ARTICLES

CALIFORNIA'S FIRST JUDICIAL STAFF ATTORNEYS:

The Surprising Role that Commissioners Played, 1885–1905, in Creating the Courts of Appeal

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In the late nineteenth and early twentieth centuries, the California Supreme Court employed legal staff — then called "commissioners" — quite differently from how it uses chambers attorneys and law clerks today. Controversy surrounding that former system led to creation of the Courts of Appeal. As we'll see, the story unfolds like a Gilbert & Sullivan operetta:

♦ The Supreme Court, which was regularly traveling up and down the state hearing oral arguments in San Francisco, Sacramento, and Los Angeles,

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was chronically unable to keep pace with an increasing influx of direct appeals from numerous trial courts throughout the state.

♦ After the Legislature directed the court to hire "commissioners" to help with its workload, a few thousand opinions authored and signed by the court's new staff were published in the *California Reports* — and approximately 700 more were published, along with hundreds of other unreported Supreme Court opinions, in the reports of "*California Unreported Cases*."

♦ There were public accusations of overreaching by the staff commissioners and abdication of judicial responsibility by the justices, culminating in major litigation by a disgruntled appellate lawyer — ultimately upholding the court's authority to use legal staff.

♦ The hired staff commissioners and elected justices played musical chairs, trading places numerous times — appearing to confirm criticisms that they were inappropriately interchangeable.

♦ Meanwhile, and amidst growing calls for the state to create an intermediate appellate court, the Supreme Court remained backlogged even with help from the staff commissioners. At one point the court fell so far behind that all seven justices, unable to file cases within ninety days after submission, went unpaid for eight months.

♦ And finally, after nearly two decades, there was an agreement to jettison the criticized staff commissioner system, and to forbid its use ever again — paving the way for the voters' acceptance of a constitutional amendment to create the California Courts of Appeal. When the music stopped, all remaining staff commissioners became appellate court justices.

I. AN OVERBURDENED COURT TRIGGERS A LEGISLATED MANDATE: HIRE HELP

The Supreme Court bench, having been enlarged from three to five justices in 1862, was nevertheless severely backlogged by the late 1870s.[1] To

[1] *Current Topics* (July 20, 1878) 1 Pac. Coast L.J. 401 [describing the "long calendar of cases waiting to be argued" before the Supreme Court and calling for "more courts and more judges"]; Willis & Stockton, 2 Debates and Proceedings of the Constitutional Convention of the State of California (State Printing Office, Sacramento, Cal. 1880) at 950 [reporting that in the prior four years the court had been

cope with increased litigation in a growing and evolving state, the court resorted to strong measures. Taking advantage of its earlier conclusion that the Legislature could not force it to state the grounds for its decisions in writing,[2] the court frequently decided cases by cursory memorandum decision, instead of by full written opinion — and sometimes it decided cases with no written decision at all.[3] It published new rules[4] under which it was quick to find that parties had waived their right to appeal,[5] and attempted to shrink its docket by imposing costs when it deemed appeals to be frivolous.[6] And the court frequently avoided "the annoyance of petitions for rehearing" by simply making its judgments final immediately.[7]

Yet those and related palliatives[8] did not reduce the backlog. Instead they just upset and frustrated litigants and their attorneys — fueling existing calls for a constitutional convention.[9] And although a former justice proposed that the state create an intermediate appellate court,[10] that would not happen for another quarter century. In the meantime, the state's new Constitution,

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"unable to fully dispatch the business before it" although it had decided more than 2,200 cases through "an almost incredible amount of labor"].

[2] Houston v. Williams (1859) 13 Cal. 24. The court branded the statute mandating written decisions "a most palpable encroachment upon the independence of this department." *Id*. at 25. Indeed, the court said, an opinion stating reasons for a decision is warranted "in important cases." But "not every case . . . will justify the expenditure of time necessary to write [such] an opinion." *Id*. at 26. Moreover, the court viewed the statute as an impermissible incursion on its necessary ability to control and modify the opinions that the court did deem worthy of rendering. *Id*. at 27–28.

[3] 2 Willis & Stockton, *supra* note 1, at 950 [noting that in the prior four years the court had decided 559 cases without written opinion]; *see also* McMurray, *An Historical Sketch of the Supreme Court of California*, in Historical and Contemporary Review of Bench and Bar in California (The Recorder Printing & Pub. Co., S.F. Cal. 1926) at 22, 35–37.

[4] Set out in (1878) 52 Cal. 677.

[5] McMurray, *supra* note 3, at 35.

[6] *Id*. [noting that the court did so "with some liberality"].

[7] *Id*. at 34.

[8] The court also adopted a problematic rule, which in turn it frequently ignored, requiring the justices to prepare an official syllabus for each full written decision — and making that brief syllabus, and not the full opinion of the court, "the authoritative precedent." *Id*. [referring to 52 Cal. at 689, rule 39].

[9] McMurray, *supra* note 3, at 34.

