Opinion Analysis: Briggs v. Brown (2017) Part 2

Introduction

This is the second of three articles about the California Supreme Court's recent decision in *Briggs v. Brown* (2017) 3 Cal.5th 808. The first article focused on the changes made by Proposition 66 to capital appeal and habeas procedures in California. This article considers the various separation of powers approaches in the opinions.[1]

The court's resolution of that issue—whether Proposition 66's mandatory five-year deadline for resolving direct capital appeals and habeas petitions violated the California constitution's separation of powers doctrine—was noteworthy in that all seven justices agreed that the mandatory deadline violated the separation of powers doctrine and was unconstitutional because the judicial branch cannot be compelled by a legislative act to obey mandatory disposition deadlines.[2] Despite their agreement on the constitutional violation, the court did not strike the mandatory deadline. Instead, the majority (in an opinion authored by Justice Corrigan) avoided the separation of powers violation by relying on a line of California authority to read the time limit as "directory" rather than mandatory.

In a concurring opinion joined by Justices Werdegar, Kruger, and Hoch, Justice Liu demonstrated that the deadline created by Proposition 66 (even if given effect) could not be met.[3] Justice Liu acknowledged that the electorate wanted to shorten the time for legal challenges to capital sentences, but argued that the absence of any policy guidance in Proposition 66 for compressing the vastly complex capital case review process into five years made it impossible to achieve that goal.

In a concurring and dissenting opinion joined by Justice Ikola, Justice Cuéllar argued that because the five-year mandatory deadline was the heart of Proposition 66, and because it was sold to the voters on that basis, the court could not uphold Proposition 66 by rewriting the deadline to be aspirational. Accordingly, Justices Cuéllar and Ikola would have invalidated the deadline.

We write to consider this question: When an initiative statute imposes mandatory restrictions on how California courts handle their dockets, is it *necessary* to invalidate the measure for unconstitutionally violating the separation of powers, or can the restriction be construed as directory under the canons of interpretation? We conclude that in this close case it may not have been necessary, but a future case that requires invalidation is easily foreseeable.

The Electorate Is Checked by Separation of Powers

As a threshold matter, *Briggs* confirms that the electorate's initiative power is limited by the separation of powers doctrine.[4] We take this as confirmation that the theories advanced in the center's articles on this subject are correct: when the electorate exercises its legislative power with an initiative measure, it should be considered a legislative branch of government for purposes of applying the core powers analysis to resolve the measure's separation of powers issues.[5]

Limits on the electorate's legislative power are best viewed from a macro perspective. When determining whether a branch can take an action, there is a distinction between the branch having the power to act (internal limitation), and something else barring it from doing so (external limitation). For example, Congress may be barred from acting because the action is not one of its enumerated powers; this is an internal limitation. Or the action may be reserved for the states, so federalism prevents the federal government from acting; this is an external limitation. In the California government, the legislative power is plenary unless otherwise limited.[6] Those limits can be internal (express curbs on the legislative power specifically) or external (a broader principle like separation of powers or the supremacy clause). For example, under Article IV section 19 the legislature "has no power to authorize lotteries" and has no power to authorize" casinos.[7] And the legislature is barred from including more than one subject in a statute, or more than one item of appropriation in any bill other than the budget.[8] The first examples prevent the legislature from enacting particular types of laws; the second apply to any legislative act. Those are internal limits specific to the legislature as a branch and its exercise of the otherwise plenary legislative power. Other limits (like separation of powers and federalism) are structural features outside the legislative power that apply to branches and governments broadly; these are operate externally

on the legislature and independent of any specific limits on the legislative power. The same internal and external limits that apply to the legislature also apply to the electorate: The California Supreme Court has long considered the electorate's legislative power to be generally the same as the legislature's.[9]

The External Separation of Powers Limit Applied to the Electorate in *Briggs*

The court did not base its decision on some inherent limit on the initiative power.[10] Instead, it held that requiring the California judicial branch to decide capital cases within five years would violate the external limit imposed by the separation of powers doctrine on the electorate's initiative power.[11]

