

Admin.

November 7, 1996

**First Supplement to Memorandum 96-73**

**Annual Report for 1996-97: Unconstitutional Statutes Report**

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Attached to this memo is a staff draft of the Report on Statutes Repealed by Implication or Held Unconstitutional, which is to be included in the 1996 Annual Report. See page 134 in the draft Annual Report attached to Memorandum 96-73.

Respectfully submitted,

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## **Report on Statutes Repealed by Implication or Held Unconstitutional**

Section 8290 of the Government Code provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared<sup>1</sup> and has the following to report:

- No decision holding a state statute repealed by implication has been found.
- No decision of the United States Supreme Court holding a state statute unconstitutional has been found.<sup>2</sup>
- Two decisions of the California Supreme Court holding a state statute unconstitutional have been found.<sup>3</sup>

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1. This study has been carried through 14 Cal. 4th 29 (Advance Sheet No. 28, Oct. 17, 1996) and 116 S. Ct. (1995-96 Term).

2. One decision of the United States Supreme Court held that state statutes were preempted by federal law. In *Smiley v. Citibank (South Dakota)*, 116 S. Ct. 1730 (1996), the Supreme Court affirmed that late payment fees are included in the term "interest" as used in the National Bank Act, 12 U.S.C. § 85 (laws of bank's home state govern the amount of interest chargeable). Therefore, California statutes (e.g. Civ. Code § 1671 governing liquidated damages for breach of contract) are preempted, under the Supremacy Clause (U.S. Const. art. 6, cl. 2), to the extent that they operate to control late payment fees charged within California by out of state banks.

3. In one decision, the California Supreme Court declined to judicially reform statutes deemed unconstitutional by the Ninth Circuit Court of Appeals. In *Kopp v. Fair Political Practices Commission*, 11 Cal. 4th 607, 905 P.2d 1248, 47 Cal. Rptr. 2d 108 (1995), in a plurality opinion, the court found that provisions of Government Code Sections 85301-85304, relating to campaign contributions, found unconstitutional by the Ninth Circuit, could not be reformed so as to closely effectuate the policy judgments of the enacting body. Government Code Sections 85301-85304 were repealed and reenacted in revised form by Proposition 208 (approved November 5, 1996), and appear not to present the constitutional infirmities of the prior sections.

In *Amwest Surety Insurance Co. v. Wilson*,<sup>4</sup> the court found that Insurance Code Section 1861.135, which exempted surety insurance from certain insurance rate regulation provisions of Proposition 103 (approved November 8, 1988), did not further the purpose of Proposition 103 and therefore violated the constitutional rule that the Legislature may not amend or repeal an initiative statute without voter approval “unless the initiative statute permits amendment or repeal without their approval.”<sup>5</sup> Proposition 103 permits amendment without voter approval, but only if the amendment furthers the purpose of the initiative.<sup>6</sup>

In *Pacific Merchant Shipping Assn. v. Voss*,<sup>7</sup> the court held that Food and Agriculture Code Sections 5352-5353 and an implementing regulation, which provide for inspection fees to be charged when ships bring agricultural products into California from foreign countries, while no agricultural inspection fees apply to interstate commerce, discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution.<sup>8</sup>

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One decision of the California Supreme Court interpreted a statute so as to avoid an unconstitutional violation of the Separation of Powers provision of Article III, Section 3 of the California Constitution. In *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996), the court interpreted Penal Code Section 667(f)(2), a provision of the “Three Strikes” sentencing law, to permit judges, acting pursuant to Penal Code Section 1385, to strike prior felony allegations on their own motion. To interpret Section 667(f)(2) as requiring approval of such strikes by the District Attorney would constitute executive oversight of judicial discretion, in violation of the Separation of Powers doctrine.

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

5. Cal. Const. art. II, §10(c).

6. Proposition 103, § 8(b).

7. 12 Cal. 4th 503, 907 P.2d 430, 48 Cal. Rptr. 2d 582 (1995), *cert denied*, 116 S. Ct. 1851 (1996).

8. U.S. Const. art. 1, §8, cl. 3.