[10] *Current Topics* (Apr. 20, 1878) 1 Pac. Coast L.J. 141, 142 [reporting former Supreme Court Justice Solomon Heydenfeldt's suggested creation of "three Courts of Appeal"].

approved by the voters in 1879, attempted to address the court's backlog through other incremental measures: It increased the Supreme Court bench from five to seven members, and adopted a novel procedure that allowed the court to designate some of its cases for decision by one of two departments of three-justice panels, with the possibility of rehearing in bank.[11]

Even with these reforms, and although the court was regularly resolving many hundreds of cases annually (most with written opinions; the *California Reports* for 1882 contain approximately 880),[12] it was still quite backlogged five years later, for various reasons. First, because the court's appellate jurisdiction was mandatory — if an appeal of any superior court decision throughout the state was filed, the Supreme Court was obligated to resolve the case — even such high productivity was insufficient in the face of increasing appeals. Second, in an effort to delay judgment against them, many litigants contested minor rulings arising from increasing numbers of trial courts.[13] Third, the Supreme Court's department decisions frequently were reconsidered by the full court in bank, meaning the court decided them twice.[14] And it could not have helped efficiency that the justices were, as a

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[11] Kagen et al., *The Evolution of State Supreme Courts* (1978) 76 Mich. L. Rev. 961, 975; McMurray, *supra* note 3, at 35–36. The department system was originally proposed for California in *Current Topics* (June 1, 1878) 1 Pac. Coast L.J. 261, 261–62 [reporting and describing the submission of trial court Judge Eugene Fawcett, of the "First Judicial District"]. The practice of sitting in departments (or divisions) apparently traced to procedures used by "the English Court of Appeal." Pound, Organization of the Courts (Little, Brown Co., Boston, Mass. 1940) at 165–66, 214. *See also id*. at 214–20 [describing practices in other jurisdictions that subsequently followed California's lead].

[12] Volumes 60–62 of *California Reports*, "Table of Cases Reported." *See also* Blume, *California Courts in Historical Perspective* (1970) 22 Hast. L.J. 121, 169–70 [describing a 790-case backlog in 1882].

[13] These problems became only more acute over the ensuing twenty-five years. *See, e.g., Notes* (1884) 1 West Coast Rep. 639 ["Seventy [superior court] trial judges are sending up a crop of litigation that no seven judges on earth could do justice to, and write the reason for their rulings"]; *The Witness* (Aug. 29, 1891) Vol. 7, No. 17 The Wave, at 8 [asserting that litigants filed appeals posing "the most frivolous questions," so as to "keep their legal antagonists out of their just deserts for years"]; *Appellate Courts Provided For by Amendment* (Aug. 15, 1904) San Francisco Examiner, at 6 [noting that although the Supreme Court resolved on average 650 cases yearly, it took in and was required to hear 1,000].

[14] Blume, *supra*, 22 Hast. L.J. at 169 [noting that cases remained on calendar for nearly two years prior to being heard] and 170 [the "'working power of the two

constitutional convention delegate described, "a Court on wheels"[15] — constantly boarding horse-drawn carriages and steam locomotives, traveling around the state to hear oral arguments not only at its headquarters in San Francisco, but also in Sacramento and Los Angeles.[16]

In 1884 San Joaquin County Judge A. Van R. Peterson revived the earlier suggested solution to the backlog: create an intermediate court of appeal.[17] But instead, in March 1885, the Legislature adopted a stop-gap measure, directing the Supreme Court to hire help. It was to appoint "three persons of legal learning and personal worth" as "commissioners," who would be paid the same as the justices, to "assist the Court in the performance of its duties and in the disposition of the numerous cases now pending."[18] This initial program was funded to last four years.

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departments [was] not much greater than that of a single court, for after a hearing in department many cases were heard in bank' "].

[15] 2 Willis & Stockton, *supra* note 1, at 954 [remarks of Mr. Hale, arguing against "cart[ing] . . . all over the state, and asserting that the court should "have some stability" and be based in Sacramento exclusively]. *See generally* Dear & Levin, *Historic Sites of the California Supreme Court* (1998–99) 4 Cal. Sup. Ct. Hist. Soc'y Y.B. 63, 72–74 [recounting the delegates' assessments of the merits and demerits of Sacramento, Los Angeles, and San Francisco — along with discussions of excessive heat, flooding, vultures, earthquakes, and the relative quality of available whiskey].

[16] Despite 1872 legislation directing the court's justices, clerk, and reporter to "reside at and keep . . . offices in the City of Sacramento (former Cal. Pol. Code, § 852), the court had returned to San Francisco for its headquarters in early 1874. Dear & Levin, *supra*, 4 Cal. Sup. Ct. Hist. Soc'y Y.B. at 71–72. That same year the Legislature retroactively gave its blessing to the court's move, instructing it to hold oral arguments in both cities. Acts Amendatory of the Codes, 1873–1874, ch. 675, § 1, at 395–96. In 1878 the Legislature directed the court to additionally hold oral arguments in Los Angeles. Acts Amendatory of the Codes, 1877–1878, ch. 142, § 2, at 22. *See generally* Blume, *supra*, 22 Hast. L.J. at 162.

[17] *Notes* (1884) 1 West Coast Rep. 639.

[18] Cal. Stats. 1885, ch. 120, § 2, at 102. *See generally* Bakken, *The Court and the New Constitution in an Era of Rising Industrialism, 1880–1910*, in Scheiber (Ed.), Constitutional Governance and Judicial Power — The History of the California Supreme Court (Berkeley Pub. Policy Press, Institute of Governmental Studies, Berkeley, Cal. 2016) 82–84; McMurray, *supra* note 3, at 38. Other states also initially adopted various commissioner systems in lieu of intermediate appellate courts, in attempts to deal with increasing demands on state high courts. *See* Kagen et al., *supra*, 76 Mich. L. Rev. at 975, fn. 33; Pound, *supra* note 11, at 201–13 [describing the various forms of commissions used over seventy years in nineteen states]. Previously, the California Constitution, both as amended in 1861 (art. VI, § 11) and thereafter under

The court promptly appointed three commissioners, and within a few months the "Supreme Court Commission" was up and running. The court's original plan was to tap three former justices for the positions, but as it turned out, only one of them was available.[19] Each of the three commissioners was nevertheless highly experienced.

