



The Constitution of 1849

## Chapter II

# California's Constitution

## Law and Order

In 1837, Mexico adopted a new constitution which created executive, legislative and judicial branches of government for the provinces. In California, considerable power was vested in the Governor who, among other duties, appointed regional officers (prefects) and local magistrates (alcaldes), the latter acting in the capacities of mayor, judge and representative of the Governor.

This system had little opportunity to take root before Commodore Sloat raised the American Flag at Monterey in 1846, proclaiming California a permanent possession of the United States, establishing military authority, and promising constitutional rights, privileges, and law. Many Californians objected to military rule and insisted upon immediate provisions for civil government.

“With the establishment of the American military government, the alcalde system was restored. On every bar, and in every gulch, and ravine, where an American crowd was collected, there an American alcalde was elected. And there were strange and often conflicting laws in adjoining neighborhoods, depending on the settlers or on the alcaldes, who made the laws, as the occasion required.”<sup>1</sup>

After the treaty of peace with Mexico was signed in 1848, California was left with practically no government other than that provided by the local alcaldes, since the effect of peace was merely to take away the authority of the military government.

The American alcaldes were generally ignorant of the Spanish language and Spanish-Mexican law upon which the alcalde system was founded. The Americans were unwilling to abide by and unable to transact their business under the provisions of such an unfamiliar system. The inevitable result was that little law, other than that upheld by custom or tradition, existed.

The discovery of gold by James Marshall at Coloma, on January 24, 1848, brought to California, within a two-year period, an increase in population never before equaled in the history of this Nation. The influx of new people completely changed local conditions. Settlements devoid of any law or law enforcement sprang up overnight. Many of the newcomers were lawless persons who caused conditions to become so bad in some mining camps that, in aggravated cases, “miners’ courts” were convened to mete out swift justice.

The combination of a burgeoning population and an unfamiliar legal system resulted in chaos and stimulated the clamor for the establishment of a civil government based upon the concepts of the more familiar common law.

The question of providing a temporary government for California had been pending in Congress for several sessions, but Congress had failed to take any action. All of the other states, prior to their admission into the Union, had an

<sup>1</sup> 1 Cal. 577 (Appendix: The Alcalde System of California).

established government on which to base their state organizations. This was not true of California, since its people were forced to form their own state government because of the political and legal tumult in which they found themselves while waiting upon Congress to act.

## The Constitutional Convention of 1849

In December of 1848, a citizens' meeting was held in San Jose to consider the "propriety of establishing a provincial territorial government for the better protection of life and property." Resolutions were adopted recommending that a general convention meet in San Jose. Similar meetings were held early the next year in Sacramento, San Francisco, and Sonoma.

In late May of 1849, word reached the acting Governor, General Bennett Riley, that Congress had again adjourned without having provided a government for California. Upon receiving this information, Governor Riley, on June 3, 1849, issued a proclamation calling for the election of delegates to a constitutional convention.

Thus, California's first Constitution was drafted by citizens who met in convention at Colton Hall in Monterey on September 1, 1849—at a meeting which took place a year before California was admitted into the Union.

The Constitution, copies of which were printed in English and in Spanish,<sup>2</sup> was adopted by the convention on October 10, and ratified by the people on November 13, 1849.

The delegates chose an eclectic approach in drafting our first Constitution. The convention appears to have reviewed the constitutions of all of the states in drafting the California Constitution, which provided for a system very much like our present state government.

"In arrangement, the Constitution follows generally the Constitution of Iowa. Sixty-six of the 137 sections of the original Constitution of California appear to have been taken from the Constitution of Iowa, and 19 from the Constitution of New York. It is clear also that sections from the Constitutions of the States of Louisiana, Wisconsin, Michigan, Texas and Mississippi, and of the United States, were adopted. The sources of the other sections of the Constitution are not clear. Some sections appear to be modifications of sections from other constitutions, and some sections appear to be original."<sup>3</sup>

## The Constitution of 1849

The Constitution as framed by the Convention of 1849 provided that upon the day of its submission for ratification the people should also, at the same time, vote for a Governor; a Lieutenant Governor; two Representatives in Congress; 16 State Senators and 36 Members of the Assembly, who were to

<sup>2</sup> Resolved. That certified copies of the Constitution in English and Spanish, be presented to the present Executive of California, and that 8,000 copies in English and 2,000 copies in Spanish, be ordered to be printed and circulated. *Journal of the Convention, Assembled to Frame a Constitution, for the State of California, Sept. 1st, 1849*, p. 156. All laws, decrees, regulations and provisions which from their nature require publication shall be published in English and Spanish. *Constitution of 1849*, Article XI, Section 21.

<sup>3</sup> Paul Mason, "Constitutional History of California," *Constitution of the United States—Constitution of the State of California*, California Legislature, Assembly, Sacramento, 1973, p. 91. See also, Cardinal Goodwin, *The Establishment of State Government in California*, McMillan Company, New York, pp. 230–243; and, J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution in September and October, 1849*, J. T. Towers, Washington, 1850, pp. 37, 56, 69, 70, 77, 110, 132, 165, 235, 248, 250, 292, 371, 380, and 385.

compose the First State Legislature.<sup>4</sup> All of the above officers were elected for two-year terms, with the exception of the Assembly Members, who were elected annually. Within four days after its organization, the Legislature was to elect two United States Senators.

At that time, Article I, Section 3 of the Constitution of the United States provided that United States Senators be elected by their respective state's legislature. It was not until after the 17th Amendment to the Federal Constitution was ratified on April 8, 1913, that United States Senators were elected by a popular vote of the people in their respective states.<sup>5</sup>

The election was held on the 13th day of November, 1849, and the people adopted the Constitution by a vote of 12,061 to 811.<sup>6</sup>

On the 15th of December, the Legislature met and organized. Governor Peter H. Burnett and Lieutenant Governor John McDougal were inaugurated on the 20th of December, and United States Senators John C. Fremont and William M. Gwin were elected by the Legislature on the same day. A Treasurer, Comptroller, Attorney General, Surveyor General, and three Justices of the Supreme Court were elected by the Legislature on December 22. The first Secretary of State was appointed by the Governor, and a complete working state government was established.