That conclusion is well-supported. The five year time limit was suspect because the court has "long recognized that imposing fixed time limits on the performance of judicial functions raises serious separation of powers concerns."[12] The legislature and the electorate generally wield the same legislative power.[13] Legislative power may regulate court procedure.[14] That regulatory function is limited by the separation of powers: legislation may not practically defeat or materially impair judicial functions.[15] This limit is narrowly construed.[16] "As long as such enactments do not defeat or materially impair the constitutional functions of the courts, a reasonable degree of regulation is allowed."[17] Here, even with a narrow construction the five-year limit grossly impairs a core judicial function: deciding cases.[18]

Courts have inherent constitutional power to decide cases.[19] A statute of limitations is the classic example of a legislative regulation on that power. This is why the five-year mandatory dismissal under Code of Civil Procedure sections 583.310 and 583.360[20] is constitutional: it is a reasonable regulation that does not practically defeat or materially impair the courts' constitutional power.[21] Now assume the electorate by initiative amended section 583.310 to provide: "Any civil action shall be resolved by a final and appealable judgment within five court days from the complaint being filed." Doubtless in that event the court would find that its constitutional powers were "so restricted by unreasonable rules as to virtually nullify them," and hold "the statute an unreasonable limitation on the constitutional powers of the appellate and supreme courts."[22] Similarly, capital cases are massively

time-consuming and complex matters.[23] They generally take a decade to resolve, twice the time Proposition 66 would permit.[24] A statutory directive to cut that time in half surely does violence to a court's inherent power over its own process.[25] And this statutory measure interferes with the court's ability to preserve its constitutional grant of jurisdiction over capital cases.[26] The court will even modify statutory procedures to prevent losing jurisdiction, or to preserve a capital prisoner's or habeas petitioner's rights on appeal.[27] Proposition 66 presents an even easier case than that.

And yet the majority avoided deciding the constitutional issue this situation presents: if the electorate's legislative act violates the separation of powers, the usual answer is that the act is invalid. Not so here. Instead, the majority set about saving the act. Again, there is an expected analysis when a legislative act needs saving: applying canons of interpretation and maxims of jurisprudence. And again, not so here.

Not the Usual Statutory Interpretation Approach

Although *Briggs* did not invalidate the mandatory deadline for violating separation of powers, neither did it strictly apply the canons of statutory interpretation that apply to all legislative acts, including initiatives like Proposition 66.[28] Those canons start with the premise that their purpose is to determine the electorate's intent to effectuate the law's purpose.[29] A court typically begins with the statute's text, giving that text its ordinary meaning, and construes it in the context of the relevant statutory scheme.[30] Once the electorate's intent has been divined, the provisions must be construed to conform to that intent.[31] Separation of powers principles compel courts to effectuate the purpose of enactments and limit judicial efforts to rewrite statutes even where drafting or constitutional problems may appear.[32]

The majority here used a different interpretive approach that appears to depart from these well-established canons of statutory interpretation. Not applying those canons in *Briggs* was a conscious choice:

> The concurring and dissenting opinion notes, as we have (fn. 28, *ante*), that other states have invalidated statutes which violate the separation of powers by imposing strict time limits. However, California courts have chosen a different

> approach to avoid separation of powers problems. Rather than striking down statutes that might unduly interfere with judicial functions, we construe them so as to maintain the courts' discretionary control.[33]

This approach expressly departs from a standard first-application canon of statutory interpretation: legislative intent controls. The majority acknowledges that the voters intended the five-year limit to be mandatory.[34] If that is so, then the analysis should become a simple syllogism: The voters intended X, which is unconstitutional, therefore that part of the statute is invalid. Again, the majority recognizes that this interpretive approach is valid and (as the dissent notes) is used by other states.[35] But not in California: "California courts have chosen a different approach to avoid separation of powers problems. Rather than striking down statutes that might unduly interfere with judicial functions, we construe them so as to maintain the courts' discretionary control."[36]