Chief Commissioner Isaac Sawyer Belcher, a former gold miner, had been a district attorney and then a district court judge in Yuba County. He served briefly as a justice on the California Supreme Court in 1872–74, and presided as president pro tempore at the then-recent state constitutional convention.[20] Henry S. Foote, son of a United States senator, had been a federal judge in Oklahoma.[21] Niles Searls, a true '49er, survived an arduous migration to California, and after trying mining took up law practice in Nevada City. He became district attorney, then a district judge, and then a state senator.[22]

For good and ill, they also reflected their times. Key parts of the 1879 Constitution were astonishingly racist.[23] These mirrored the prejudices of

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the 1879 charter (art. VI, § 14), permitted trial courts — first called district courts, and subsequently named superior courts — to employ "commissioners" to undertake some of the "chambers business" and other work of trial court judges. As observed *post* note 123, a corresponding provision remains today.

19 Johnson, 1 History of the Supreme Court Justices (Bender-Moss Co., S.F., Cal. 1966) 122 & fn. 4 [recounting the Supreme Court's plan to appoint former justices I. S. Belcher, W. W. Cope, and Jackson Temple].

20 Johnson, *supra* note 19, at 121–23. *See also generally* McKinstry, *Supreme Court of 1890: An Historical Overview* (Spring 1993) Cal. Supreme Ct. Hist. Soc'y Newsletter 8, 9. Regarding Belcher's election as president pro tempore at the constitutional convention, see 1 Willis & Stockton, *supra* note 1, at 38.

21 McKinstry, *supra* note 21, at 9.

22 Johnson, *supra* note 19, at 152–55. Searls was a "dyed-in-the-wool Democrat" who nevertheless admired President Lincoln. *Id*. at 153. *See also* Schuck, History of the Bench and Bar of California (The Commercial Printing House, L.A., Cal. 1901) at 494–95.

23 Some of the history and resulting provisions are related in *In re Chang* (2015) 60 Cal. 4th 1169, 1172–73 [describing the anti-Chinese sentiment that was a major impetus for the convention, and the ensuing constitutional provisions (1) denying the right to vote to any "native of China"; (2) directing the Legislature to enact laws to combat "the burdens and evils" posed by Chinese immigrants; (3) prohibiting any corporation or government entity from "employ[ing] directly or indirectly, in any capacity, any Chinese or Mongolian" and directing the Legislature to "pass such laws as may be necessary to enforce this provision"; and (4) directing the Legislature to "provide

the era, as already reflected in early case law and statutes.[24] Similarly, the justices elected to the court under the new state charter were overwhelmingly members of the xenophobic Workingmen's Party.[25] It seems probable that some of the hired staff commissioners held similar views.[26]

II. THE COURT'S USE OF COMMISSIONERS

The staff commissioners performed functions similar to those of today's appellate court and Supreme Court attorney staff. After a case was assigned to three commissioners, they were to review the record and briefs,

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the necessary legislation to prohibit the introduction into this State of Chinese" and to "discourage their immigration by all the means within its power"]. The convention delegates invested substantial time addressing these and related issues. *See* Willis & Stockton, *supra* note 1, at (vol. 1) 627–40; (vol. 2) 641–92; 695–721, 724–29, 739, 756; and (vol. 3) 1428–31, 1435–37, 1493–94.

[24] *See*, *e.g.*, People. v. Hall (1854) 4 Cal. 399 [finding a Chinese person to be an "Indian" under a statute that prohibited a "Black or Mulatto person, or Indian . . . [from] giving evidence in favor of, or against a white man," and reversing the murder conviction of a white man for killing a Chinese miner because the witnesses who testified at trial were Chinese]. Regarding *Hall*, *see*, *e.g.*, Nagel, *The Worst Statutory Interpretation Case in History* (2000) 94 N.W. L. Rev. 1445, 1459–68; Traynor, *The Infamous Case of People v. Hall (1854) — An Odious Symbol of Its Time* (Spring/Summer 2017) Cal. Supreme Ct. Hist. Soc'y Newsletter 2 [noting that on remand, the defendant escaped retrial] and *id*. at 6–8 [appended "colorful tidbits"]. Regarding corresponding and equally odious anti-Chinese early legislation, see Cal. Stats. 1858, ch. 313, at 295; Cal. Stats. 1862, ch. 339, at 462; Cal. Stats. 1872 (1872 Reg. Sess.) res. ch. 20, at 970 (Assem. Conc. Res. No. 3); and Cal. Stats. 1874 (1874 Reg. Sess.) res. ch. 29, at 979 (Sen. Conc. Res. No. 25). Statutory law also required segregated schools. E.g., Cal. Stats. 1870, ch. 556, § 53, at 838, & § 56, at 839 ["The education of children of African descent, and Indian children, shall be provided for in separate schools"]. The court in Ward v. Flood (1874) 48 Cal. 36, 52 found no constitutional problem with separate-but-equal schools.