The Constitution of 1849 provided that the Comptroller, Treasurer, Attorney General, and Surveyor General were to be chosen by a joint vote of the two houses of the Legislature at its first session; but thereafter they were to be elected at the same time and places, and in the same manner as the Governor.<sup>7</sup>

The first Secretary of State was appointed by the Governor, by and with the advice and consent of the Senate, and continued to be an appointive office until 1862 when, by constitutional amendment, the office was made elective.<sup>8</sup>

Into the preamble of the Constitution of 1849 the delegates who made California a state wrote these words: "We, the people of<sup>9</sup> California, grateful to Almighty God for our freedom; in order to secure<sup>10</sup> its blessings, do establish this Constitution." Freedom and independence were guaranteed. It was further provided that "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it."<sup>11</sup>

The Constitution of 1849 contained only 12 articles and a schedule. Although in operation for 30 years, it was amended only three times—in 1856, 1862, and 1871.

<sup>4</sup> Article IV, Section 6 of the *Constitution of 1849* did not specify membership of the Legislature, stating only that the number of Senators should be not less than one-third and not more than one-half the number of Members of the Assembly.

<sup>5</sup> *The Constitution of the United States—Analysis and Interpretations*—(Edwin S. Corwin, Editor), U.S. Government Printing Office, 1953, p. 48. See also, *Dillon v. Gloss* (1921) 256 U.S. 368.

<sup>6</sup> *Aggregate of the Votes for Governor, Lieutenant Governor, and Members of Congress (1849)*, State Archives, Sacramento, California.

<sup>7</sup> *Constitution of 1849*, Article V, Section 20.

<sup>8</sup> *Constitution of 1849*, Article V, Section 19.

<sup>9</sup> The words "the State of" were added in the *Constitution of 1879*.

<sup>10</sup> The words "and perpetuate" were added in the *Constitution of 1879*.

<sup>11</sup> *Constitution of 1849*, Article I, Section 2.

The paucity of amendments to the original Constitution can be attributed, at least in part, to the amendment procedure which required that proposed amendments to the Constitution must first be “agreed to” by a majority vote of both houses of the Legislature proposing the amendment or amendments; published for three months next preceding the election of the next Legislature; “agreed to” by a majority vote of the newly elected Legislature; and then approved by a majority vote of the electors qualified to vote for Members of the Legislature.<sup>12</sup>

## The Constitutional Convention of 1878

The Constitution of 1849 was a response to existing conditions in California and was framed to service those needs. With the swift and drastic changes California was to undergo after its adoption, it soon became apparent that it was an inadequate solution to the state’s new and pressing problems of taxation, the banks, big business, land monopolization and particularly the railroads.

The social unrest and frustration resulting from the failure to cope with these troubles and the building resentment against the continuing influx of cheap Chinese labor motivated the Legislature to pass a bill in 1876 which submitted to the voters the proposition of whether or not to call a convention to frame a new constitution.<sup>13</sup> The proposition was subsequently approved by the voters at the general election of September 5, 1877.<sup>14</sup>

In accordance with the provisions of the Constitution of 1849 the Legislature at its next session in 1878 passed an enabling act calling for the election of delegates to the convention.<sup>15</sup> The bill provided for the selection of 152 delegates to be chosen at a special election on Wednesday, June 19, 1878. The elected delegates were to meet in the Assembly Chamber in the State Capitol on September 28, 1878, to draft a new Constitution for the State of California.

Of the 152 delegates elected, 145 were in attendance on the first day of the convention, four were absent, while one had resigned, and two others had died prior to convening.<sup>16</sup> The Convention adjourned *sine die* (“without day,” meaning final adjournment) on March 3, 1879, 157 days after first being called to order.

While the delegates attempted to deal with California’s vexing problems, most commentators agree that they accomplished little more than creating a document that was the perfect example of what a constitution ought *not* to be.

<sup>12</sup> *Constitution of 1849*, Article X, Section 1.

<sup>13</sup> *Statutes of 1875–76*, Chapter 516, p. 791.

<sup>14</sup> “A Complete Abstract of the whole number of Votes cast in the several Counties of the State (at the General Election for members of the Legislature, held on Wednesday, September 5th, 1877) ‘For’ and ‘Against’ a Convention to revise and change the Constitution of the State of California,” State Archives, Sacramento, California. See also, *Journal of the Assembly*, January 22, 1878, p. 240.

<sup>15</sup> *Statutes of 1877–78*, Chapter 490, p. 759.

<sup>16</sup> *Debates and Proceedings of the Constitutional Convention of the State of California, 1878–79*, Vol. I. E. B. Willis and P. K. Stockton—Editors, State Printing Plant, Sacramento, California, 1880, p. 13.

## The Constitution of 1879

The Constitution of 1879 was adopted at a convention at Sacramento on March 3 of that year, by a vote of 120 to 15.<sup>17</sup> The draft of the proposed Constitution was submitted to the electors on May 7, 1879, at which time the voters ratified the convention's action, adopting the new Constitution by a vote of 78,406 to 67,492.<sup>18</sup>

The new document fixed the membership of the Legislature at the current 80 Assembly Members and 40 Senators. Insofar as it related to the election of officers, the commencement of their terms in office, and the meeting of the Legislature, the new Constitution became effective at 12 m. on July 4, 1879. In all other respects, the effective date of the Constitution was 12 m., January 1, 1880.