Initially, this sounds plausible. Another canon requires courts to avoid interpreting a statute in a way that might render it unconstitutional. And "shall" is notoriously vague and may be construed as directory, rather than mandatory.[37] The problem is that the court "may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."[38] As they often do, the canons cut both ways.[39]

Interestingly, the same can be said of all three opinions in *Briggs*: each sounds plausible, with a major catch. The majority correctly identifies a long line of California cases that read seemingly mandatory language as directory when no penalty is provided for noncompliance. But that non-canon interpretive approach contravenes the electorate's intent. Justice Liu is also correct: the court cannot appropriate more funds for capital cases, nor make counsel file shorter briefs in less time without raising due process concerns. Yet that is what Proposition 66 requires. And Justice Cuéllar is right: a mandatory, enforceable deadline would be invalid as a separation of powers violation (and without the deadline the act probably violates the single subject rule). That, however, should not be the first option for a court that respects the electorate's policymaking power, and interprets statutes to avoid constitutional invalidity.

So if all three opinions are correct, how does the case get decided? If the various interpretive approaches (the majority's avoidance rule, the interpretation canons in the other opinions) all produce equally plausible results, something must tip the balance. While the majority acknowledges that initiative acts should be liberally construed to maintain the electorate's power, the decision does not rest on deference.[40] We suggest that a factual issue and two jurisprudential concerns tip the scale ever so slightly against outright invalidation.

A Concession, Stare Decisis, and a Policy Concern

The familiar appellate advocacy rule about conceding weak points when necessary at oral argument is relevant here. Justice Cuéllar's opinion notes:

> At oral argument, the initiative's proponents (intervener Californians to Mend, Not End, the Death Penalty) admitted that an actual five-year deadline would "perhaps not" be constitutional. The proponents instead let it slip that the initiative's five-year deadline is not a deadline after all, but just a "goal" that has no real consequence if it goes unmet. The Attorney General, also purportedly arguing in support of Proposition 66, added that this five-year "goal" was not "binding" and is really just "an invitation to take up the question of how long these appeals should take."[41]

By making this concession, the initiative's proponents appeared to waive the mandatory five-year deadline issue. When "[b]oth the Attorney General and intervener-proponents . . . concede" that a five-year deadline "would unconstitutionally interfere with the judiciary and violate the separation of powers," those parties necessarily waive the issue of whether a mandatory deadline is constitutional.

But the concession is not conclusive because a statute's constitutionality is solely the court's province, so the court still must decide whether it is constitutional regardless of what position the proponents take.[42] Consequently, whether this statute is facially constitutional remained a live issue despite the concession.[43] Yet the concession is compelling on the issue of the electorate's intent, and it certainly supports the majority's conclusion that "shall" was meant to be directory here.

Regarding stare decisis, the majority cites a long series of cases supporting the propositions that a legislative act that impairs the core judicial power "to control the order of its business" would present a "serious constitutional question," and that reading the text to be directory, not mandatory, to avoid the constitutional question is the preferred resolution. Justice Liu puts it best:

> I acknowledge this is one way of enforcing the separation of powers and there is a lot of water over the dam in our case law. So, although no one really disagrees that "the voters intended the five-year limit to be mandatory," our precedent supports the court's approach of imputing to the voters a further intent not to unconstitutionally impair the judicial function.[44]

Avoidance is the preferred solution because of a policy concern: respect for the electorate. Justice Cuéllar makes a powerful argument that true respect means that the judiciary must be honest with the voters when they overstep their bounds. A fair point; and the majority's decision to respect the voters' intent in a different way appears equally reasonable. Again, nobody is clearly wrong in this case. They just disagree over the "right" way to honor the electorate's intent.