[25] McMurray, *supra* note 3, at 37 [six of seven justices elected in 1879 "were nominees of the Workingmen's Party"]. McClain, In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America (U.C. Press, Berkeley, Cal. 1994) at 79–83, describes the influence on the constitutional convention of the Workingmen's Party, led by Dennis Kearney, whose slogan was "The Chinese Must Go!" One-third of the convention delegates were members of that party — "by far the largest voting block present." *Id*. at 81.

[26] As the constitutional debates disclosed, Belcher, like the vast majority of his fellow delegates, expressed (or at least acceded to) racist views concerning Chinese immigrants. 2 Willis & Stockton, *supra* note 1, at 715 & 727 [remarks of Belcher].

undertake any necessary legal research, and submit a draft memorandum in the form of a proposed opinion. This is in some respects akin to the model used currently.

There were substantial differences, however. The first related to constitutional organization. As noted, the 1879 Constitution encouraged the court to operate in two departments of three-justice panels.[27] This effectively created a somewhat crude and ultimately dysfunctional internal form of an intermediate court of appeal. Final review was possible in bank before the full seven-member court. Sometimes, full review was *required*: Under the Constitution's judicial article, department decisions had to be unanimous in order to produce a judgment — meaning that any dissent would automatically trigger an in bank hearing. The same provision afforded no right to oral argument except in cases that were heard in bank.[28]

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[27] In order to avoid exercising discretion in the distribution of cases, the chief justice assigned all even numbered cases to one department, and all odd to the other. McMurray, *supra* note 3, at 75–76. Sloss, *M. C. Sloss and the California Supreme Court* (1958) 46 Cal. L. Rev. 715, describes how the department system worked in practice, and the chief justice's special role: "Each department, so far as its own work went, had a great deal of independence; it could adopt its own methods of assigning cases and announcing decisions. Each associate justice was for practical purposes a member of two separate, though interlocking, courts — his own department and the full bench. His most intimate association was with his departmental colleagues; and when . . . each department was operating harmoniously, its members influenced each other and a departmental view of legal issues was likely to emerge." *Id*. at 716. Moreover, the chief justice during most of the relevant period, William H. Beatty, "did not ordinarily sit in either department," and he wrote fewer "than the usual number of opinions in bank" because he "devoted much of his time to a painstaking study of the numerous applications for writs and petitions for rehearing." *Id*.

[28] At that time California Constitution article VI, former section 2 provided simply, and without reference to oral argument: "The presence of three Justices shall be necessary to transact any business in either of the departments, except such as may be done at Chambers, and the concurrence of three Justices shall be necessary to pronounce a judgment." By contrast, the procedure governing hearings in bank specifically contemplated oral argument: "The Chief Justice may convene the Court in bank at any time, and shall be the presiding Justice of the Court when so convened. The concurrence of four Justices present at the argument shall be necessary to pronounce a judgment in bank; but if four Justices, so present, do not concur in a judgment, then all the Justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four Judges shall be necessary." Today's corresponding provision (art. VI, § 2), which was revised in 1966 to eliminate the by then disused department practice, assumes the court will hear argument in bank, and states, "Concurrence of 4

This, in turn, allowed the justices to assign to the commissioners cases that, the court hoped, would be decided on the briefs alone, and with the understanding that they could be resolved without oral argument.[29]

Second, whereas today it is understood that attorney staff serve a behind-the-scenes research and drafting role for the justices,[30] the nineteenth century court commissioners were anything but anonymous. The commissioners' draft opinion — authored by one of them, and usually signed by the other two — would be submitted to a panel of three Supreme Court justices, sitting in one of the departments. And that signed "commissioner opinion" — with each commissioner's name as prominent as any justice's — would be adopted (sometimes after modifications, but often verbatim) by the justices, making it the court's judgment, subject only to rehearing before the full seven-member court in bank.[31] The result of this system was that the commissioners' opinion usually would become *the* opinion of the Supreme Court. And most of these opinions would be published in the *California Reports*, in a format that looked just like any other Supreme

judges present at the argument is necessary for a judgment." (Even under this provision, however, in limited circumstances there is no right to oral argument. *See* Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1253–61.).

[29] People v. Hayne (1890) 83 Cal. 111, 124 (Beatty, C.J., conc.) ["The cases which are referred by us to the commission are those which are fully presented on the papers"]; accord, *post* text at notes 49 & 50 [describing testimony of Justice Thornton and Commissioner Hayne]; *The Supreme Court, Justice Patterson Answers "The Witness"* (Sept. 5, 1891) Vol. 7, No. 18 The Wave at 8 [cases assigned to the commissioners were those "submitted on the briefs"]. *See also* Blume, *supra*, 22 Hast. L.J. at 170 [noting the court concentrated on deciding matters on the briefs and had little time for oral argument].

[30] *See post* note 122.