A Declaration of Rights, not unlike the Federal Bill of Rights, is set forth in the State Constitution, in which the principle embodied in the Constitution of 1849 is reaffirmed: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."<sup>19</sup>

California's historical position with regard to the federal government is stated as follows: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."<sup>20</sup>

By reason of subsequent amendments, this Constitution has been altered considerably from the original document of 1879. A total of 583 amendments were proposed by the Legislature and by the people through the initiative from 1880 through 1962. Of these, 334 were adopted by the voters.<sup>21</sup>

This haphazard and unbridled growth led the Legislature in 1963 to the conclusion that our Constitution had to be revamped. The Legislature felt that it was replete with unnecessary detail, inconsistent provisions and material that could more properly be contained in the statutes.<sup>22</sup> To remedy this situation they created the Constitution Revision Commission and directed it to make recommendations to the Legislature. While the ensuing acceptance of many of the commission's recommendations by the Legislature and the people significantly reduced the size of the Constitution, it remains a lengthy and detailed body of law. Despite the deletion of 14,500 words in 1949, and 16,000 words in 1966, California's Constitution now exceeds 72,000 words.

<sup>17</sup> *Id.*, Volume III, p. 1521.

<sup>18</sup> The figures usually cited are taken from the *Camvass of Votes For and Against the New Constitution*. The figures in this document show a total of 145,212 votes cast: 77,959 for; 67,134 against; and 119 rejected. The *Camvass*, however, did not include the votes cast in Mariposa County. The June 7, 1879, edition of the *Sacramento Bee* also makes mention of this fact. A search of the State Archives by Dr. William N. Davis, Jr., California State Historian, produced a *Duplicate of the Elections For the New Constitution and Against the New Constitution* showing that 805 votes were cast in Mariposa County, making the total vote 146,017. Four hundred forty-seven of these votes were cast in favor of adopting the new Constitution, bringing that total to 78,406; the remaining 358 votes were cast against the new Constitution, making that total 67,492; none were rejected, leaving that figure at 119. The *Duplicate* was not received until June 26, 1879, and for that reason was not included in the *Camvass* which was completed on June 6, 1879.

<sup>19</sup> *Constitution*, Article II, Section 1.

<sup>20</sup> *Constitution*, Article III, Section 1.

<sup>21</sup> Compiled from Mason's *Constitution of California, Annotated, 1933*, California State Legislature, State Printing Plant, 1933, pp. 1769–1846; and *Statement of Vote, 1935–1962*, Secretary of State, Sacramento, California. *See also, Amendments to the Constitution of 1879, infra*, p. 12. Considering the *Constitution of 1879* originally contained 22 articles and totaled approximately 16,000 words, the numerous amendments from 1880 to 1962 left California with the most lengthy constitution of all the states.

<sup>22</sup> *Statutes of 1963*, Resolution Chapter 181.

*Amendments to the Constitution of 1879,  
Proposed and Adopted, 1880–2015*

<i>Year*</i>	<i>Proposed</i>	<i>Adopted</i>	<i>Year*</i>	<i>Proposed</i>	<i>Adopted</i>
1884.....	3	3	1968.....	9	5
1886.....	1	0	1970.....	23	13
1887 †.....	3	1	1972.....	21	17
1890.....	1	1	1973 †.....	1	0
1892.....	5	2	1974.....	20	15
1894.....	9 <sup>23</sup>	7	1976 †.....	10	8
1896.....	6	3	1976.....	9	6
1898.....	7 <sup>24</sup>	1	1978 †.....	11	6
1900.....	8 <sup>25</sup>	5	1978.....	3	2
1902.....	9	7	1979 †.....	4	4
1904.....	6	3	1980 †.....	9	5
1906.....	14	8	1980.....	7	4
1908.....	14	11	1982 †.....	4	3
1910.....	8	8	1982.....	5	1
1911 †.....	23	22	1984 †.....	4	3
1912.....	4	2	1984.....	7	4
1914.....	30 <sup>26</sup>	18	1986 †.....	6	6
1915 †.....	9	0	1986.....	6	5
1916.....	4	1	1988 †.....	3	1
1918.....	19	9	1988.....	10	10
1919 †.....	1	1	1990 †.....	7	5
1920.....	12	5	1990.....	12	4
1922.....	22	9	1992 †.....	1	0
1924.....	16	10	1992.....	7	3
1926.....	23	15	1993 †.....	6	2
1928.....	17	14	1994 †.....	4	2
1930.....	21	10	1994.....	5	4
1932.....	17	10	1996 †.....	1	1
1933 †.....	8	6	1996.....	2	2
1934.....	18 <sup>27</sup>	11	1998 †.....	4	3
1935 †.....	3	0	1998.....	4	4
1936.....	20 <sup>28</sup>	4	2000 †.....	3	2
1938.....	19	6	2000.....	5	2
1939 †.....	1	0	2002 †.....	3	2
1940.....	16	8	2002.....	1	1
1942.....	15	6	2003 †.....	2	0
1944 †.....	1	1	2004 †.....	2	1
1944.....	11	7	2004.....	10	5
1946.....	14	11	2005 †.....	3	0
1948.....	15	6	2006 †.....	1	0
1949 †.....	11	10	2006.....	6	1
1950 †.....	3	2	2008 †.....	3	0
1950.....	9	5	2008 †.....	2	1
1952.....	19	15	2008.....	4	3
1954.....	18	11	2009 †.....	4	1
1956.....	16	12	2010 †.....	3	2
1958.....	15	6	2010.....	5	4
1960 †.....	3	3	2012 †.....	1	1
1960.....	13	8	2012.....	2	1
1962.....	23	10	2014 †.....	1	1
1964.....	12	10	2014.....	1	1
1966.....	14	9		<u>896</u> <sup>29</sup>	<u>530</u>

\* Refers to the year that the amendment appeared on the ballot and was voted upon by the electors.

† Special or statewide primary election.

<sup>23</sup> A proposed amendment to the Constitution, *Statutes of 1893*, Chapter 34, p. 657, was declared invalid by the Supreme Court (*Livermore v. Waite*, 102 Cal. 113) and was not placed on the ballot; therefore, it is not included in the proposed total for 1894.

<sup>24</sup> In 1897, the Legislature adopted Senate Concurrent Resolution 4, *Statutes of 1897*, Chapter 35, p. 650, calling for a convention to revise the Constitution. The proposal appeared on the 1898 ballot, but as it did not propose to amend any specific article of the Constitution, it is not included in the proposed total for 1898.