Finally, Justice Cuéllar argued that Proposition 66 did provide an enforcement mechanism. But this is not altogether clear. Although a petition for writ of mandate could be filed, a writ cannot actually enforce the deadline. What remedy could a court issue on a writ petition if the court found that the five-year period had lapsed? The deadline is not a statute of limitations that would bar the action if violated. Nor can a court dismiss the appeal and order an immediate execution without violating the petitioner's due process rights. In theory, the court could set a new deadline that could be enforced through contempt proceedings. But that would do nothing to ensure that the deadline is met in the first instance. And if the deadline is unenforceable, then Proposition 66 must be ambiguous, because the voters are presumed not to have intended an absurd result. Requiring capital cases to be completed in five years *and* requiring someone to issue a writ of mandate to the California Supreme Court are the definition of absurd results.

That absurdity creates an ambiguity. Because the statute is ambiguous, the majority's application of the canons is justifiable. Ultimately, the majority made a

reasonable compromise: legislative intent must be effectuated, that intent is presumed to not include absurd results, constitutional questions are to be avoided, and statutes should be saved to the extent possible by reformation.

Conclusion

The court had a choice between two analytical paths: the measure could be upheld with a directory deadline, or be invalidated as unconstitutional with a mandatory deadline. Under either path, the result is the same: the deadline is void. This may look like six of one, half a dozen of another. Yet there is an important difference. As the court noted in *Shafter*:

> [R]elying on the rules favoring statutory construction to avoid absurd or unjust results, account for statutory context, and uphold a statute's constitutionality when reasonably possible, the court concluded that the time limit before it was "directory and was intended to give this appeal as early a hearing and decision as orderly procedure in this court will permit." Otherwise, the court would have held the statute "an unreasonable limitation on the constitutional powers of the appellate and supreme courts."[45]

We think the best way to frame this decision is that the court ultimately decided to honor the electorate's intent to the extent possible by making the deadline directory, rather than striking it entirely. A purist approach here requires the court to strike down an initiative—a course the court is loath to take, and for good reasons. The other path requires the court to avoid a constitutional conflict (and arguably absurd results) while respecting the electorate's intent to the extent possible. In choosing the latter path, the court displayed its reluctance to strike a voter-enacted initiative in its entirety.[46]

So which is best? Confront the matter directly and strike down part of the initiative as a separation of powers violation, or elide the matter with interpretation tools? Both reach the same result: the voters' intent is not effectuated. Or do they? Is it better to have a whole statute with an unintended meaning, or a statute with parts struck down? The decision comes down to Justice Céllar's point about intellectual honesty: directly telling the voters that their action is invalid or reframing the act much as an executive signing statement would. This may once have been a live

debate in the state high court, but as Justice Liu pointed out, this debate has been resolved for decades. At that point stare decisis becomes a powerful influence.

Recall our statute of limitations hypothetical above. The only functional difference between that example and Proposition 66 is section 583.360, which provides that "[a]n action shall be dismissed by the court on its own motion" when the deadline elapses. Under the *Briggs* analysis the "shall" in our hypothetical cannot be read as directory because section 583.360 contains a penalty. But if the hypothetical initiative is invalidated while Proposition 66 is "saved," is the outcome any different? Practically, no: neither measure takes effect.

The preference for avoiding constitutional questions goes only so far. What happens when the next ballot proponent, having read *Briggs*, imposes a clear deadline on the court *and* provides some consequence for failure to meet that deadline? Or when the proponent amends the California constitution to require the same impossible deadlines as did Proposition 66? That initiative measure, if it ever materializes, will present the issue sharply. As Justice Cuéllar said, "When a statute encroaches on a court's discretion in managing its docket—and there is a clear statement the statute is mandatory, not directory—then we have no option but to provide the public and the other branches with the requisite clarity of decision and doctrine by declaring the statute unconstitutional as a violation of the separation of powers." But let's not borrow trouble.

Senior research fellow Danny Y. Chou contributed to this article. The views expressed here are solely his own, and here he writes only in his academic capacity.