[31] *See generally* Pound, *supra* note 11, at 204–05 [describing how the commissioners were utilized by the court]. There were substantial variations. For example, sometimes the full court adopted an opinion issued by the commissioners. E.g., In re Asbill (1894) 104 Cal. 205, 208; Jones v. Board of Police Commissioners (1903) 141 Cal. 96, 98. And not infrequently, a divided in bank court adopted the commissioners' opinion, with some justices dissenting. E.g., Estate of Hugh J. Glenn (1888) 74 Cal. 567, 569; Yosemite Stage etc. Co. v. Dunn (1890) 83 Cal. 264, 269–70; Daley v. Russ (1890) 86 Cal. 114, 118; Tyler v. Mayre (1892) 95 Cal. 160, 161–70; Murray v. Murray (1896) 115 Cal. 266, 279. Less frequently, when a department panel of justices adopted the commissioners' opinion, a justice wrote separately to explain his own reasons for concurring. E.g., McLaughlin v. Clausen (1897) 116 Cal. 487, 492. And sometimes a department panel adopted an opinion written by a commissioner and concurred in by only one other commissioner. E.g., Pool v. Butler (1903) 141 Cal. 46, 54.

Court case set out in those volumes, complete with caption, abstract, headnoted text, and a disposition paragraph.

This process appears to have vested far more authority in the commissioners compared with the present system, under which a staff attorney or law clerk submits a draft to a single justice to whom the case has been assigned — and who then reviews, edits, requires rewrites and generally has significant input into the version that finally circulates within the court. It is unknown whether comparable initial (or subsequent) oversight was employed by the justices when they assigned matters to the commissioners.

Fewer than five months after the Legislature told the court to hire help (and just two days after the court decided a case in which Chief Commissioner Belcher himself was counsel of record for one of the parties[32]), three justices of the Supreme Court adopted the first "commissioner opinion": *Smith v. Cunningham*, set out in the *California Reports* at 67 Cal. 262, looking like any other case of the court at that time.

Except for these differences: The opinion shows that it was written by "Searls, C." At the end, after the opinion's reasoning, comes this phrase — a version of which the commissioners and Supreme Court justices would use more than 3,700 more times in the *California Reports* over the next twenty years: "We find no error in the record and the judgment should be affirmed." The signatures of the concurring commissioners, "Belcher, C. C., and Foote, C.," appear next, followed by the statement: "The Court. — For the reasons given in the foregoing opinion the judgment is affirmed."[33]

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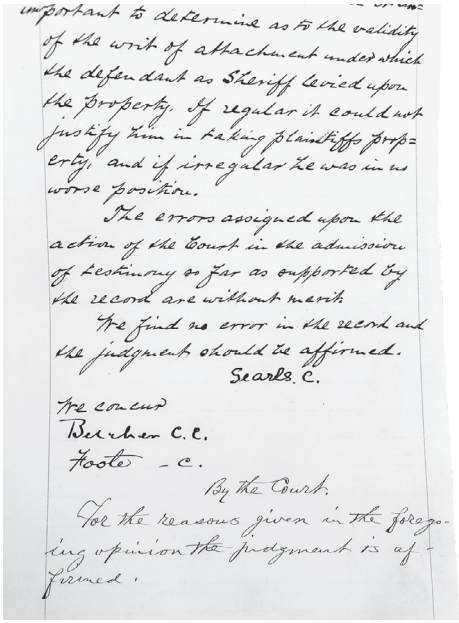
[32] Scollay v. County of Butte (1885) 67 Cal. 249 [Belcher represented Butte, and his client prevailed]. It is unclear whether, or to what extent, the commissioners were precluded from practicing law during their terms. The 1879 Constitution had adopted a provision barring judges and justices from engaging in the private practice of law while in office. CAL. CONST. art. VI, former § 22 [presently art. VI, § 17]. No similar prohibition appeared in any provision governing commissioners. The impetus for the judicial provision, in turn, might be traced to the practices of the earliest justices, two of whom "devoted a great part of their time while members of the Court to private affairs." JOHNSON, *supra* note 19, at 20. The first chief justice, Serranus Clinton Hastings, opted not to seek re-election at the end of his term, in favor of becoming attorney general, so that he could be even "freer to engage in private business." *Id*.

[33] As described *post*, text at notes 92–94, the phrasing changed periodically from case to case, and over the years, sometimes becoming more deferential on the part of the commissioners, and also becoming somewhat more transparent on the part of the justices, who eventually began signing their own names.


important to determine as to the validity
of the writ of attachment under which
the defendant as Sheriff levied upon
the property. If regular it could not
justify him in taking plaintiffs prop=
erty, and if irregular he was in no
worse position.
The errors assigned upon the
action of the Court in the admission
of testimony so far as supported by
the record are without merit.
We find no error in the record and
the judgment should be affirmed.
Searls C.
We concur
Belcher C.C.
Foote - C.
By the Court.
For the reasons given in the foregoing opinion the judgment is affirmed.

The justices immediately adopted the same approach with respect to unreported commissioner opinions. Some might, at this point, be thinking: *unreported* Supreme Court opinions? Yes indeed. Although an early statute mandated that all decisions were to be reported,[34] the 1849 Constitution did not address that issue. And the 1879 Constitution, even as amended today, calls only for the publication of opinions as the court deems warranted.[35] The court declined to report some of its opinions beginning in 1855, and that practice was codified in an 1860 statute, under which the justices were permitted to direct that certain opinions not be reported.[36] The court issued approximately 1,800 unreported opinions over the next twenty-five years. That practice continued unchanged with the advent of the commissioners, who produced nearly 700 of the unreported opinions, bringing the total number of Supreme Court commissioner opinions to approximately 4,400.

