the officer serves would implicate a conflict of interest." *Id.* The court cites *Morrison v. Olson*, 487 U.S. 654 (1988), as an example. State courts have permitted legislative appointments to commissions that investigate governmental ethics and practice based on the reasoning that the commission's task makes it unique and that interbranch appointments are necessary to avoid conflicts of interest. *See* Parcell v. State, 620 P.2d 834, 837 (Kan. 1980) (finding no violation where legislature appointed majority of Government Ethics Commission); La. Bd. of Ethics for Elected Officials v. Green, 566 So.

Although *Obrien* permits interbranch appointments, the decision suggests that interbranch appointments can, in context, violate California's separation-of-powers provision. *Obrien* was about judicial, not executive, power. But if we were to adopt *Obrien*'s analysis in the Commission's case, we would probably ask a few questions. First, does the Commission exercise core executive functions that are inherently under the supervision of the governor (or other executive branch officers)? Second, does the legislature's influence "defeat or materially impair" the executive's vested power? Finally, does the legislature have a "special purpose" or are there "sufficient safeguards" to protect the executive branch and administrative officers from legislative interference?

The main point of this Section is that *Obrien* reflects an approach taken by many states that frames the separation-of-powers violation in terms of encroachment upon, impairment of, or interference with the executive authority. The next Section will talk about *Carmel Valley* and a way of looking at the appointment problem in terms of the legislature overstepping limits on its power.

B. Carmel Valley *and the Limits on Legislative Power*

In the California Supreme Court's most recent separation-of-powers decision, *Carmel Valley Fire Protection District v. State*,[102] the legislature enacted a budgetary measure that withdrew funding from, and effectively suspended, an executive regulatory mandate to provide a specific kind of firefighting equipment.[103] The case thus pitted the legislature's ability to affect administrative policy through its statutory and budgetary powers against the executive's ability to set policy by issuing regulatory mandates. A unanimous court found no violation because the legislature was acting within its core constitutional role of defining policy and allocating funds through its lawmaking power.[104]

This Part discusses *Carmel Valley* for two reasons. First, the decision offers background principles for an inquiry into separation of

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2d 623, 624 (La. 1990) (finding no violation where legislature appointed all of board's members).

The second example given is where the appointee's duties do not implicate the core functions of any one branch, but are more of a "hybrid sort." *Obrien*, 999 P.2d at 114 (Kennard, J., dissenting). Again, this comment accords with state practice. The legislative appointees often serve on commissions, committees, and boards that have very limited powers, such as the ability to issue reports and conduct investigations, but not actually to bring prosecutions.

[102] 20 P.3d 533 (Cal. 2001).

[103] *Id.* at 534–35.

[104] *Id.* at 541.

powers and the way constitutional structures impose checks on the lawmaking power to prevent arbitrary governmental action. Second, the decision discusses a California appellate court case standing for the proposition that the legislature may not veto execution of the law except through its lawmaking power. Combined, these two points set up the argument that this Note will make against the Coastal Commission's composition: Appointment power enables the legislature to effect execution of the law without going through the lawmaking process, thus bypassing safeguards that help improve accountability and decrease arbitrariness in the enforcement of the Coastal Act.

1. *Separation-of-Powers Principles and the Limits on Legislative Power*

The legal discussion in *Carmel Valley* begins with a summary of California's separation-of-powers doctrine (that later would be cited in the *Marine Forests* appellate decision). The doctrine, the supreme court wrote, "limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch."[105] The "primary purpose" of separation of powers "is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government."[106]

The opinion continued by expressing skepticism about the expansive nature of legislative power: "The founders of our republic viewed the legislature as the branch most likely to encroach upon the power of the other branches."[107] "The principle of separation of powers," the court explained, "limits any such tendency" in two ways.[108] First, the doctrine "prohibits the legislative branch from arrogating to itself core functions of the executive or judicial branch."[109] Second, the legislative power is "circumscribed by the requirement that legislative

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[105] *Id.* at 538; *see id.* at 539 ("The purpose of the doctrine is to prevent one branch from exercising the complete power constitutionally vested in another; it is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch." (quoting Younger v. Superior Court, 21 Cal. 3d 102, 117 (1978))).

[106] *Id.* at 538 (quoting Davis v. Municipal Court, 46 Cal. 3d 64, 76 (1988) (quoting Parker v. Riley, 18 Cal. 2d 83, 89–90 (1941))). In serving the purpose of separation of powers, the opinion continued, "courts have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Id.* (internal citations and quotations omitted).

[107] *Id.* at 539 (citing Bowsher v. Synar, 478 U.S. 714 (1986); Buckley v. Valeo, 424 U.S. 1 (1976); THE FEDERALIST NO. 48 (James Madison)).

[108] *Carmel Valley*, 20 P.3d at 539.

[109] *Id.*

acts be bicamerally enacted and presented to the head of the executive branch for approval or veto."[110]

These two limitations work together. Because the legislature cannot directly control executive functions, it must proceed through its lawmaking requirement. The court in *Carmel Valley* recognized that these restrictions promote deliberation and consensus in law while mitigating legislative influence over functions vested in other democratic agents.[111] The *Carmel Valley* court found no violation in the case before it because the legislature had affected executive policy through its core legislative functions of defining policy and allocating funds:[112] "When the Legislature has not taken over core functions of the executive branch and the Legislature has exercised its authority in accordance with formal procedures set forth in the Constitution, such an enactment is normally consistent with the checks and balances prescribed by our Constitution."[113] The court thus described what *does* constitute appropriate control over administrative policy: passing laws. The next Section addresses the court's description of legislative practices that are more suspect under separation-of-powers principles.

2. *The Problem of the Legislative Veto*

In responding to the opponents of the legislature's action, the *Carmel Valley* court addressed and distinguished a California appellate court case, *California Radioactive Materials Management Forum v. Department of Health Services* (*CRMMF*).[114] In *CRMMF*, the Senate Rules Committee used its confirmation power over administrative nominees to extract concessions regarding specific procedures for hearings on waste disposal.[115] The court of appeals adopted *Bowsher's* reasoning in refusing to permit the Senate Rules Committee to "inject itself" into administrative decisions by threatening to hold up

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[110] *Id.* (referring to bicameralism requirement, CAL. CONST. art. IV, § 8(b), and presentment requirement, CAL. CONST. art. IV, § 10(a)).

[111] *Id.* at 542 (citing INS v. Chadha, 462 U.S. 919 (1984) (finding that legislature violated separation of powers by attempting to affect executive policy on immigration without fulfilling constitutional procedural requirements)). The court in *Chadha* held that an action by the House "that has the purpose and effect of altering the legal rights, duties and relation of persons . . . outside the Legislative Branch," must be by the procedures authorized in the Constitution. INS v. Chadha, 462 U.S. at 952–54. Also see *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271–76 (1991), a case "in which Congress created an administrative agency over which it retained absolute control because members of Congress constituted a majority of the agency's executive board." *Carmel Valley*, 20 P.3d at 544.

[112] *Carmel Valley*, 20 P.3d at 539.

[113] *Id.* at 541.

[114] 15 Cal. App. 4th 841 (1993).

[115] *Id.* at 854.

confirmations.[116] The decision held that, having enacted a statutory scheme and delegated authority, the legislature had "no power to exercise supervisorial control or to retain for itself some sort of 'veto' power over the manner of execution of the laws," except by amending the statute.[117]

Prompted by *CRMMF*, the *Carmel Valley* court reviewed *Bowsher v. Synar*,[118] observing that *Bowsher* "stands for the proposition that Congress may limit the discretion vested in the executive by enacting a statute circumscribing that discretion, but it may not control the *exercise* of the discretion actually vested by statute in the executive by retaining the unilateral power of removal."[119] The appellate

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[116] *Id.* at 871–72.

[117] *Id.* at 872 ("[T]he Legislature must abide by its delegation of authority until that delegation is legislatively altered or revoked by statute, in accordance with the bicameral and presentment requirements of our Constitution." (internal quotations omitted)).

Carmel Valley disapproves of *California Radioactive Materials Management Forum v. Department of Health Services (CRMMF)* "to the extent it is inconsistent with this opinion." 20 P.3d at 543 n.5. More specifically, *Carmel Valley* criticizes *CRMMF*'s treatment of two prior California cases, and argues that *CRMMF* "overstated the matter" in saying that the legislature retains no veto power over the execution of the law. *Id.* at 542–43. *CRMMF*, the *Carmel Valley* court argued, was correct in saying that the legislature cannot affect the law without passing an enactment. *CRMMF*'s analysis, however, suggested an interpretation of "enactment" limited to rewriting the statute. The California Supreme Court adopted a broader interpretation to include appropriation bills within the legislative arsenal for affecting executive power. *Compare id.* at 542–43, 545, *with CRMMF*, 15 Cal. App. 4th at 872.

[118] 428 U.S. 714 (1986).

[119] *Carmel Valley*, 20 P.3d at 543 (emphasis in original); *see Bowsher*, 478 U.S. at 726 ("[T]he Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."). Expressing approval of the case's reasoning, *Carmel Valley* presciently opined that *Bowsher* could "cast doubt" on the state legislature's power to remove an executive branch official, though *Bowsher* would not prevent a statutory change in the scope of the officer's duties. *Carmel Valley*, 20 P.3d at 543; *see* Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 881 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Ct. App. Jan. 23, 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2003).

The *Carmel Valley* court also addressed the other major Supreme Court case on legislative aggrandizement, *INS v. Chadha*, 462 U.S. 919 (1983) (finding legislative veto unconstitutional). Regarding *Chadha*, the *Carmel Valley* opinion reaffirmed that "the flaw in the legislative act was that Congress failed to enact the measure (overturning the administrative decision) by act of both houses and to present the duly passed enactment to the chief executive for approval or veto." *Carmel Valley*, 20 P.3d at 542. The court did not explicitly condemn the legislative veto under California law. But it stated that *Chadha* "was concerned primarily with the formal requirements of bicameralism and presentment"—the same kind of provisions that the court had called fundamental to the California constitutional structure. *Id.* at 544. Moreover, the court used the unconstitutionality of the legislative veto to distinguish the case before it—where the legislature had duly enacted a statutory budgetary provision. *Id.* at 544–45 ("Even cases holding that certain legislative veto provisions violate the doctrine of separation of powers nonetheless have recognized that the legislature properly retained certain power to control executive action [through statutes and budgetary provisions].").

court in *Marine Forests* ultimately quoted *Carmel Valley*'s citations to *Bowsher*, while itself summarizing the holding of *CRMMF* as: "The Legislature cannot exercise direct supervisorial control over the performance of the duties of an executive officer in his or her execution of the laws; rather, it can exercise control only indirectly . . . via the enactment of legislation."[120]

Part II.B discussed *Obrien* as, by analogy, offering an executive-centered perspective on the separation-of-powers violation. The concern under this view is that appointments prevent the executive—the governor, for example—from exercising its role in the checks-and-balances system regarding the Coastal Commission's performance of its duties. The concern coming out of *Carmel Valley* and *CRMMF*, however, seems to be less about harm to the executive branch and more about whether the legislature is operating beyond its lawmaking role. This approach recognizes that the legislature already has a set of controls over the Commission's ongoing action. It can pass a statute that imposes standards or requirements or, as in a recent case, it can force the Commission to take a certain action.[121] The legislature can change the scope of the commissioners' power, and it controls the Commission's budget. *CRMMF,* with its focus on the confirmation process,[122] and *Carmel Valley,* with its dicta about removal power,[123] thus seem concerned with the legislature affecting executive actions through means of control not subject to the constitutional safeguards of the lawmaking process.

Part III will establish a framework for understanding the separation-of-powers violation more along the lines of *Carmel Valley* than *Obrien*. Viewing the problem in terms of limits and dangers of legislative power helps connect the inquiry to the purposes of both separation of powers and administrative structure: to protect individual liberty from arbitrary governmental action and to ensure that policy is made by accountable government agents.[124]

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120 *Marine Forests*, 128 Cal. Rptr. 2d at 880.

121 As Professor Bressman argues, "the formal procedures for lawmaking of bicameralism and presentment can be understood [to ensure that government officials make non-arbitrary decisions and] . . . that whatever law results triggers a strong electoral check." Bressman, *supra* note 22, at 500.

122 *CRMMF*, 15 Cal. App. 4th at 872–73.

123 *Carmel Valley*, 20 P.3d at 543.

124 *See* Bressman, *supra* note 22, at 496–500. *See generally* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PENN. L. REV. 1513 (1991). Professor Brown advances the theory that separation-of-powers and checks-and-balances analyses should be tied to the external value of ordered liberty—that is, respecting individual rights by avoiding the "threat of arbitrary government conduct which arises with the impairment of government process." *Id.* at 1548.

III
FACTION, SELF-INTEREST, AND THE PROBLEMS WITH LEGISLATIVE APPOINTMENTS TO THE COASTAL COMMISSION

In his review of state decisions regarding legislative appointment power, Professor Devlin notes the need to refine the functionalist inquiry and offer factors to identify separation-of-powers violations,

> demonstrating how those factors are convincingly derived from the underlying purposes of the separation and checks and balances (both the purposes as they appeared to the founders and as they appear to us), and creating a structure for applying these factors that is reasonably predictable in its outcomes.[125]

In this Part, this Note hopes to contribute, albeit in a limited way, to that project.[126] While many frame the legislative appointments issue in terms of interference with the executive,[127] this Part offers reasons for looking at the issue as a problem of legislative limits—the legislature bypassing checks on its power and exercising arbitrary influence at the expense of the public.

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125 Devlin, *supra* note 16, at 1268.

126 Admittedly, in drawing on Madisonian theory and literature written in the context of federal administrative law, this Note does not fit wholly within Devlin's project of creating a separation-of-powers analysis solely for states. However, to the extent that this Note frames the issue in terms of legislative limits, as opposed to framing the issue in terms of impairing the power of a unitary executive, the analysis is consonant with state theories on separation of powers. *See* Devlin, *supra* note 16, at 1219–35 (arguing that state and federal separation-of-powers analyses should be distinct, particularly because governors were not intended to be unitary executives, unlike U.S. presidents); Robert F. Williams, *Comment: On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57 (1995) (discussing constitutional limits to otherwise plenary legislative power in comment on Michael J. Besso, *Connecticut Legislative Power in the First Century of State Constitutional Government*, 15 QUINNIPIAC L. REV. 1 (1995)). Moreover, this Note does not rely on federal precedent or even Madison's specific designs, and instead evokes Madison to offer a theory of human nature and political realism that should underlie any functionalist inquiry. *Cf.* Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 TEMP. L. REV. 1145 (1993) (suggesting that investigation of state issues may help courts find "common principles of state constitutionalism—and, ultimately, of American constitutionalism" (quoting Paul Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1162–63 (1993))).

127 *See, e.g.*, Seymour v. Elections Enforcement Comm'n, 762 A.2d 880, 896–97 (Conn. 2000) (finding no violation where legislature appointed majority of members because power to appoint is not inherently executive and powers exercised by appointees were not strictly executive); Phelps v. Sybinsky, 736 N.E.2d 809, 816 (Ind. 2000) (noting that under Indiana law it is unconstitutional for legislature to "appoint members to executive branch boards or commissions, a distinctly executive function"); Arch T. Allen III, *A Study of Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2083–95 (1999) (discussing governor's appointment power); Elizabeth Vaughn Baker, Note, *Usurping the Executive Power:* State Board of Ethics for Elected Officials v. Green, 51 LA. L. REV. 911 (1991) (discussing constitutionality of legislatively-appointed board's exercise of civil enforcement power in Louisiana).

Part III.A connects the legislative-limitation perspective to a central aim of separation of powers and administrative law: distributing power and creating checks and balances so as to protect individual rights and the public good from the threats of faction and governmental self-interest. Part III.B goes on to suggest ways in which legislative appointments, in general, impair the quality of the law, even if they do not necessarily encroach upon the power of the executive branch. Part III.C then explains why the Commission is different from other administrative bodies and why enforcing legislative limits is particularly important.

A. Purposes Underlying the Separation-of-Powers Inquiry

This Part lays out some basic principles and purposes underlying the separation-of-powers inquiry. Part III.A.1 will explore the pathologies that a system of checks and balances seeks to address—faction and government self-interest. Part III.A.2 then looks at how the Commission's case implicates structural concerns under the *Obrien*-like executive-centered perspective and *Carmel Valley*–based legislative-centered perspective.

1. The Problems of Faction and Government Self-Interest

A structural theory concerned with limiting arbitrariness arises out of Madison's understanding of basic human and political nature: the "encroaching spirit of power" found in the tendency of any person, group, or department to consolidate and entrench its own influence while shielding itself from criticism or reform.[128] Believing that "[a]mbition must be made to counteract ambition,"[129] the Framers divided governmental powers in order to protect individual liberty from "the twin problems of faction and governmental self-interest—the principal components of governmental tyranny."[130]

Faction reflects the tendency of people and groups, "united and actuated by some common impulse of passion,"[131] to pursue private interests and capture government decisionmaking at the expense of

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[128] THE FEDERALIST NO. 48, at 276 (James Madison) (Clinton Rossiter ed., 1961); *see also* INS v. Chadha, 462 U.S. 919, 951 (1983) (warning about "hydraulic pressure inherent" in legislature to attempt to expand its power at expense of other branches).

[129] THE FEDERALIST NO. 51, *supra* note 128, at 290 (James Madison).

[130] Bressman, *supra* note 22, at 497; *see also* Sunstein, *supra* note 23.

[131] THE FEDERALIST NO. 10, *supra* note 128, at 46 (James Madison) ("By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.").

the public good.[132] Government self-interest, meanwhile, reflects the tendency of government actors and political institutions to attempt to aggrandize their power and pursue their own special agenda, again to the detriment of the public and the law.[133]

The pathologies of faction and government self-interest are not only interrelated—they are mutually reinforcing. In the context of modern administrative law, public choice theory has been one attempt to capture the ways in which these problems interact and affect decisionmaking.[134] The theory argues that politicians are under constant pressure to appease the demands of highly organized and well-funded private interest groups (that facilitate campaign funds and thus reelections).[135] In the context of administrative regulation, public choice theory posits that legislators intentionally write statutes that are vague and open, giving broad powers and unconstrained discretion to administrative agencies.[136] By leaving the law open, legislators create "space to pressure agencies" on behalf of interest groups; they also create space for the interest groups to dominate the administrative process, often "capturing" the very agencies that are supposed to regulate them.[137] The goal of separation of powers and checks and balances, therefore, is to harness human interests while mitigating the potential for such abuses.[138]

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[132] *See* Bressman, *supra* note 22, at 498–500; Sunstein, *supra* note 23. *See generally* Cass R. Sunstein, *Interest Groups in Public Law*, 38 STAN. L. REV. 29 (1985) (discussing problem of interest groups, though from perspective of "republican" model of deliberation as opposed to public choice theory).

[133] It is not that people are malicious or that power is inherently corrupting (though they often are and it probably is). It is simply that for any person, "his opinions and his passions will have reciprocal influence on each other." THE FEDERALIST NO. 10, *supra* note 128, at 46. People will pursue their agendas and their perceptions of the world through whatever channels are available and effective. If left unchecked, even well-intended agendas may lead to tunnel vision and zealotry.

[134] *See* Bressman, *supra* note 22, at 496–97; David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 102–03 (2000) (discussing link between Madisonianism and public choice theory, including "their attention on the ways institutions might be designed to harness this ongoing process of individual goal maximization so as to produce the best possible collective outcome").

[135] Bressman, *supra* note 22, at 496.

[136] *See id. See generally* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

[137] Bressman, *supra* note 22, at 496–97.

[138] By referring to public choice problems, this Note does not mean to imply that the Commission should not be delegated broad authority or that it is inherently doomed to corruption—although those conclusions would be consistent with some forms of public choice theory. This Note evokes public choice theory as a way to highlight the concern with factions and a certain realistic approach to law and policymaking, but it does not mean to exclude the potential for a theory consistent with agency autonomy and agencies as loci for deliberative decisionmaking. *See, e.g.*, Bressman, *supra* note 22, at 496–97 (raising public choice theory in connection with discussion of problems of faction and polit-

2. *The Connection Between Basic Separation-of-Powers Concerns and the Executive-Centered and Legislative-Centered Inquiries*

Thus far this Note has discussed the executive-based perspective coming out of *Obrien*, and the legislature-based perspective reflected in *Carmel Valley*. Applying the *Obrien*-style inquiry to the Coastal Commission in light of underlying structural principles, we might say that the problem with the legislative appointments is that no executive branch official has any independent role for supervising or controlling the Commission's functions. The legislature, in taking away executive branch control, has undermined the executive's role in checking legislative arbitrariness and supervising administrative action.[139] Between the executive branch losing its checks and the legislature delegating the appointment and removal to itself, one might become suspicious that interest groups and politicians are manipulating policymaking.

At the same time, focusing on harm to the executive has its limits. The approach raises concerns about what will occur if the executive branch loses its checks over administrative policymaking, but there are ways for factions to capture the law, even when executive checks are in place. The executive's checks are not the only constitutional safeguards against arbitrary influences. The constitutional limitations on the legislature—as discussed in *Carmel Valley*—reflect a unique set of concerns. We should be sensitive to the problem that appointment power enables legislators to circumvent those internal procedural checks while changing the incentives and behavior of legislators in ways that have nothing to do directly with harm to the executive.[140]

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ical self-interest). *See generally* Spence & Cross, *supra* note 134 (offering vision of public choice theory consistent with normative defense of agency autonomy). *See also* Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1749–55 (1998) (reviewing MASHAW, *supra* note 136, and commenting that Mashaw finds public choice insightful in providing realism and usable knowledge, but criticizes tendency of public choice scholarship to be overly pessimistic).

139 *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (discussing role of branches in supervising and controlling independent agencies); *cf.* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 132–71 (1991) (advocating clear separation of powers and unitary executive as way of providing government accountability); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 546–47 (1994–1995) (asserting case for unitary executive based on text and original history); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–4 (1994) (discussing role of unitary executive over administrative state).

140 The problem with the rhetoric of impairment is that it requires an object—some branch or official needs to be harmed. That approach, in a sense, connects to a conception of administrative law as hierarchical and categorical, where every power and agent can be classified as belonging to some branch, being under the supervision of a particular supe-

The next Section will discuss problems with legislative appointments generally, from the perspective of mitigating arbitrariness and abuse by enforcing legislative limitations.

B. Problems with Legislative Appointment Power Generally

The appellate court focused almost entirely on the removal power, which in many ways was the most egregious aspect of the case.[141] Although appointment is not as direct as removal at will, it still has an impact that raises serious separation-of-powers concerns. This Part discusses three problems with legislative appointments. First, appointment power is a more arbitrary, direct, and unilateral influence than lawmaking and more impactful than even a legislative veto. The influence and connection created by appointment power changes the legislators' incentives regarding the law, raising the second point: Legislative appointments create a "reverse delegation" problem where the legislators have incentives to give agencies more power and broader discretion—making the law less clear, fair, and efficient.[142] The final point is that putting such power into the hands of individual legislators creates problems of democratic accountability.

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rior. But agencies do not fit that neat conception and are always being supervised by multiple branches at the same time. The rhetoric of legislative expansion is thus designed to capture the idea of the legislature entrenching itself in the decisionmaking structure in a way that broadly affects the system as a whole, rather than any discrete interest. *See generally* Brown, *supra* note 124, at 1555–56 (suggesting that it is more fruitful in separation-of-powers analysis to look at impact on lawmaking processes rather than trying to specify particular people whose rights have been infringed or particular branches whose inherent powers have been usurped).

141 *See* Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 881–84 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Ct. App. Jan. 23, 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2003); Garcia, *supra* note 50 (reporting on problem with fact that Commissioner is "subject to the political whims of legislators"); Weiss, *supra* note 25 (quoting Sierra Club director as stating that people have been seeking fixed terms for years and that "irony" of suit against Commission is that it may end up strengthening Commission by giving commissioners more independence).

142 *See* Robert F. Williams, *Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Power*, 4 ROGER WILLIAMS U. L. REV. 159, 172 (1998) (referring to legislative appointments as "reverse delegation"); *see also* Devlin, *supra* note 16, at 1267 (referring to a problem created by legislative appointments as "quasi-delegation"). The term indicates the fact that the legislature is delegating broad powers to an agency, but then gives itself control over the agency and thus those powers. *Cf.* CRMMF v. Dep't of Health Serv., 15 Cal. App. 4th 841, 872 (Ct. App. 1993) ("[T]he Legislature 'must abide by its delegation of authority until that delegation is legislatively altered or revoked' by statute . . . ." (quoting INS v. Chadha, 462 U.S. at 954–55)).

1. *Difference in the Nature of Appointment and Lawmaking Influence*

Carmel Valley and *CRMMF* suggest that the lawmaking power—which is clearly a permissible means for legislative control of administrative action—provides a baseline for comparing questionable forms of control, such as the legislative veto or legislative removal power.[143] In the words of the appellate court, both cases stand for the proposition that the "[l]egislature cannot exercise direct supervisorial control over the performance of the duties of an executive officer in his or her execution of the laws; rather, it can exercise control only indirectly by dictating the manner of execution of the laws via the enactment of legislation."[144] While fixed terms make the appointment power less arbitrary, legislative appointments still enable the legislature to exert a high level of "supervisorial control" over the Commission's performance.[145] In fact, appointment authority allows legislators an influence that is much more subtle, but much more powerful than a one-time "veto" of executive action.

Legislators who appoint commissioners may not always be able to create a voting bloc and they certainly do not control every decision, but appointment power enables legislators to influence the ideology and perspective of the Commission. When a legislator has sole authority to choose the appointee, extracting concessions for a particular case is not even necessary. The legislator can simply choose someone who will predictably vote a certain way, or, at least, is predisposed to vote a certain way.[146] To that extent, appointment power changes the execution of the law by affecting the dynamic of the Commission, altering the way it approaches cases, and manipulating the overall pattern of Commission decisions.

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[143] *See, e.g.*, Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 539–42 (Cal. 2001) (citing bicameralism and presentment requirements as limitations on legislative power, denouncing legislative veto, and raising doubts about legislative removal power, but ultimately ruling that action was permitted because it was taken through lawmaking process); *CRMMF*, 15 Cal. App. 4th at 872 (declaring that legislature "has no power to exercise supervisorial control or to retain for itself some sort of 'veto' power over the manner of execution of the laws" except by amending statute by passing bill through both houses and having it signed by governor).

[144] Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 879 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Ct. App. Jan. 23, 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2003).

[145] *CRMMF*, 15 Cal. App. 4th at 872.

[146] This power to influence administrative agents is presumed when it comes to the presidential power of appointment. In fact, under some theories, administrative agencies are legitimated solely by the fact that they are accountable to the President, an elected official. *See generally* Bressman, *supra* note 22.

While fixed terms help insulate commissioners, the commissioners presumably want to be reappointed, giving the legislators substantial leverage and influence. The Commission's amended appointment mechanism, for example, still only provides for four-year terms.[147] Meanwhile, many of the Commission's projects and cases—particularly the most controversial ones—take years to be fully investigated and adjudicated (not to mention the time spent by other executive branch agencies before the project even goes before the Commission).[148] Or they involve licenses and leases that expire and must be renewed.[149] Therefore, it is likely that a commissioner's term will expire at some point during the determination of a highly controversial case. At some point during that case, the legislator likely will have the sole and unchecked power to dismiss a commissioner who is performing administrative functions in an unfavorable way. And that makes the appointee, to a great degree, subservient to those legislators.[150]

Administrative agents, naturally, are constantly under pressure from various legislators, who, for example, may be threatening to amend the underlying statute or restrict the agency's budget.[151] There

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147 *See* A.B. 1B, 2003–2004 Leg., 2d Extraordinary Sess. (Cal. 2003); Berman, *supra* note 1.

148 Take, for example, the *Marine Forests* case, which, compared to multimillion dollar development projects, is a simple situation. In 1987, Marine Forest Society, a nonprofit organization, obtained a permit from the California Department of Fish and Game to build an experimental reef out of materials such as tires and plastic jugs. In 1993, the Commission first found that the artificial reef project was a coastal zone development requiring a permit, and denied the application. But it was not until 1999 that the Commission actually issued a cease-and-desist order to enforce its decision. *See* Reyes, *supra* note 56. Another example of the timeline involved in many development schemes that come before the Commission involves a project to build housing on the Bolsa Chica mesa. In 1996, the Commission had approved the project, but a year later the decision was invalidated in court. *See* Lesley Wright, *Bolsa Chica Project Can Wait*, L.A. TIMES, Jan. 23, 1999, at B12. All told, the project has been in the works for over three decades. *Id.*; *see* Joanna M. Miller, *Tide Turning in Favor of Wetlands*, L.A. TIMES, Aug. 16, 1992, at A3 (reporting that wetland restoration projects often take years or decades to come to fruition and that delays occur often because of contentious environmental battles).

149 *See, e.g.*, Bailey, *supra* note 5 (noting that public access deals often must be renewed); Weiss, *supra* note 3 (reporting on issues involving renewal of offshore oil drilling leases).

150 Judge Scotland, the author of the appellate opinion in *Marine Forests*, was reported as saying during oral argument: "Let's talk human nature here. . . . When you have a position that you want to keep, it puts you in a subservient role. Your basic desire is not to lose your job. . . . So why doesn't that create a problem?" Weiss, *supra* note 24. While Judge Scotland was apparently talking about the removal-at-will provision, the logic also applies to a fixed term of only four years.

151 *See generally* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (comparing ex ante and ex post means for legislatures to control and supervise administrative action).

are important distinctions, however, between a kind of negotiating influence based on the lawmaking power and a hierarchical influence exerted by select legislators through patronage. Passing a law requires more deliberation, consensus, and openness than making an appointment. Legislators cannot unilaterally change the agency's performance of its functions. They must garner the support of other legislators. Agencies generally will have the opportunity to respond and defend themselves in the face of potential legislation through testimony or alliances with opposing legislators, for example.

To this extent, tension between a legislature and an agency, when channeled through constitutional structures is a good thing, because it can promote deliberation, information-seeking, and consensus-building.[152] Using appointments to monitor agency behavior, however, is far more unilateral and coercive, while also being far less costly in terms of legislative resources and political capital.[153] Merely having appointment power encourages legislators to pursue their agenda without going through the legislative process; it tempts them to intervene in individual decisions and pander to special interests.[154]

Of course, legislative deals are often made behind closed doors and powerful legislators will often exert unilateral and arbitrary influence despite constitutional safeguards. However, appointment power exacerbates the potential and temptation for capricious, hierarchical control by individual legislators.

2. *Improper Incentives and the Problem of "Reverse Delegation"*

The Section above addressed the question of how appointment changes the nature of control that legislators have over commissioners, compared to the influence they can exert based on their lawmaking power alone. This Section considers whether the legislature's appointment influence changes its incentives regarding the Commission and Coastal Act. The first problem of appointment power involves what one might call "reverse delegation."[155] In the modern

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[152] *See generally* Sunstein, *supra* note 132 (emphasizing importance of deliberation in lawmaking). *Cf.* Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 544–45 (Cal. 2001) (emphasizing importance of constitutional safeguards connected to legislative process).

[153] *See* McCubbins et al., *supra* note 151, at 481 (concluding that lawmaking power is cumbersome way of controlling agency decisionmaking).

[154] Take the example of former State Senator David Roberti. Roberti was cited in an in-depth *Los Angeles Times* article as recommending that "politically appointed Commissioners" be elected—that is, they would have more independence, perhaps, if they were not the agents of lawmakers. *See* Stewart & Taylor, *supra* note 51. As Chairman of the Senate Rules Committee, however, Roberti controlled four appointees, and twice removed commissioners either during or right before a hearing in order to influence the outcome of Commission deliberations. *See Wounded Watchdog*, *supra* note 53.

[155] *See supra* note 142.

regulatory state, legislatures often delegate broad authority to administrative agents. While delegation has been well accepted as an administrative necessity, it comes at the cost of ambiguous and less predictable legislation.[156] Public choice theory, as discussed above, argues that legislators will prefer to pass on difficult or controversial policy decisions to administrative agencies, taking credit for superficial success while disavowing responsibility for actual problems.[157]

A range of political, legal, and social forces will produce inevitable statutory ambiguity. But if the legislature cannot control executive agents except by statute, there are at least countervailing incentives that improve the quality of legislation. To help see that their programs and purposes are carried out efficiently, legislators will want to anticipate a range of potential problems and produce laws with clearer standards. If the legislature is skeptical that the executive branch's political ideology may be hostile to the legislative goals, it may seek to limit the administrative agency's discretionary interpretive power, or it might require procedures that increase fairness and bolster the voices of groups fighting for a range of public interests.[158] In general, limiting the legislature to its statutory power pushes it to produce better legislation[159]—in part because legislators know that they will not have direct control over the executing agents without having to go through the costly legislative process.

Those countervailing incentives disappear if legislators know that they will be able to set the ideology, and thus the dynamic, of the executive agency. In fact, the legislators will have incentives to give their agents *more* powers and *broader* discretion, knowing that they will have access to those powers in the future.[160] Separation-of-powers theory also would predict that legislators will be more likely to permit governmental inefficiency and abuse if it increases their own power. Moreover, there is a natural tendency for legislators to *encourage* the agency to try to expand and assert its power. For example, legislators have appointment influence over the Commission, but not other executive branch agencies with overlapping jurisdiction over coastal activity. There is thus an incentive for legislators to encourage the Commission to expand its authority at the expense

156 *See* Bressman, *supra* note 22, at 496–97.

157 *Id.*

158 For the range of ways that the legislature can control agency policy, see McCubbins et al., *supra* note 151; Strauss, *supra* note 139.

159 *See generally* INS v. Chadha, 462 U.S. 919 (1984); Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 539–42 (Cal. 2001); *CRMMF*, 15 Cal. App. 4th 841, 872-74 (Ct. App. 1993); Devlin, *supra* note 16, at 1267.

160 *See* Bressman, *supra* note 22, at 496–98; Devlin, *supra* note 16, at 1267.

of other administrative agencies or even the governor, who appoints a minority of commissioners.[161]

Unfortunately, the legislators are also the ones who can reform the law to address structural and global problems. When individual legislators have a vested interest in the status quo, needed reform is much less likely even to be considered. There is a tendency to think of legislative appointment power as siphoning away autonomy from commissioners and giving it to the legislators. There is certainly some truth in the notion that commissioners, and appointees in general, feel pressured by the appointing authorities. But in fact, problems of factionalism and governmental self-interest may be worse when the legislators and agents are able to mutually reinforce each others' authority at the expense of safeguards that curb abuse and arbitrariness.

This does not mean that people are *malicious*. Someone who has just been elected Speaker of California Assembly likely has not plotted to abuse her power to appoint commissioners for purposes of private profit. But the Speaker's interest in the Commission will quickly become normalized. In setting the legislative agenda, the Speaker will be less likely to prioritize a large project to reform the Coastal Commission in a way that upsets her interests in the relationships and issues that she has already incorporated into her agenda.

3. *Democratic Accountability*

The problems above raise concerns primarily about arbitrariness—about legislators having incentives to give agencies broad discretion and great power at the expense of better law. Yet legislators are not necessarily held accountable for the problems in the law. They can claim credit for laws that superficially address voter concerns while "shifting blame to agencies for unpopular outcomes"[162] (even though the legislators themselves may have been lobbying behind the scenes for that unpopular outcome).

This practice of blame-shifting and baiting-and-switching presents a problem not only of arbitrariness, but also of accountability. In the Commission's case, with the three-way division of appointment power, control over individual commissioners is direct enough to

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[161] State courts often ask whether the legislative purpose in creating interbranch appointment schemes was cooperative—designed to share power with other branches and increase the influence of all involved—or coercive—designed to dominate or control others. *Compare* Obrien v. Jones, 999 P.2d 95, 103 (Cal. 2000) (calling interbranch appointment scheme "cooperative") *with id.* at 124 (Brown, J., dissenting) (asserting that legislative design lacked "any sense of . . . restraint"). *See also CRMMF*, 15 Cal. App. 4th at 869, 871 (rejecting coercive attempt by legislators to "inject[ ]" themselves into administrative decision).

[162] *See* Bressman, *supra* note 22, at 497.

cause arbitrariness, but diffuse enough to allow legislators to disavow responsibility for the Commission's actions as a whole.[163] Even though legislators are elected, they are unlikely to be held accountable for their relationships with their appointees. Meanwhile, vesting control in the hands of individual legislators may create a problem of misrepresentation.[164] The Assembly Speaker and Senate Rules Committee do not necessarily reflect the interests of the legislature as a whole. Empowering particular legislators threatens to overrepresent particular interests and regions, while shutting out others, and makes those legislators targets for interest-groups and lobbyists.[165]

C. *Why the Problems with Legislative Appointments Are Particularly Acute in the Coastal Commission's Case*

The Section above talked about theoretical problems with legislative appointments generally. But as a matter of practice, California, along with many other states, has a number of commissions, boards, committees, and councils whose members are appointed by the legislature.[166] This Section recalls the Commission's powers discussed in Part I.A in order to distinguish the Coastal Commission from the range of other administrative bodies that have legislative appointees and to show that the concerns raised in Part III.B have particular relevance to the Commission.[167]

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163 *See id.* at 496–97.

164 *See* Devlin, *supra* note 16, at 1268.

165 *See* Bressman, *supra* note 22; Sunstein, *supra* note 23.

166 In *Parker v. Reilly*, 18 Cal. 2d 83 (1941), the California Supreme Court upheld a legislatively controlled commission where "[t]he clear purpose of such legislation [was] to . . . exchange information and formulate proposals for mutual action." *Id.* at 85. The commission's functions were "subsidiary and incidental," *id.* at 89, to the legislature's duty to craft future legislation and did "not require the exercise of a part of the sovereign power of the state," *id.* at 87. Therefore, the commission's structure did not infringe upon executive power. But the court warned: "It must not be assumed, however, that legislative activities may be expanded indefinitely through the creation of separate agencies responsible primarily to the legislature. This sort of expansion would soon lead to a legislative usurpation of power incompatible with the proper exercise of its lawmaking function." *Id.* at 88.

Similarly, many modern boards and commissions have legislative members, but if one looks at the powers and function of those boards, it is clear why there would be no separation-of-powers violation. For example, the Commission of Health and Safety and Workers' Compensation, CAL. LAB. CODE § 75, and the Off-Highway Vehicle Recreation Commission, CAL. PUB. RES. CODE §§ 5090.15, 5090.17, are primarily information-gathering bodies that prepare reports for future legislation rather than implement enacted laws.

167 *See* Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 883 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Ct. App. Jan. 23, 2003),

1. *The "Complete" Executive Role and a Central Position in California's Administrative State*

The *Marine Forests* appellate court described the Commission's executive powers in "interpret[ing] and implement[ing]" the Coastal Act.[168] While functions such as quasi-legislative rulemaking and quasi-judicial adjudication have notoriously blurred the boundaries between separated powers, the appellate court's phrase captures the basic executive/administrative *role* in our three-branch system:[169] interpreting and constructing the legislature's generally applicable statutory commands, and then taking action in a way that changes the legal status quo and affects the interests of particular individuals who can then seek judicial review of the agency's decisions.

While administrative agencies generally have a range of rulemaking, investigatory, and adjudicative powers, many state boards and commissions have a limited executive/administrative role; that is, they only perform some of the functions often delegated to administrative bodies. For example, in *Parcell v. State*, a Kansas court upheld an ethics commission that had the power to investigate governmental ethics violations, but could not actually bring legal action.[170] Because that role was left to the Attorney General's Office, the executive branch retained some discrete, autonomous role to play (and check to employ) in enforcing the law.[171] In other states, the legislature sometimes makes appointments to administrative review boards that hear appeals on certain regulatory decisions. That scenario raises the prospect of a "legislative veto," but the review board still plays a limited role in the larger administrative machinery. It is not the first-mover with the initial power to disturb the legal status quo and frame ongoing disputes. Presumably, those other administrative roles would

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cert. granted, 65 P.3d 1285 (Cal. 2003) (responding to argument that many state bodies would have to be invalidated).

168 *See id.* at 876.

169 Reference to the executive "role" as opposed to executive "powers" is an attempt to avoid the trap of trying to categorize individual administrative duties as inherently belonging to one branch or another. Instead, the focus on role of agencies vis-à-vis the other branches is intended to evoke more functionalist approaches to the administrative state as an interconnected dynamic involving "reins of control." *See* Strauss, *supra* note 139, at 580.

170 Parcell v. State, 620 P.2d 834, 836–37 (Kan. 1980) (finding no violation where legislature appointed majority of Government Ethics Commission but expressly noting that Commission lacked any means of directly enforcing its determinations).

171 *See* Devlin, *supra* note 16, at 1250–51 (discussing *Parcell* and noting that because agency did not possess direct enforcement authority, it did not exercise "essentially" executive functions); Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 254 (1988) (noting that withholding litigating authority from agencies gives President "an important control" over administrative enforcement).

be delegated to agents responsible to the executive branch. Other actors with distinct institutional perspectives would thus be able to provide a check against arbitrariness and abuse. In that way, procedures and safeguards compensate for the blending of traditionally separated powers to maintain ordered liberty and limit government arbitrariness.[172]

The Coastal Commission, on the other hand, has broad and nearly exclusive powers in implementing the Coastal Act.[173] It occupies the entire or "complete" executive role in the process of the Coastal Act being written, implemented, and adjudicated. The commissioners, operating through the Executive Director and his staff, have the full range of quasi-legislative rulemaking authority, the traditionally executive power to investigate and prosecute, as well as quasi-adjudicative functions involving the issuing of permits, cease-and-desist orders, and civil penalties.[174] There is no question that the Coastal Commission exercises "core executive functions,"[175] and that these functions directly affect individuals' rights and interests. To protect people from abuse by the arbitrary exercise of government power, there should be a series of checks and balances, including the traditional separation of the executive and legislative institutions. But in this case, the legislature retains direct and largely unfettered control over two-thirds of commissioners, and through them it has control over the complete role of implementing the Coastal Act.

Because the governor and entire executive branch have been given a diminished role in supervising the Commission, there are fewer safeguards to prevent legislative intrusion into the Commission's functions, and that increases the threat for faction and self-interest to take over.[176] But the Commission does not only affect

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[172] *See* Brown, *supra* note 124, at 1557. Blended functions, Brown notes, should be a straightforward separation-of-powers violation, *id.* at 1556, yet this practice has been widely accepted. Why? Because procedures and checks have been put in place to limit abuse. Brown thus concludes: "The removal of incentives for biased decisionmaking, a core due-process notion, satisfies concerns regarding how the governmental body is constituted, a structural notion. Due-process principles, therefore, compensate for departures from the structural constitutional norms." *Id.* (footnote omitted). So what happens when the departure from structural norms increases incentives for biased decisionmaking?

[173] *See supra* Part I.A.

[174] *See supra* Part I.A.

[175] *See* Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869, 882 (Ct. App. 2002), *modified*, No. C038753, 2003 Cal. App. LEXIS 93 (Ct. App. Jan. 23, 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2003); *cf.* Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 539 (Cal. 2001) ("The purpose of the doctrine is to prevent one branch from exercising the complete power constitutionally vested in another . . . .").

[176] *See Marine Forests*, 128 Cal. Rptr. 2d at 880 (writing that Commission is not under "primary authority and supervision of the executive branch" yet not explicitly concluding that separation-of-powers violation involved interference with governor). It is certainly

implementation of the Coastal Act. It also affects the implementation of other statutes and regulatory regimes by other agencies. A key aspect of the Commission's "executive nature"—one not emphasized by the *Marine Forests* appellate court—is that the Commission, through its control over the coastal zone, is at the center of California's regulatory state generally.[177] This fact also distinguishes the Commission from virtually any other agency, and it shows that the legislature can affect the operation of California's entire administrative regime through its influence over the Commission. Legislative control of the Commission not only prevents the governor from consolidating power, but also can interfere with the authority already vested by statute in other administrative agencies and agents.

2. *Impact on Individual Rights, Private Interests, and Public Goods*

The dangers created by certain factors—the commission's ability to affect individual rights, the legislature's direct access to commissioners, and the diminished role of the executive branch in checking legislative arbitrariness—are heightened by the scope of the Commission's power and jurisdiction. In many ways, the Commission is unique not just within the state, but within the nation. It affects thousands of miles of property, millions of people, billions of dollars, and, of all California agencies, it has the primary responsibility for protecting the public from widespread environmental impacts.[178] It is precisely the type of body that is ripe for faction, as Madison predicted:

> [T]he most common and durable source of factions has been the various and unequal distribution of property. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up . . . actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of part and faction in the necessary and ordinary operations of government.[179]

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true that the governor is not powerless over the Commission. Governors, such as Wilson and Deukmejian, have exerted considerable control over Commission power, primarily by slashing the Commission's budget. *See* Bailey, *supra* note 5. But slashing an agency's budget is not a "check" geared toward improving the quality of the law or integrity of Coastal Commission decisions. Such actions only leave the Commission with fewer resources to pursue an equally ambitious agenda. This kind of "check" promotes arbitrariness rather than preventing it.

[177] *See* Ettinger, *supra* note 34.

[178] *See* Bailey, *supra* note 5.

[179] THE FEDERALIST NO. 10, *supra* note 128, at 47 (James Madison).