[1] The lineup here is somewhat unusual. Chief Justice Cantil-Sakauye and Justice Chin did not participate; they were replaced by Court of Appeal Justices Hoch and Ikola. Justice Corrigan wrote the majority opinion as acting Chief Justice, joined by Justices Werdegar, Liu, Kruger, and Hoch. Justice Liu filed a concurring opinion, *also* joined by Justices Werdegar, Kruger, and Hoch (how often does a four-justice majority sign a concurring opinion?). Justice Cuéllar filed a concurring and dissenting opinion, joined by Justice Ikola.

[2] *Briggs* at 862 (Liu, J., concurring): "All members of the court agree that this provision imposes no legally enforceable obligation," *Id.* "no one really disagrees

that the voters intended the five-year limit to be mandatory," *Id.* (quotation and citation omitted); "All members of the court agree that if the five-year limit were mandatory, it 'would undermine the courts' authority as a separate branch of government.'" *Id.* at 862–63.

[3] The reader will note that we cite from Justice Liu's concurring opinion throughout this article. We do so for two reasons: his gloss on the majority's opinion illuminates its meaning, and (unusually) this concurring opinion garnered four signatures—a majority of this seven-member court.

[4] *Briggs* at 846–47 (discussing separation of powers limits on legislature and initiative synonymously), citing *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674 (initiative measures are subject to the same constitutional limitations as statutes passed by the legislature; *see also id*. at 883 (Cuéllar, J., concurring): "So far as I can see, courts across the country have found a violation of the separation of powers in every single case addressing a legislative attempt to impose an enforceable judicial deadline. . . . Accordingly, the separation of powers doctrine requires us to strike down this mandatory five-year deadline." *See also id*. at 867 (Liu, J., concurring: "As the court today makes clear, Proposition 66 cannot override the constitutional doctrine of separation of powers and compel this court to alter its docket by deciding more capital cases and fewer noncapital ones.").

[5] Carrillo, Duvernay, & Stracener, *California Constitutional Law: Popular Sovereignty* (2017) 68 Hastings L. J. 731; Carrillo & Chou, *California Constitutional Law: Separation of Powers* (2011) 45 USF. L. Rev. 655.

[6] "[T]he Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States." *People v. Coleman* (1854) 4 Cal. 46, 49; *See Methodist Hosp. of Sacramento v. Saylor* (1971) 488 P.2d 161, 164 ("Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature.").

[7] Cal. Const., art. IV sections 19 (a) and (e); note that both subdivisions are

modified by subdivisions (d) and (f) respectively.

[8] Cal. Const., art. IV section 9 (statute); Art. IV section 12(d) (appropriations).

[9] In California, "the power to legislate is shared by the Legislature and the electorate through the initiative process" (Cal. Const. art. IV, § 1)." *Prof'l Eng'rs in Cal. Gov't v. Kempton* (2007) 155 P.3d 226, 240. The legislature's powers are broader than the electorate's, because the 1911 reforms restored to the electorate only a shared piece of the whole legislative power delegated to the legislature in the 1849 state constitution. *Howard Jarvis Taxpayers Ass'n v. Padilla* (2016) 363 P.3d 628, 646; *Saylor* 488 P.2d at 165 (state's entire lawmaking authority, excepting initiative and referendum powers, vested in legislature). The electorate's legislative power through the statutory initiative is coextensive with, not greater than, the legislature's power. *Deukmejian*, 669 P.2d at 17. In general, the electorate may not enact a statute that the legislature itself could not enact. *Bldg. Indus. Ass'n v. City of Camarillo* (1986) 718 P.2d 68; *Deukmejian*, 669 P.2d at 17. Initiative measures are subject to the ordinary rules and canons of statutory construction. *Evangelatos v. Super. Ct.* (1988) 753 P.2d 585, 601.

[10] Because Proposition 66 made only *statutory* changes, the court had little difficulty concluding that the separation of powers doctrines applied and limited the electorate's legislative powers. If, however, Proposition 66 had made changes to the California constitution, the question would have been much more difficult for the court. Assuming that this version of Proposition 66 would not somehow violate the federal Constitution, the court would presumably have been left with only one question: whether Proposition 66 was an unconstitutional revision because it made structural changes to the California constitution.