Eventually the court's unreported opinions began to be collected and published regularly, albeit unofficially, in the *Pacific Reporter*, which commenced operation in late 1883. All unreported opinions that could be

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34 Cal. Stats. 1850, ch. 90. *See generally* Strauss, *Historical Study — Written Opinions* (1964) 39 J. St. Bar of Cal. 127. As alluded to (*ante* note 2), another early statute, which the court first ignored and later found unconstitutional, required the court to explain its decisions in writing.

35 The 1849 California Constitution's judicial article (VI) did not require that opinions be given in writing, much less that they be published. Article VI, former section 16 of the 1879 Constitution provided for publication as the court "may deem expedient." Currently, article VI, section 14, provides for publication as the court "deems appropriate"; and California Rules of Court, rule 8.1105(a), which was adopted by the court itself, mandates publication of all Supreme Court opinions.

36 Cal. Stats. 1860, ch. 132, 104.

found from the prior decades were retroactively rescued from archives and published in 1913, in the amusingly named reports, "*California Unreported Cases*." Both publications showed *Moore v. Moore* (1885) 7 Pac. 688, 2 Cal. Unrep. 510, as the first unreported commissioners' opinion case.[37]

III. CRITICISM OF, AND LITIGATION CHALLENGING, THE COMMISSIONERS

Even with the help of the three commissioners, a substantial backlog of cases remained years later.[38] Renewed calls to create an intermediate appellate court[39] again failed. Instead, in early 1889, the Legislature renewed the commissioners program for another four years and increased their number to five.[40]

Yet storm clouds were gathering. After the court had issued more than 1,200 commissioner opinions, there was a legal challenge to the system. In mid-August 1889 Ben Morgan, a local attorney and perennial unsuccessful

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[37] The preface to 1 Cal. Unrep. highlighted "the extent to which the unreported decisions have been cited by courts and legal writers," and asserted that "the intrinsic value revealed in the opinions themselves . . . have placed the question of their importance to the practitioner beyond all controversy." *Id*. at "v." Such cases are equally precedential as other officially reported Supreme Court cases — *see* In re Harris (1993) 5 Cal. 4th 813, 849, n. 18 [and cases cited]. Regarding the earliest days of the *California Reports*, including fire that destroyed the original documents, see Bennett, *Preface* (1851) 1 Cal. vii–viii. Concerning various publishers of timely unofficial reports of decisions prior to the *Pacific Reports*, see Wood, *Legal Journalism in San Francisco*, in Historical and Contemporary Review of Bench and Bar in California (The Recorder Printing & Pub. Co., S.F. Cal. 1926) at 5; and McMurray, *supra* note 3, at 29–30. As observed *ante* note 3, until the practice was barred by the Constitution of 1879, the court also frequently issued decisions without any statement of reasons. At least one early unofficial publisher made available not only the unreported opinions of the court, but also provided sometimes detailed notes concerning the court's unwritten decisions. *See*, *e.g.*, (Apr. 20, 1878) 1 Pac. Coast L.J. at 145–55 [setting out nine unreported per curiam opinions], and 155–57 [setting out three "Notes of Unwritten Decisions"].

[38] *See Easing the Calendar, Proposals to Come to the Supreme Court's Relief* (Dec. 5, 1888) S. F. Examiner, at 5 [noting that the court's San Francisco docket was two to three years behind].

[39] *Id*. [describing a proposal to create an "intermediate Court of Appeals"].

[40] Cal. Stats. 1889, ch. 16, 13. Thereafter, the Commission continued to be periodically renewed, and ultimately a total of 16 commissioners were appointed. *See post* note 91.

candidate for political office,[41] sued the sitting five commissioners in a quo warranto proceeding in the San Francisco Superior Court, naming Commissioner Robert Y. Hayne the lead defendant.[42] Morgan had, by then, appeared before the Supreme Court in eight cases, losing in his most recent four — thrice, and quite tellingly, in commissioner opinions, two of which were authored by Hayne.[43] Hayne's most recent ruling against Morgan, filed three months earlier, had commenced: "There is absolutely no merit

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[41] *See, e.g.*, *The Democratic Nominee for Congress in the Third District* (Sept. 12, 1888) Oakland Tribune, at 8; [noting that Morgan had unsuccessfully run for the state Senate two years earlier, and was the sole nominee for Congress after the preferred candidate declined]; *Joe McKenna's Opponent, The Democrats Nominate Benjamin Morgan, of Alameda, for Congress* (Sept. 13, 1888) Pacific Bee, at 8; *Our Portrait Gallery of Prominent Citizens* (July 26, 1890) City Argus, at 7 [promoting for governor "Ben. Morgan of Berkeley, . . . a fluent and forcible speaker, a close and exact reasoner, and one who would inspire confidence in the trust and sincerity of his views"]; *American Nominations* (Sept. 26, 1890) San Francisco Chronicle, at 8 [noting Morgan presided over the "State Central Committee of the American party," which nominated candidates for the California Supreme Court]; 2 The Bay of San Francisco: The Metropolis of the Pacific Coast and its Suburban Cities (The Lewis Pub. Co., Chicago, Ill. 1892), at 309 [noting that "Colonel Morgan" was born in Virginia, studied law in Georgia, immigrated to California in 1867, worked four years in Arizona, had been nominated the American party's candidate for Lieutenant-Governor in 1890 — and was "imbued with the spirit of 1776" and the idea that "Americans should govern America"]. According to the San Francisco Directories, Morgan kept law offices at, variously, San Francisco, Berkeley, Alameda, and ultimately, Inverness, in Marin County.