<sup>25</sup> Two proposed amendments to the Constitution, *Statutes of the Extraordinary Session of 1900*, Chapters 6, 10, pp. 26, 29, were declared invalid by the Supreme Court (*People ex rel Attorney General v. Curry*, 130 Cal. 82) and were not included in the proposed total for 1900.

<sup>26</sup> In 1913, the Legislature adopted Assembly Concurrent Resolution 17, *Statutes of 1913*, Chapter 75, p. 1714, calling for a convention to revise the Constitution. The proposal appeared on the 1914 ballot, but as it did not propose to amend any specific article of the Constitution, it is not included in the proposed total for 1914.

<sup>27</sup> In 1933, the Legislature adopted Assembly Concurrent Resolution 17, *Statutes of 1933*, Chapter 45, p. 3002, calling for a convention to revise the Constitution. The proposal appeared on the 1934 ballot, but as it did not propose to amend any specific article of the Constitution, it is not included in the proposed total for 1934.

<sup>28</sup> In 1936, an initiative constitutional amendment was invalidated by the Supreme Court (*Clark v. Jordan*, 7 Cal.2d 248) and it did not appear on the ballot; therefore, it is not included in the proposed total for 1936.

<sup>29</sup> Two amendments, one each in 1920 and 1930, were adopted by the Legislature, calling for constitutional conventions by amending Article XVIII of the Constitution. Neither of these amendments were adopted by the people, but as they did appear on the ballot and proposed the amendment of an article of the Constitution, they are included in the proposed totals for the respective years. An initiative constitutional amendment, adding Section 26 to Article 1, was approved by the electorate at the Nov. 3, 1964 general election, but was subsequently declared unconstitutional both by the California Supreme Court and the United States Supreme Court (*Mulkey v. Reiman*, 64 Cal.2d 529; *Reiman v. Mulkey*, 387 U.S. 369). This amendment appears in both the proposed and adopted totals for 1964.

## Constitution Revision Commission

Until 1962, California's Constitution could be revised extensively only by means of a constitutional convention. Article XVIII, Section 1, made provision for amendment, but that provision apparently indicated something less than a comprehensive constitutional revision.<sup>30</sup>

In 1960, the Legislature, acting upon the recommendation of an interim committee,<sup>31</sup> adopted a constitutional amendment providing for revision of the Constitution, i.e., by complete or partial changes. Previously, amendments could provide only specific or limited changes in the Constitution. This amendment was approved by the people in 1962 by more than a two-to-one vote.<sup>32</sup>

The Legislature, in the 1963 First Extraordinary Session, adopted a concurrent resolution establishing the Constitution Revision Commission under the Joint Committee on Legislative Organization. By the terms of the resolution,<sup>33</sup> the commission was to consist of not more than 50 citizen members appointed by the Joint Committee on Legislative Organization, three Members of the Senate appointed by the Senate Committee on Rules, three Members of the Assembly appointed by the Speaker, and the members of the Joint Committee on Legislative Organization, who were to serve as ex officio members.

In February 1966, the commission made its initial report to the Legislature.<sup>34</sup> Revisions of Articles III, IV, V, VI, VII, and XXIV of the Constitution, dealing with the legislative, executive, and judicial branches of government and the civil service system, were recommended.

Constitutional revision was placed on "special call" during the 1966 First Extraordinary Session and the commission's proposals, with the exception of those affecting Article XXIV, were introduced in the form of Assembly Constitutional Amendment 13<sup>35</sup> and subsequently passed by the Assembly and Senate. Placed on the November 8, 1966, ballot as Proposition 1-a, it was approved by the people by a vote of 4,156,416 to 1,499,675.<sup>36</sup>

The revised Article IV affected a number of important substantive changes relative to the legislative branch of government:

Under former constitutional provisions, the Legislature met in general session during odd-numbered years and in budget session during even-numbered years. The amendment eliminated the budget session and provided for regular annual sessions of unspecified duration.<sup>37</sup>

Prior to this time, the Legislature could meet for a period not to exceed 120 days, excluding Saturdays and Sundays, during the odd-numbered years; nor for more than 30 days, exclusive of a recess no longer than 30 days, during the even-numbered years. The adoption of Proposition 1-a in 1966 removed these limitations.

<sup>30</sup> *McFadden v. Jordan* (1948) 32 Cal.2d 330, cert. denied; 336 U.S. 918; *Livermore v. Waite* (1894) 102 Cal. 113.

<sup>31</sup> *Report of the Assembly Interim Committee on Constitutional Amendments to the California Legislature*, November 15, 1960, pp. 25-34.

<sup>32</sup> 2,901,537 to 1,428,034, Secretary of State, *Statement of the Vote, General Election, 1962*, Sacramento.

<sup>33</sup> *Statutes of 1963 First Extraordinary Session*, Resolution Chapter 7.

<sup>34</sup> *Proposed Revision of the California Constitution*, February 1966, California Constitution Revision Commission, San Francisco.

<sup>35</sup> *Statutes of 1966 First Extraordinary Session*, Resolution Chapter 139.

<sup>36</sup> Secretary of State, *California Statement of Vote and Supplement, November 8, 1966 General Election*, p. 27.

<sup>37</sup> *Constitution*, Article IV, Section 3(a), [1967]



Compensation for Members of the Legislature had been set at \$500 per month since 1954 and could not be altered except by constitutional amendment. Pursuant to additional provisions of Proposition 1-a, a 1966 statute initially set the Members' salaries at \$16,000 per year. The Legislature further was permitted to set its own compensation by a two-thirds vote of each house. Increases of more than 5 percent per year could not be passed for each calendar year following the operative date of the last adjustment, and such increase was subject to the Governor's veto and the initiative and referendum processes. No salary adjustment was operative until the beginning of the regular session commencing *after* the next general election following the enactment of the statute making the adjustment.<sup>38</sup> In this manner, all Members of the Assembly and at least one-half of the Senators who voted for an increase in compensation could not benefit from it unless they were reelected after they had voted for or against such increase.