[11] *Briggs* at 854: "while the Legislature has broad authority to regulate procedure, the constitutional separation of powers does not permit statutory restrictions that would materially impair fair adjudication or unduly restrict the courts' ability to administer justice in an orderly fashion. Repeatedly, for over 80 years, California courts have held that statutes may not be given mandatory effect, despite mandatory phrasing, when strict enforcement would create constitutional problems."

[12] *Briggs* at 849.

[13] *Deukmejian*, 34 Cal.3d at 674 (initiative measures are subject to the same constitutional limitations as statutes passed by the legislature); *see* note 7 above.

[14] *Brydonjack v. State Bar* (1928) 208 Cal. 439, 442–443; accord, *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 54, 51.

[15] *Brydonjack*, 208 Cal. at 444; *County of Mendocino*, 13 Cal.4th at 51, 54.

[16] *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.

[17] *People v. Bunn* (2002) 27 Cal.4th 1, 16.

[18] See discussion in *Briggs* at 852–53.

[19] *People v. Garcia* (2017) 2 Cal.5th 792, 800 (court has inherent power to inherent power to retain and decide even a moot case); *Mandel v. Myers* (1981) 29 Cal.3d 531, 547 ("Our Constitution assigns the resolution of such specific controversies to the judicial branch of government"); *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 147–48 (every court of record has powers requisite to its proper functioning as an independent constitutional department of government); *Keeler v. Superior Court* (1956) 46 Cal.2d 596, 600 ("There is no question but that, consistent with proper regulations, a court has inherent power to control the course of litigation before it."). See also *In re Jessup* (1889) 81 Cal. 408, 463–64:

The jurisdiction of this court is derived from the constitution, and can be neither enlarged nor abridged by the legislature. What it was in the beginning it remains, and it must remain until the constitution itself is changed. If the constitution has denied to this court the power to grant rehearings in causes that have been decided in bank, the legislature cannot confer the power. If the constitution has conferred the power, the legislature cannot take it away, or, by pretense of regulating its exercise, substantially impair it. And, whatever matters are by the constitution committed to the jurisdiction of the court, the court may by a constitutional majority—that is to say, by the voice of four of its seven justices—decide. The legislature has no more [right] to say that we shall not decide a matter within our jurisdiction unless five justices subscribe an order in writing than we should have to require all acts of the legislature to be subscribed by two-thirds of the members of

each house. The constitution has conferred the power of deciding all matters within our jurisdiction upon a majority of the court; the legislature cannot require more than a majority.

[20] Section 583.310 provides: "An action shall be brought to trial within five years after the action is commenced against the defendant." Section 583.360 provides: "(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article. (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

[21] *Quarry v. Doe I* (2012) 53 Cal.4th 945, 955 ("The Legislature has authority to establish—and to enlarge—limitations periods."); *County of Mendocino*, 13 Cal.4th at 53 ("the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings"; *Perez v. Richard Roe 1* (2006) 146 Cal.App.4th 171, 177: "A core function of the Legislature is to make statutory law, which includes weighing competing interests and determining social policy. A core function of the judiciary is to resolve specific controversies between parties. As part of that function, the courts interpret and apply existing laws such as statutes of limitation."; *Muller v. Muller* (1960) 179 Cal.App.2d 815, 819 (citation and quotation omitted): "The power of the legislature to provide reasonable periods of limitation, therefore, is unquestioned, and the fixing of time limits within which particular rights must be asserted is a matter of legislative policy the nullification of which is not a judicial prerogative."

[22] *Briggs* at 850–51, quoting *In re Shafter-Wasco Irr. Dist.* (1942) 55 Cal.App.2d 484, 487–89 (quotations omitted).

[23] As Justice Liu pointed out in his concurring opinion (*Briggs* at 864):

On average in California, it takes three to five years after a death judgment to appoint appellate counsel. . . . A single death penalty case can and often does dominate a lawyer's practice for well more than a decade. [¶] Direct appeals in this court are completed on average 11.7 to 13.7 years after the death judgment. Many appeals take considerably more time. State habeas review is completed on average

more than 17 years after the death judgment.