[42] *Coast Reports: Legality of the Supreme Court Commission Disputed* (Aug. 13, 1889) San Diego Union and Daily Bee, at 1. ["San Francisco, August 12. — A complaint was filed in the Supreme Court today by Ben Morgan, a lawyer of this city, against R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson and S. Van Cliffe, to determine their right to act as Supreme Court Commissioners. . . ."] Morgan's suit proceeded despite the Attorney General's subsequent opinion, rendered August 15, that the system was constitutional, and that Morgan's "request for leave to sue should be denied." *The Act is Constitutional* (Aug. 16, 1889) Sacramento Daily Union, at 3.

[43] Morrow v. Graves (1888) 77 Cal. 218 [opn. by Hayne, C., rejecting Morgan's assertion that a deed was fraudulently conveyed]; Drexler v. Seal Rock Tobacco Co. (1889) 78 Cal. 624 [opn. by Belcher, C. C., affirming an underlying judgment in light of Morgan's failure to file a brief]; Shain v. Belvin (1889) 79 Cal. 262 [opn. by Hayne, C., rejecting Morgan's defense concerning a promissory note]; Drinkhouse v. Spring Valley Waterworks (1889) 80 Cal. 308 [Department 1 opn. by Beatty, C. J., rejecting Morgan's choice of venue]. Regarding the latter case: Co-counsel with Morgan was 25-year-old Abe Ruef, who had been admitted to the bar only a few years earlier, and later became notorious as a corrupt political boss. *See generally* Thomas, A Debonair Scoundrel

in this appeal." The opinion proceeded to call the underlying judgment, which Morgan sought to undo, "clearly right," and it dismissively concluded: "We cannot see the least shadow of excuse for the appeal." Finally, Hayne's opinion proposed not only affirmance, but also "20 per cent. damages" in sanctions.[44] The court, augmenting its customary per curiam adoption language, ordered judgment accordingly.[45]

The *San Francisco Chronicle* noted Morgan's filing under the headline, "Usurpation Charged — Ben Morgan Takes a Tilt at the Supreme Court Commissioners."[46] His suit alleged that the commissioners, by undertaking to give the justices their written opinions, were exercising judicial power that was not theirs. And by inference it suggested that the Supreme Court justices, having routinely adopted opinions submitted to them, were abdicating their own judicial duties.

Justice James D. Thornton and Commissioner Hayne appeared at the trial to testify as fact witnesses. Eyebrows must have shot up when it was reported that the justices review the commissioners' recommendations, but not the briefs submitted by counsel.[47] Three times in his direct

(Holt, Rienhart and Winston, N.Y. 1962), at 11 [Ruef was then "small-time in the political swirl, primarily a lawyer with a political avocation"].

44 Shain v. Belvin, *supra*, 79 Cal. at 261–64.

45 *Id*. at 264. The court wrote: "For the reasons given in the foregoing opinion the judgment and order are affirmed; and, it appearing to the court that the appeal herein was taken for delay, it is ordered that there be added to the costs 20 per cent. of the amount of the judgment as damages by virtue of the provisions of section 957, Code Civil Proc."

46 (Oct. 11, 1899) San Francisco Chronicle, at 3. *See also Court Commissioners, Contention as to the Legality of Their Official Actions* (Oct. 11, 1889) Daily Alta California, at 1. The latter reported: "The Attorney-General, on the relation of Ben Morgan, has applied to the Superior Court for a writ of quo warranto, to be directed to the Supreme Court Commissioners, ordering them to appear and show by what authority they claim the right to exercise any judicial powers within this State, and particularly that of considering and determining cases on appeal in the Supreme Court . . . ."

47 *Court Commissioners, Proceedings to Declare the Office Unconstitutional* (Nov. 1, 1889) Daily Alta California, at 2. The article reported:

> Mr. Morgan appeared on behalf of the people, and Messrs. Garber and Wilson for the Commissioners.
>
> Justice Thornton and Commissioner Hayne were sworn as witnesses to show the duties which devolve upon Supreme Court Commissioners. It was shown that the Commissioners review briefs in cases, write their conclusions, and reasons therefor, which are handed up to the Supreme Judges, *who do not*

examination of Justice Thornton, Morgan pointedly referred to Commissioner Hayne as "Judge Hayne"; and even in his own testimony on cross-examination, Commissioner Hayne referred to his fellow commissioners as "Judge Belcher and Judge Gibson."[48]

The testimony shed light concerning how the commissioners interacted with the justices. Justice Thornton explained, "there is a general order that if a case is not . . . argued orally" it is assigned to the commissioners.[49]

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review the briefs, but affirm or reject the recommendations of the Commissioners, and if accepted indorse the same as the opinion and decision of the Court.

Mr. Morgan contends, on behalf of the people, that the Constitution limits the number of Judges of the Supreme Court and designates them and that the Act of the Legislature providing for Court Commissioners to aid and assist the Judges in the performance of their duties is unconstitutional, and, therefore, void. On the contrary, it is contended by Messrs. Garber and Wilson that it is an inherent power of all courts to call to their aid such assistance from the outside as may be necessary, and to adopt opinions so received as their own if they so elect." (Italics added.)

See also Court Commissioners, Proceedings to Declare that They are Exercising Illegal Power (Nov. 1, 1889) Sacramento Daily Union, at 1.