Related to the commission's recommendation was the passage of Assembly Bill 173 of the 1966 First Extraordinary Session. The provisions of this bill, contingent on the adoption of Proposition 1-a, established a legislative conflict-of-interest law and enacted provisions governing travel expenses and retirement benefits for legislators.<sup>39</sup> This bill also provided that Members of the Legislature are entitled to living expenses at the same rate established for other elected state officers by the State Board of Control.<sup>40</sup>

The amendment reduced the signature requirement for initiative statute petitions from 8 to 5 percent of registered voters but retained the 8-percent requirement for constitutional amendments.<sup>41</sup>

Changes in the executive article included, among others, authority for the Governor to reorganize the executive branch of government<sup>42</sup> and permission for the Legislature to provide for gubernatorial succession by statute.<sup>43</sup>

Article VI, relating to the judicial branch, also underwent revision. Retaining the requirement of a superior court in each county, the revision permitted the Legislature to provide, with the concurrence of the board of supervisors of the affected county, that one or more superior court judges be selected to serve in more than one county.<sup>44</sup>

Municipal court judges are required to have been members of the California State Bar for at least five years immediately preceding their appointment. The other state court judges (superior, appellate and Supreme Court judges) require membership in the California State Bar for 10 years immediately preceding their appointment.<sup>45</sup> Unopposed incumbent judges of trial courts (superior) in the state need not have their names printed on the ballot.<sup>46</sup>

<sup>38</sup> *Constitution*, Article IV, Section 4; *Government Code*, Section 8901. For current legislative compensation provisions, see Chapter VII, *infra*, p. 101–104.

<sup>39</sup> *Government Code*, Sections 8903, 8920–8926, 9359.11, 9359.12 and 9360.10. For current legislative retirement provisions, see Section 9350, *et seq.*

<sup>40</sup> *Government Code*, Section 8902. 1987 amendments to this section provide for reimbursement at the same rate provided to federal employees traveling to Sacramento. See also, *Constitution*, Article IV, Section 4(b).

<sup>41</sup> *Constitution*, Article IV, Section 22(b) [1967]. See now, *Constitution*, Article II, Section 8 (section renumbered in 1976).

<sup>42</sup> *Constitution*, Article V, Section 6.

<sup>43</sup> *Constitution*, Article V, Section 10; *Government Code*, Sections 12058, 12058.5 and 12059.

<sup>44</sup> *Constitution*, Article VI, Section 4.

<sup>45</sup> *Constitution*, Article VI, Section 15. Prior service as a judge of a court of record (municipal court) is an alternative qualification for selection to the superior, appellate and Supreme courts. See Chapter 5 for explanation of the 1998 court consolidation.

<sup>46</sup> *Constitution*, Article VI, Section 16(b); *Elections Code*, Section 8203. Municipal and justice courts were consolidated in 1998.

In 1968 the Constitution Revision Commission submitted a proposal affecting Articles IX, X, XI, XII, XVII and XVIII. Many of the provisions of the commission's proposal were incorporated in Assembly Constitutional Amendment 30, which was adopted by the Legislature. This measure was defeated by the voters in the 1968 general election.

A review of this public rejection of the commission's proposal resulted in the submission of separate and more succinct propositions to the electorate.

The June 1970 ballot contained four of the commission's suggestions, of which only Proposition 2 was adopted.<sup>47</sup> This amendment made extensive revisions in Article XI relating to local government. Among the major changes made by this amendment are those requiring voter approval for county consolidation, formation of new counties, and annexation or consolidation of cities; those permitting all cities to be charter cities regardless of population; those requiring the election rather than the appointment of boards of supervisors; and those permitting counties complete jurisdiction over certain matters previously requiring legislative approval.

Subsequent elections in 1970, 1972 and 1974 saw the adoption of several propositions recommended by the commission. In the main, these changes deleted obsolete provisions, altered and clarified language in numerous sections, and brought others into conformity with Supreme Court decisions and provisions of the U.S. Constitution.

After studying and reporting on every article of the Constitution, the commission's existence was terminated by the Legislature in 1974.<sup>48</sup> Interest in the revision of the State Constitution was renewed, however, in the 1993–94 Regular Session. The Legislature and Governor approved Senate Bill 16 in 1993, creating a new Constitution Revision Commission, which operated from 1994 to 1996.<sup>49</sup> This 23-member body was charged with examining the state budget process, the relations between state and local government, and considered suggestions as to how to improve on these areas. To gain input from the public, as well as from local government officials and organizations, the commission held public hearings throughout the state focusing on various issues.

On September 15, 1995, the Commission reported its preliminary findings and recommendations to the Legislature.<sup>50</sup> In a sweeping series of proposals, the Commission suggested several reforms, among which included the following: the Governor and Lieutenant Governor should be elected on the same "ticket"; reduce the number of elective statewide officers by giving the Governor the power to appoint the State Treasurer, Insurance Commissioner, and Superintendent of Public Instruction; overhaul the state civil service system; replace the two-house Legislature with a unicameral body of 121 members, serving no more than three four-year terms; prohibit legislators from fundraising while the Legislature is in session; replace the state's annual

<sup>47</sup> *Statutes of 1969*, Resolution Chapter 331.

<sup>48</sup> *Joint Rules Committee Resolution 57*, March 4, 1974. For a comprehensive summary of the commission's activities and recommendations, see Jay Gould, *Report on Materials of Constitution Revision Commission Relating to Provisions in California's Constitution Recommended or Endorsed by Commission*, December 10, 1974, pp. 1–147.

<sup>49</sup> *Statutes of 1993*, Chapter 1243.