[24] *Id.* at 867, Justice Liu in his concurring opinion:

[T]here are reasons why capital briefs are lengthier—opening briefs of 300 to 500 pages, raising 30 to 40 claims, are common—and often take several years to complete. . . . In addition, the record in capital cases is usually massive, often comprising more than 5,000 pages of trial transcript plus several thousand pages of exhibits, juror questionnaires, and additional materials—all of which must be carefully reviewed.

[25] *Briggs* at 867 (Liu, J., concurring): "As the court today makes clear, Proposition 66 cannot override the constitutional doctrine of separation of powers and compel this court to alter its docket by deciding more capital cases and fewer noncapital ones. (Maj. opn., ante, at p. 501–502, 400 P.3d at 59 [construing § 190.6(d) 'to maintain the courts' discretionary control over the conduct of their business'].)"

[26] See *People v. Superior Court* (2017) 2 Cal.5th 523, 533 (courts have inherent power to protect their jurisdiction), citing Code of Civil Procedure section 187 (when jurisdiction is conferred on a court "all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."); *Brydonjack*, 208 Cal. at 442: "Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government."; *see also Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1344 (courts have exercised inherent powers in "situations in which the rights and powers of the parties have been established by substantive law or court order but workable means by which those rights may be enforced or powers implemented have not been granted by statute.").

[27] *People v. Superior Court*, 2 Cal.5th at 532 (when the court has been unable to appoint counsel it "adapted existing procedures to that regrettable reality" as by "recognizing an exception to the general rule that a habeas petitioner must raise all

claims in a single, unamended petition").

[28] *People v. Estrada* (2017) 3 Cal.5th 661, 668 (citations omitted): "In construing the text of a statute adopted through the initiative process, we apply the same principles of statutory interpretation that we apply to statutes enacted by the Legislature. In both contexts, our essential aim is to give effect to the statutory purpose of the specific legislation at issue."

[29] *Id.*; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.

[30] *People v. Johnson* (2015) 61 Cal.4th 674, 682.

[31] *Arias v. Superior Court* (2009) 46 Cal.4th 969, 979.

[32] *Bunn* at 16.

[33] *Briggs* at 858.

[34] *Briggs* at 857: "The concurring and dissenting opinion argues at length that the voters intended the five-year limit to be mandatory. We do not dispute that point."

[35] *Briggs* at 858: "The concurring and dissenting opinion notes, as we have (fn. 28, ante), that other states have invalidated statutes which violate the separation of powers by imposing strict time limits."

[36] *Briggs* at 858.

[37] "Shall" in legal usage is inherently vague and commonly provokes an argument over whether it is permissive, directory, or mandatory. Bryan Garner, Dictionary of Legal Usage 952-55 (3d ed 2011) ("*shall* can bear five to eight senses even in a single document.").

[38] *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.

[39] Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed (1950) at 401-406 (the article lists, side by side, contradictory maxims of statutory interpretation; the article's thesis is that judges select the rules that permit a desired result).

[40] *Briggs* at 827 (citations and quotations omitted, brackets original): "We are guided by policies this court has consistently followed in cases challenging the validity of initiative measures. [T]he Constitution's initiative and referendum provisions should be liberally construed to maintain maximum power in the people. Under article IV, section 1 of the California Constitution, [t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum. . . . We have declared it our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise."

[41] *Briggs* at 874–75.

[42] *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326: "it is the duty of this court, when . . . a question of law is properly presented, to state the true meaning of the statute finally and conclusively . . . ."

[43] And we question whether the court can truly resolve a constitutional issue by forfeiture because it doesn't resolve the issue, especially where a statute's validity is at issue. The court will have to face the validity issue eventually.

[44] *Briggs* at 862 (Liu, J., concurring).

[45] *Briggs* at 851, quoting *In re Shafter-Wasco Irr. Dist.* at 488–89.

[46] *Briggs* at 827 (quotation omitted): "We have declared it our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise."