

CONFERENCE PANEL

THE GOLDEN LABORATORY:

Legal Innovation in Twentieth-Century California

EDITOR'S NOTE

For the first time, the Annual Meeting of the American Society for Legal History has included a panel of scholars sponsored by the California Supreme Court Historical Society and its journal, *California Legal History*. The 2012 Annual Meeting also appears to be the first at which a panel has been devoted specifically to legal history in California. This panel was one of 35 offered at this year's conference — held at the Four Seasons Hotel in St. Louis from November 8 to 10 — at which papers were presented by scholars from 46 U.S. and 12 foreign universities.

As indicated by its title, “The Golden Laboratory: Legal Innovation in Twentieth-Century California,” the panel represents the continuing dedication by the CSCHS to the theme of California's leading role in American jurisprudence.¹ This panel also represents the first occasion on which we

¹ See, for example, the panel program presented by the CSCHS at the 2006 Annual Meeting of the California State Bar, “California — Laboratory of Legal Innovation,” published in the CSCHS *Newsletter*, Autumn/Winter 2006, Supplement pages 1–4, available at http://www.cschs.org/images_features/cschs_2006-autumn-winter.pdf.

have brought California-directed legal research to the attention of an international scholarly audience at a venue outside of California.

Sponsorship of this panel furthers several of our objectives: encouraging emerging legal historians to undertake new research in the field of California legal history, giving prominence to scholars who do so, and making known the results of their work, both to their colleagues in person and to a broader readership in print and online. At my invitation, Professor Reuel Schiller of UC Hastings College of the Law, a member of the journal's Editorial Board, undertook with enthusiasm the role of chairing the panel and "shepherding" the project through the process of approval and presentation. Professor Lawrence Friedman of Stanford University, also a member of the journal's Editorial Board (and a past president of the ASLH), who had generously agreed to serve as the panel's commentator, was forced by a family medical emergency to leave the conference early and return to California. The three scholars selected for the panel — Mark Brilliant, S. Deborah Kang, and Felicia Kornbluh — who have already achieved recognition in the field of legal history, were thereby given the opportunity and the impetus to develop further the California aspects of their individual areas of interest, as demonstrated by their papers on the following pages.

— SELMA MOIDEL SMITH

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FROM INTEGRATING STUDENTS TO REDISTRIBUTING DOLLARS:

*The Eclipse of School Desegregation by
School Finance Equalization in 1970s California*

MARK BRILLIANT*

My current book project examines the relationship between opposition to school desegregation through busing, school finance equalization litigation and reform, Proposition 13 and the tax revolt, and the increasing concentration of income and wealth in the hands of the nation's richest one percent that pundits, policy makers, and scholars have begun to refer to as America's new Gilded Age. In my paper, I want to explore a piece of this particular constellation of interrelated developments, namely, the connection between the rise of school busing to promote school desegregation and the rise of school finance litigation and reform, which scored its first major victory in the California Supreme Court in 1971 in the case of *Serrano v. Priest*.

Criticism of the largely property tax revenue basis for funding K–12 schools is almost as old as public schools themselves. Alluding to the

* Mark Brilliant is an associate professor in the Department of History and in the Program in American Studies at the University of California, Berkeley. He wishes to extend a special thanks to Reuel Schiller for his invitation to join the panel at the 2012 American Society for Legal History Annual Meeting from which this paper is drawn and for commenting so thoughtfully on its contents, as well as the California Supreme Court Historical Society for sponsoring the panel. The author requests that this paper be read as a slightly expanded version of his conference paper and as a work-in-progress.

inequalities in per pupil expenditures between local school districts rooted in their differing property values, no less than Horace Mann himself denounced the notion that “mere circumstance of local residence” should shape a child’s access to equality of educational opportunity.¹ Mann’s concern anticipated similar reservations voiced by northern members of Congress during Reconstruction and the Gilded Age, Populists, Progressives, and New Dealers, and found expression, almost verbatim, in the California Supreme Court’s *Serrano* decision, which rejected the state’s school financing scheme for making “the quality of a child’s education a function of the wealth of his parents and neighbors.”²

Given this longstanding criticism, why did it take until the 1970s before school finance reform gained traction, beginning in California and then spreading across the country? The answer, I contend, can be found in the combination of two contemporaneous developments: opposition to school busing to promote desegregation and the burgeoning tax revolt over rising property taxes. The former spurred support for school finance reform whose proponents — from both the left and right — often expressed preference for the redistribution of property tax dollars over the redistribution of students through busing, while the latter prompted efforts to search for alternative sources of revenue for financing public schools.

On January 16, 1970, Daniel Patrick Moynihan delivered a soon-to-become infamous memorandum to President Richard Nixon. “The time may have come when the issue of race could benefit from a period of ‘benign neglect,’” Moynihan wrote. By “race,” Moynihan meant the “position of Negroes” — “*the* central domestic political issue.”³ And at the center of

¹ Mann quoted in Robert A. Gross and John Esty, “The Spirit of Concord,” *Education Week*, October 5, 1994.

² Goodwin Liu, “Education, Equality, and National Citizenship,” *Yale Law Journal* 116:2 (2006): 331–411; Charles Postel, *The Populist Vision* (New York: Oxford University Press, 2007); David Tyack, Robert Lowe, and Elisabeth Hansot, *Public Schools in Hard Times: The Great Depression and Recent Years* (Cambridge: Harvard University Press, 1987); *Serrano v. Priest*, L.A. No. 29820, 5 Cal. 3d 584, August 31, 1971.

³ “Memorandum for the President from Daniel P. Moynihan,” January 16, 1970, John D. Ehrlichman Papers, Box 30, Folder Committee for Educational Quality [2 of 2], Richard Nixon Presidential Library (hereafter, RN).

the race issue in the early 1970s was busing, which Nixon would describe in 1971 as “by far the hottest” domestic issue.⁴

California turned up the heat on the busing controversy less than a month after Moynihan’s memorandum. On February 11, 1970, Los Angeles County Superior Court judge Alfred Gitelson ruled in the case of *Crawford v. Board of Education of the City of Los Angeles*. “Negro and Mexican children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be,” Gitelson announced. His decision drew no distinction between “segregation not compelled by law (allegedly *de facto*)” and segregation “compelled by law (allegedly *de jure*).”⁵ Moreover, in the sprawling city of Los Angeles, it required extensive busing to implement. Little wonder, then, that the *Los Angeles Times* described *Crawford* as “the most significant court decision on racial segregation outside the South.”⁶

California governor Ronald Reagan was more blunt. He denounced the decision as “utterly ridiculous . . . shatter[ing] the concept of the neighborhood school as the cornerstone of our educational system.”⁷ Later that year, Reagan reiterated his vigorous opposition to “forced busing,” insisting instead that “quality education must be provided for every child” within his or her neighborhood school.⁸ Caspar Weinberger, Reagan’s director of finance, had suggested how to help make this happen the year before when he called for property taxes — which he described as “one of the most regressive” — to be reduced and replaced with increased income, commercial real estate, and sales taxes. In turn, these taxes, “which are directly related to ability to pay,” Weinberger maintained, would support 80 percent of public school costs.⁹ Similarly, a Reagan Administration “Issue Paper”

⁴ White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

⁵ *Crawford v. Board of Education of the City of Los Angeles*, “Minute Order of Court’s Intended Findings of Fact, Conclusions of Law, Judgment, and for Preemptory Writ of Mandate,” February 11, 1970.

⁶ “L.A. Schools Given Integration Order,” *Los Angeles Times*, February 12, 1970.

⁷ “Press Release #101,” February 17, 1970, Box GO 74, Folder Busing — General, 1970 (2/3), Ronald Reagan Governor’s Papers, Ronald Reagan Library (hereafter, RR).

⁸ Ronald Reagan, speech to the California Real Estate Association, October 5, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

⁹ Caspar Weinberger, press release, July 22, 1969, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

on education called for property tax reform and greater support for “less affluent” school districts in March 1970, just one day before Reagan vowed to “take all legal steps possible to oppose mandatory student busing.”¹⁰

Richard Nixon concurred with his fellow California Republican’s busing diagnosis and school finance prescription. Indeed, if Nixon’s *opposition* to school desegregation through busing, represented the “neglect” half of Moynihan’s “benign neglect” advice, his *support* for school finance reform represented the “benign” half.¹¹ In a nationally televised address on busing delivered on March 24, 1970, Nixon blasted *Crawford* as the “most extreme” desegregation decree issued by any court to date owing to its failure to distinguish between unconstitutional de jure segregation and “undesirable” (but not unconstitutional) de facto segregation. Where de facto segregation existed, rooted in “residential housing patterns,” Nixon maintained, it was better to employ “limited financial resources for the improvement of education . . . rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools.”¹²

Nixon’s preference was to redistribute those “limited financial resources” to improve education — to desegregate dollars, rather than desegregate students. He spelled this out just a few weeks earlier in a “Message on Education Reform” in which he denounced the absence of “equal educational opportunity in America.” This absence was felt most in school districts with a “low [property] tax base,” which “find it difficult or impossible to provide adequate support to their schools.” Declaring school finance inequality a “national concern,” Nixon called for “narrowing the gap” between “rich and poor states and rich and poor school districts.”¹³

To this end, he issued Executive Order 11513, establishing “The President’s Commission on School Finance,” chaired by Neil McElroy, formerly secretary of defense during the Eisenhower Administration. Nixon’s action

¹⁰ Issue Paper No. 1 (Education), March 2, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR; Draft of form letter to constituents, March 3, 1970, GO 74, Folder Busing — General, 1970 (2/3), RR.

¹¹ White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

¹² Richard Nixon, “Statement by the President on Elementary and Secondary School Desegregation,” March 24, 1970, Daniel Patrick Moynihan Papers, Box 23, Folder Desegregation, RN.

¹³ Richard Nixon, “Message on Education,” March 3, 1970, Daniel Patrick Moynihan Papers, Box 20, Folder Commission on School Finance [1 of 7], RN.