<sup>50</sup> *Assembly Daily Journal*, September 15, 1995, p. 3934.

budget process with a two-year budget cycle; reduce the vote threshold for legislative passage of the state budget bill from a two-thirds vote to a majority vote; shorten the time period during which bills must be “in-print” prior to being considered from 30 days to 10 days; restructure the public school system to provide more accountability and flexibility; and realignment of state and local government responsibilities and financing.<sup>51</sup>

After further hearings and testimony, a final report and recommendation was published and presented to the Legislature on August 6, 1996. The final report included most of the original recommendations, but some changes were made to reduce initial legislative opposition to specific proposals, such as the unicameral legislature proposal. The bulk of the recommendations were drafted into Senate Constitutional Amendment 39 and Assembly Constitutional Amendment 49, both of which failed to pass the 1995–96 Legislature. As a result, no revision of the Constitution was offered to the voters for consideration.

### Differences Between the Federal and the State Constitutions

Article VI of the Constitution of the United States declares that: “This Constitution, and the Laws of the United States which shall be made\*\*\* under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.”

The fundamental difference between the California Constitution and the Constitution of the United States is that the Federal Constitution is a grant of power to Congress and is also a limitation upon its powers, whereas the State Constitution is a limitation upon the power of the State Legislature. The powers of the Legislature are inherent and are only restricted by the State Constitution and the Constitution of the United States. The sphere of state activity is more extensive than that of the federal government since its powers are original and inherent, not derived or delegated, as are the powers of the federal government.

Perhaps the best description of this concept was set forth by Chief Justice John Marshall, discussing the Federal Constitution in the early and famous case of *McCulloch v. The State of Maryland*,<sup>52</sup> when he stated:

“The Government of the Union, \*\*\* is, emphatically, and truly, a government of the people. In form and in substance it emanated from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

“This government is\*\*\* one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required\*\*\* argument\*\*\*.

<sup>51</sup> “Summary of Preliminary Recommendations,” California Constitution Revision Commission, September 1995.

<sup>52</sup> 17 U.S. (4 Wheat.) 316 (1819).

“It is the government of all; its powers are delegated by all; it represents all, and acts for all.

“The Government of the United States, then, though limited in its powers, is Supreme; and its laws, when made in pursuance of the Constitution, form the Supreme law of the land.”

Other significant differences between the United States Constitution and the Constitution of California include the fact that under the Federal Constitution, revenue bills originate only in the House of Representatives.<sup>53</sup> In California, revenue bills may originate in either house.

Among the contrasting powers of the executive, the Federal Constitution gives the President the power to call both houses of Congress or either of them into extraordinary session. The Governor of California has no power to call only one of the houses into extraordinary session; the Governor must call into session the entire Legislature.<sup>54</sup>

The U.S. Congress, when so convened, may legislate on subjects which are not specified in the President’s proclamation. In an extraordinary session of the California Legislature, however, the houses may legislate only on those matters itemized in the Governor’s proclamation.

In the arena of foreign relations, the President of the United States, by and with the advice and consent of the U.S. Senate (provided two-thirds of the Senators present concur), is empowered to make treaties with foreign governments.<sup>55</sup> Further, the U.S. Constitution prohibits states from entering into any treaty with a foreign government.<sup>56</sup> The California Constitution explicitly recognizes the U.S. Constitution as the supreme law of the land,<sup>57</sup> and consequently, no provision for “treaty making” is vested in the Governor.<sup>58</sup>

## Constitutional Amendments

### *California Constitutional Amendments*

The people of California have a direct and final say in the amending of their state’s constitution. Article II, Section 8 and Article XVIII of the California Constitution give the voters authority to approve or reject amendments to the State Constitution. Private citizens or groups may propose an amendment, or the Legislature may place an amendment on the ballot, if the proposal passes each house by a two-thirds vote. In either case, all proposed constitutional amendments must eventually be approved by a majority vote of the people in order to be adopted.<sup>59</sup>

<sup>53</sup> *United States Constitution*, Article I, Section 7.

<sup>54</sup> *United States Constitution*, Article II, Section 3; *Constitution*, Article IV, Section 3(b).

<sup>55</sup> *United States Constitution*, Article II, Section 2(2).

<sup>56</sup> *United States Constitution*, Article I, Section 10.

<sup>57</sup> *Constitution*, Article III, Section 1.

<sup>58</sup> The Supreme Court of California has ruled that treaties entered into by the President are also the supreme law of the land, and that the states are bound thereby, notwithstanding anything in their laws or constitutions to the contrary. *See Fiji v. State of California*, 38 Cal.2d 718.

<sup>59</sup> For more information on initiatives and how the California Constitution is amended, see Chapter 3. Note: If the provisions of two or more measures approved at the same election conflict, those provisions of the measure receiving the highest affirmative vote shall prevail. *Constitution*, Article XVIII, Section 4.

The Legislature proposes amendments by passing a Senate Constitutional Amendment (S.C.A.) or an Assembly Constitutional Amendment (A.C.A.); neither require approval of the Governor. When the Legislature approves an A.C.A. or S.C.A., it is assigned a “proposition number” and placed on a statewide ballot, giving the electorate the power to ratify or reject such a change. Case law precludes the Legislature from prescribing the language that will be used on the ballot label and for the ballot title and summary in the voter information guide.<sup>60</sup>

To assist voters in understanding the effect of ballot measures, the law requires the Attorney General to draft the ballot labels and the Legislative Analyst must prepare a fiscal impact summary for each measure in the voter guide.<sup>61</sup> The title and summary of each proposition must be unbiased and the Legislative Analyst must provide a concise summary of the general meaning of “yes” and “no” votes on the measures. The ballot language, including the summary and title, is subject to judicial review.<sup>62</sup>

Citizens also have the power to propose their own amendments via the initiative process. A citizen, or group of citizens, may draft an amendment to the California Constitution and have it placed on a statewide ballot for approval by the voters. Strict constitutional and statutory guidelines and deadlines must be followed in order to have an initiative placed on the ballot, yet California citizens have successfully amended their Constitution numerous times this century.

Article XVIII gives the California Legislature the power to place on the ballot a call for a constitutional convention, provided such a call passes each house by a two-thirds vote. Once the convention delegates agree to language for amendment(s), the proposition(s) would be placed on the ballot for ratification by voters. The Legislature has not provided for a convention since 1879, and has instead created Constitution Revision Commissions to study and recommend constitutional changes.<sup>63</sup> (In 1934, the Legislature adopted ACR 17, which placed a call for a constitutional convention on the ballot. The call for the convention, Proposition 8, was passed by voters 705,915 to 668,080, but the Legislature never provided for the convention.)<sup>64</sup>

### **United States Constitutional Amendments**

The process governing amendments to our nation’s constitution is outlined in Article V of the *U.S. Constitution*. It should be noted that the method of amending *California’s* Constitution differs greatly from amending the *federal* document. As mentioned above, all amendments proposed to the State Constitution must eventually be approved by a popular vote of the California electorate, whereas amendments to the *U.S. Constitution* do *not* go to a direct

<sup>60</sup> *Howard Jarvis Taxpayers Association v. Bowen* (2011-Case No. C060441).

<sup>61</sup> *Elections Code*, Sections 9050, 9051(b), 9053, 9087(e), 13247, and 13262(d); *Government Code*, Sections 88002(a)(2), 88003.

<sup>62</sup> *Elections Code*, Sections 9092 and 13282; *Government Code*, Section 88006. An example of a challenge to ballot language is *Yes on 25 v. Superior Court* (2010) 189 Cal.App 4th 1445.

<sup>63</sup> An example of a proposed convention is ACR 95 (2011–12 Regular Session).

<sup>64</sup> The language of the ballot measure provided only a three month window from the date of the election to provide for the convention. Since the Legislature did not convene its new session until January 1935, only a few weeks remained to act on the convention. See article, *An Overview of the History of Constitutional Provisions Dealing with State Governance*, by Pat Ooley, as printed in the California Constitution Revision Commission report “Constitution Revision History and Perspective: State Governance,” 1996, p. 6. See also, Alonzo Baker, *Problems in State Constitution Revision, with Special Reference to California*. University of the Pacific, 1964.

vote of U.S. voters; instead, state legislatures *or* conventions are given the sole power of amendment ratification. Like California's amendment procedure, the chief executive (the President) plays no formal role in the federal constitutional amendment process.

An amendment to the *U.S. Constitution* may be submitted to the states for ratification in two manners: two-thirds of state legislatures (34 out of 50) may call for a constitutional convention to formulate a proposed amendment; or, by two-thirds vote of each house, Congress may propose an amendment. The requisite number of states have never called for the assembling of a national constitutional convention. Congress, however, has proposed a total of 31 constitutional amendments since 1787.

Once an amendment has been officially proposed to the states, the ratification process may begin. Three-fourths of the states (38 out of 50) must ratify, or approve, the proposed change. The Constitution allows Congress to determine the method of ratification: an amendment may be ratified by three-fourths of all state legislatures, or by three-fourths of conventions held in each state. Interestingly, Congress has only submitted a proposed amendment to *state conventions* once (for the 21st amendment); all other constitutional amendments have been subjected to ratification by state legislatures.

How state legislatures actually ratify an amendment varies from state to state. Most states require a simple majority vote in each house, while others require an absolute or supermajority vote in one or both chambers.<sup>65</sup> In California, a U.S. Constitutional amendment is ratified by joint resolution, passed by an absolute majority vote of each house (41 Assembly Members, 21 Senators). The resolution may originate in either house (i.e., A.J.R. or S.J.R.).

The most recent movement to change the U.S. Constitution has been the "Balanced Budget Amendment," which has yet to pass the Congress for submission to the states. In total, 27 amendments have been added to the U.S. Constitution from 1787 to present—the most recent was ratified in 1992.<sup>66</sup>

## Distribution of Powers of Government

The powers of the government of the United States and the powers of the government of the State of California are divided into three separate departments—the Legislative, the Executive and the Judicial. While the Constitution of the United States does not expressly provide for this division, the Supreme Court of the United States has stated that "the rule established by the American Constitutions, both State and Federal, divides the government into three separate departments—the legislative, executive and judicial."<sup>67</sup>

<sup>65</sup> See "State Ratification of Amendments to the U.S. Constitution," by Christopher Zimmerman, National Conference of State Legislatures, as appeared in "Legisbrief," May 1995.

<sup>66</sup> The 27th Amendment was proposed in 1789, yet was not fully ratified until 1992 (203 years later). The amendment prohibits Congress from increasing salaries of its own Members during the same legislative session; however, Congress may still approve salary increases to take effect after the Congressional elections. Note: The California Legislature ratified the 27th Amendment over two months after it had already been fully ratified by the necessary 38 states. *Statutes of 1992*, Resolution Chapter 64 (S.J.R. 1, 1991–92 Regular Session).

<sup>67</sup> *Springer v. Philippine Islands*, 277 U.S. 189.

The California Constitution, however, does specifically provide that the powers of government be divided into these three separate departments; and that no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others except as the Constitution expressly directs or permits.<sup>68</sup>

One of the exceptions to the constitutional provision providing for three separate and distinct coordinating branches of government occurs when the Senate sits as a court of impeachment, thereby serving in a judicial capacity. As long as the constitutional guarantees have been complied with, the courts have no jurisdiction or power of review in impeachment proceedings or their results.<sup>69</sup>

### Confirmation of Appointments

Many of the appointments made by the President of the United States must be confirmed by the United States Senate before the appointees may hold office.<sup>70</sup>

Similarly, most appointments made by the Governor must be confirmed by a majority vote of the State Senate before the appointment becomes effective. The appointees to the State Board of Education,<sup>71</sup> the Public Utilities Commission,<sup>72</sup> the South Coast Air Quality Management District Board,<sup>73</sup> and the State Adjutant General<sup>74</sup> are but a few examples of the offices over which the Governor has appointment power and for which State Senate confirmation is required.

The California State Assembly shares the confirmation power with the State Senate in only two instances: gubernatorial appointments to fill a vacancy in a statewide office, and approval of actuarial appointments. In each instance, an affirmative vote of both the Assembly and the Senate is required for the appointment to take effect, and if either house fails to confirm the appointment, it is considered denied. When a vacancy occurs in specified statewide offices (e.g., Lieutenant Governor, Attorney General, etc.), the Governor's nomination of a replacement is subject to confirmation by a majority vote of the membership of the Assembly and Senate.<sup>75</sup> In the event the nominee is neither confirmed nor denied within 90 days of the appointment, he or she shall take office as if having been confirmed.<sup>76</sup> Likewise, when the Governor wishes to appoint an actuary for the Board of the Public Employees' Retirement System, the nominee is submitted to each house of the Legislature. Thereafter, the Legislature has 60 calendar days within which to confirm or deny the nomination; a majority vote

<sup>68</sup> Constitution, Article III, Section 3.

<sup>69</sup> See, e.g., *Nixon v. U.S.*,—U.S.—, 113 S. Ct. 732 (1993). See also, *State (Oklahoma) Chambers*, 220 P. 890, 96 Okl. 78 and *In re Dauphin County Grand Jury*, September, 1938 (Pennsylvania), 2 A.2d 802, 332 Pa. 342.

<sup>70</sup> United States Constitution, Article II, Section 2(2).

<sup>71</sup> Education Code, Section 33000.

<sup>72</sup> Public Utilities Code, Section 301.

<sup>73</sup> Health and Safety Code, Section 40420.

<sup>74</sup> Military and Veterans Code, Section 162.4

<sup>75</sup> The Chief Deputy to the constitutional officer shall discharge the statutory duties of the office while the vacancy exists. *Government Code*, Section 1775.

<sup>76</sup> Constitution, Article V, Section 5. If the 90-day period ends during a period of joint recess, the confirmation period is extended to the sixth day following the reconvening of the Legislature. *Government Code*, Section 1775.

in each house is required for approval. If the nominee is neither confirmed nor denied during this period, the appointment shall become effective on the 61st calendar day after the date of the nomination.<sup>77</sup>

## Impeachment

The Legislature may be considered the most important of the three branches of government, for, while it is in session, the Legislature not only has the last word in the enactment of laws through its power to override the Governor's veto, but the Assembly has the sole power of impeachment, and the Senate is designated as the tribunal for trying such impeachments.<sup>78</sup>

All impeachments must be by resolution originating in the Assembly and adopted by a majority vote of that house. If the resolution of impeachment is adopted, the Assembly then elects managers who prepare the articles of impeachment, present them at the bar of the Senate, and prosecute them.<sup>79</sup>

The trial must be before the Senate sitting as a court of impeachment.<sup>80</sup> When sitting for that purpose, the Senators are upon oath or affirmation. No Member of the Senate can act or vote upon the impeachment without having taken such oath, and no person shall be convicted without the concurrence of two-thirds of the Members elected.<sup>81</sup>

State officers elected on a statewide basis, members of the State Board of Equalization, and judges of state courts are subject to impeachment for misconduct in office;<sup>82</sup> but judgment in such cases may result only in the removal or suspension from office and the disqualification to hold any office of honor, trust, or profit under the state.<sup>83</sup> The person impeached, whether convicted or acquitted, is also subject to criminal punishment according to law.<sup>84</sup>

The Constitution of the United States has similar provisions relative to impeachment. Should the President of the United States be tried, the Chief Justice of the Supreme Court would preside.<sup>85</sup> In California, the Lieutenant Governor, by virtue of his or her office as President of the Senate, presides over all impeachment proceedings except when the Lieutenant Governor is impeached.<sup>86</sup>

Local officials are not impeached but may be removed by other means. Any county, city or district officer, whether elected or appointed may be removed for willful or corrupt misconduct in office. Removal requires that an accusation, in writing, be presented to the grand jury. If at least 12 of the

<sup>77</sup> *Government Code*, Section 20015. If the 60-day period ends during a period of joint recess, the confirmation period is extended to the sixth day following the reconvening of the Legislature.

<sup>78</sup> *Constitution*, Article IV, Section 18; *Government Code*, Sections 3020–3040.

<sup>79</sup> *Government Code*, Sections 3021 and 3022.

<sup>80</sup> *Government Code*, Section 3022.

<sup>81</sup> *Constitution*, Article IV, Section 18; *Government Code*, Sections 3031 and 3032.

<sup>82</sup> *Constitution*, Article IV, Section 18(b); *Government Code*, Section 3020. For trial proceedings, see *Judge Levi Parsons*, Proceedings in the House of Assembly of California in 1851, 1 Cal. 539; *Trial of the Impeachment of Judge Carlos S. Hardy*, Senate of the State of California (Editor, Joseph A. Beek, Secretary of the Senate), California State Printing Office, Sacramento, California, 1930. Impeachment proceedings have been held only four times in California's history: State Treasurer Henry Bates (1857); State Controller G.W. Whitman (1857); Judge James H. Hardy (1862); and Judge Carlos S. Hardy (1929). *The California Legislature*, Joseph A. Beek (1980), pp. 209–215.

Alternative procedure for the removal of justices and judges may be found in *Constitution*, Article VI, Section 18. Recall provisions for elected state and local officers are contained in *Constitution*, Article II, Sections 13–19.

<sup>83</sup> *Government Code*, Section 3035.

<sup>84</sup> *Constitution*, Article IV, Section 18(b); *Government Code*, Section 3040.

<sup>85</sup> *United States Constitution*, Article I, Section 3(6), (7).

<sup>86</sup> *Government Code*, Section 3039.



grand jurors concur, the accusation is presented to the district attorney by the foreman of the grand jury. The officer accused may then answer by denying the sufficiency of the accusation in writing or deny its truthfulness at a jury trial. If the defendant officer pleads guilty or refuses to answer the accusation or if the officer is convicted by the jury, he or she may be removed from office.<sup>87</sup>

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<sup>87</sup> *Government Code*, Sections 3060–3074.