As the director of Sierra Club's California Coastal Campaign stated in discussing the Commission appointment process and its constitutional challenge, "The whole danger here . . . [is that] the commissioners are subject to so much lobbying and pressure because coastal resources are so valuable."[180]

In fact, the Coastal Commission might be a prime example of a public choice problem, as one Democratic State Senator remarked: "It's the lobbyists for development interests that take over and occupy the inside politics. . . . The commission has become more a status quo agency brokering development deals than one advocating for the restoration of the coastal environment."[181] Or, in the words of a Republican State Senator: "The (appointment) system as established by the Coastal Act lends itself to politics getting involved in the whole process."[182]

One does not need to believe that all people are power-hungry and scheming. Separation-of-powers theory is concerned about the tendency for people, often well-intentioned, to push their own special agendas and consolidate their personal powers—especially when they truly believe the public good is on their side.[183] For example, for years people have commented that the power to remove commissioners at will has had a destabilizing and politicizing force on Commission actions.[184] Commissioners have often been threatened with removal or actually removed in order to influence decisions.[185] In at least one instance, a critic of the removal-at-will provision became one of the legislators most willing to wield it.[186] But the legislative leadership possessing that power to remove never bothered to fix the obvious problem—until a court found the Commission unconstitutional. The problem is that the very power and publicity involved in the Commission creates an incentive for legislators to inject themselves into the issues handled by the Commission. It is the natural desire to build one's status and pursue one's agenda. Very often it is not about bad

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180 Berman, *supra* note 54.

181 *See* Bailey, *supra* note 5.

182 *Wounded Watchdog*, *supra* note 53.

183 *See* THE FEDERALIST No. 48 (James Madison).

184 *See supra* notes 24–25, 50–53 and accompanying text.

185 *See, e.g.*, Garcia, *supra* note 50 (claiming that Commission "appointments are subject to the political whims of legislators often at war among themselves and heavily dependent on the kindness of lobbyists"); Seema Mehta, *Coastal Panel Drops Bid for Role in Habitat Plans*, L.A. TIMES, Jan. 11, 2001, at A3 (stating that commissioners have been threatened with removal or actually removed to influence votes).

186 *See supra* note 154 (describing how Senator Roberti at one time argued that commissioners should be given fixed terms but after gaining appointment authority twice used his power to remove commissioners in attempts to change Commission decisions); *see Wounded Watchdog*, *supra* note 53.

intentions but tunnel vision, lack of perspective, and more than a bit of egoism.

3. *The Purpose and Effect of Legislative Appointments (and Their Invalidation) on the Operation of the Coastal Commission*

A counterfactual question: Would the Coastal Act look different if the legislature could not influence it through appointment power? The goal of separation of powers is to channel human passions into structures that promote good government. The expressed purpose behind the Commission's appointment scheme is that the people were afraid of the Commission being taken over by private interests and a deregulatory governor.[187] So the question is: How else would the legislature solve the problem, if it could not resort to giving itself appointment power?

As is, the power to enforce the Coastal Act is consolidated almost entirely in the twelve voting members and the Executive Director, Peter Douglas, who has been Director for over two decades. It is the consolidation of power in that small group that creates the danger of takeover by a hostile governor. If the legislature is afraid of faction and self-interest taking over the Commission, it might try modeling a true checks-and-balances approach, allocating agency power and diversifying functions across multiple departments dedicated, for example, to drafting and reviewing local coastal programs; to environmental and economic research; to transportation and tourism issues; and to hearing appeals on adjudicative decisions.

By increasing the number of appointments and assigning them specific roles, the agents would tend to become more accountable to each other than to any one perspective or interest. Moreover, the legislature could impose different qualifications on appointees, it could create committees to produce short lists of candidates, and it could assign appointments to other executive branch officers. All of these methods would help address the legislature's concerns. It hopefully would also improve the efficiency and transparency of the Commission's processes. To the extent that there is a layered decisionmaking structure, it could also help clarify the records of cases for judicial review. Finally, by increasing the number of departments, one also increases the ability for less-represented interests to make meaningful contact with the agency.

While the Commission undoubtedly has done incredible work over its twenty-five-year existence, serious questions remain about how the Coastal Act and the body enforcing it can be improved. The

[187] *See generally* SCOTT, *supra* note 1.

point of this Note is not to argue for any particular reform or strategy. The point is to argue that as long as certain members of the legislature have a vested interest in the Commission's power, serious consideration about improving the Coastal Act on the legislative level is unlikely.

CONCLUSION

For nearly thirty years, the California Coastal Commission has been at the center of California's administrative state. It has also been at the center of hotly debated issues involving public good and private property, and the appropriate balance between environmental protection and commercial development. The Coastal Commission has been championed as the guardian of California's greatest resource and denounced as the embodiment of tyrannical bureaucracy. But all sides seem to agree on one point: The Commission's decisionmaking is mired in politics. While dividing appointments among the governor and legislature was supposed to neutralize political involvement in Commission decisions, all indications are that the appointment scheme has done just the opposite.

The California Court of Appeals has now found the Coastal Commission's structure to be in violation of the state's separation-of-powers doctrine, based largely on the legislature's ability to appoint and *remove at will* two-thirds of the commissioners. Since that decision, the California legislature has amended the Coastal Act to provide legislative appointees with four-year fixed terms. The California Supreme Court must now hear arguments and decide whether that amendment is sufficient to alleviate any constitutional deficiencies.

Two recent California Supreme Court cases are likely precedent for the upcoming decision, and they reflect two different perspectives on the purpose of a separation-of-powers inquiry. *Obrien v. Jones* reflects an executive-centered approach that would have the court ask whether the current appointment structure defeats or materially impairs some inherent authority of the governor over the Commission's executive powers. *Carmel Valley Fire Protection District v. State* reflects an approach that is less concerned with the harm to the executive, and more concerned with the ability of the legislature to overstep checks on its power.

This Note has argued for a legislative-centered approach that identifies the prevention of governmental arbitrariness as the core purpose of separation of powers. Regardless of the impact on the governor's inherent power, the court must take action to prevent legislative control from allowing the twin problems of faction and gov-

ernment self-interest to enforce each other. The current Commission structure, this Note argues, creates problematic incentives for legislators to pursue their own interests and agenda at the expense of the public and better lawmaking. These problems are only magnified by the unique scope of the Commission's power, the breadth of its jurisdiction, and its central role in California's administrative state.

Sometimes the judiciary needs to provide the impetus for reform. Appointment power has distracted the legislature from what it is designed to do—supervise the administrative state through its lawmaking authority. There undoubtedly will be extreme political pressure for the California Supreme Court to uphold the Commission because it is so central to the state regulatory scheme. Moreover, there is a legitimate concern that any attempt to revamp the Commission will create an opportunity for development and property-rights interests to dilute the Commission's ability to protect coastal resources. But it is precisely because the Commission is so important that the courts should be vigilant against the potential for faction and political self-interest to distort policymaking dynamics. And indeed, there is reason to believe that the courts have. It would be fully consistent with separation-of-powers principles for the court to take a stand, and in the end, such a position would likely improve the Coastal Act and the ability of the commissioners to do their jobs.