The *Daily Alta's* characterization was sensational, but perhaps not wholly accurate. The actual testimony, set out in *People v. Hayne, No. 13666, Transcript on Appeal* (Jan. 18, 1890, on file at the California State Archives, Sacramento), shows that although Justice Thornton apparently was willing to do so, he was not permitted to answer whether the justices "re-examine the entire record of" each case when reviewing and deciding whether to adopt the commissioners' opinions. *Id*. at 14-15. There appears to have been no testimony concerning whether Thornton or other justices read the briefs filed by the parties.

48 People v. Hayne, No. 13666, Transcript on Appeal, *supra* note 47, at 15–16 & 18. To be sure, all three *had earlier* been judicial officers. As observed previously, Isaac Belcher had served as a justice on the Supreme Court. Robert Y. Hayne had, before becoming a commissioner, served as judge of the San Francisco Superior Court. *See, e.g.,* (1880) 57 Cal. at iv; Clarke (1928) *Robert Young Hayne* (San Mateo–San Francisco–Santa Barbara County CA Archives Biographies, available at http://files.usgwarchives.net/ca/sanmateo/bios/hayne973nbs.txt). Likewise, James A. Gibson, later a founder of the law firm Gibson, Dunn, and Crutcher, had served as a judge of the San Bernardino Superior Court. *See, e.g.,* (1883) 64 Cal. at vii; see biography set out in San Diego Yacht Club, available at https://sdyc.org/vewebsite/exhibit2/e21261b.htm. The title "judge" as used at trial may have been no more than polite deference (much as a former senator or president is often referred to by those titles), but given the circumstances of the litigation, one might have expected the commissioners, at least, to refer to themselves as just that, and not as judicial officers.

49 People v. Hayne, No. 13666, Transcript on Appeal, *supra* note 47, at 14.

Commissioner Hayne elaborated that the commissioners very rarely hear oral argument, and had done so in only two cases in which the parties had specially requested that opportunity.[50] Hayne explained that he and his colleagues prepare opinions concerning cases assigned to them and "send [the opinions] up" to the justices for their review; the justices retain their own copies of the case "record" — presumably including briefs; and he confirmed that, when the justices decide to adopt an opinion by the commissioners, they file a brief per curiam statement to that effect.[51] Hayne added that some commissioner opinions and work product, after being sent to the justices, "go[] into the waste basket."[52]

The trial judge ruled for the defendants, rejecting challenges to the statute and the court's implementation of it.[53] The judge's loquacious decision reached back to mid-eighteenth century English jurists Lord Hardwicke, Lord Mansfield, and Lord Chancellor Loughborough to demonstrate that "courts of the greatest authority and . . . the most eminent judicial personages" had long relied on the ability to consult with others in forming their opinions and making decisions.[54]

The matter moved quickly from the superior court, housed inside San Francisco's then "New City Hall," to the Supreme Court's temporary quarters in a commercial building a dozen blocks away on Post Street.[55]

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[50] *Id*. at 18–19.

[51] *Id*. at 17–18.

[52] *Id*. at 18–19.

[53] The decision was widely reported. *See Court Commissioners, Judge Wallace Declares They Were Lawfully Appointed; A Very Important Decision* (Jan. 3, 1890) Daily Alta California, at 1 [reprinting verbatim Judge Wallace's approximately 2,500 word decision]); *Supreme Court Commissioners* (Jan. 3, 1890) The Los Angeles Times, at 4; *A Legal Body; The Supreme Court Commissioners' Case Decided* (Jan. 4, 1890) San Jose Daily Mercury, at 1. Thereafter, the press reported Judge Wallace's denial of a new trial. *Court Notes* (Jan. 11, 1890) San Francisco Chronicle, at 8 [relating that the motion had been denied "yesterday"].

[54] *See Court Commissioners, Judge Wallace Declares They Were Lawfully Appointed*, *supra* note 53, at 1.

[55] Langley's San Francisco Directory (May 1890) at 1331 [listing Superior Court Judge Wallace's chambers at "New City Hall," 799 Van Ness Ave.] & 58 [listing the Supreme Court's offices at 121 Post Street]. The court had moved to Post Street in 1884, and in early 1890 shared that building with numerous others, including The San Francisco Bar Association; Miss Isabella Gunn, dressmaker; and the Musicians' Mutual Protective Union. *See* San Francisco Directory, *supra*, at 90, 577, 987. Later in 1890

Wisely deciding to sit in bank, the Supreme Court agreed to expedite review in light of the "commanding public importance" of the issues raised, which potentially implicated the validity of approximately half of the court's recent judgments.[56] The *Daily Alta California* reported extensively about the oral argument: "During the course of Mr. Morgan's argument, Justice Works remarked: 'The act seems to be an attempt to evade the Constitution. The only question is, whether or not the attempt has been successful.' Chief Justice Beatty at once replied with decided emphasis: 'Justice Works speaks for himself and not for the Court. I do not think there has been any evasion of the Constitution. The Commissioners certainly have not violated the Constitution. If there has been any dereliction of duty it has been, not by the Commissioners, but by the Court.' "[57]

In addition to this revealing jousting among the justices, the oral argument also touched on the art and challenge of opinion writing: "Justice Thornton remarked that for him the task of writing out an opinion was *a most tedious one*, as he went over his work two and often three times if he had the time. Chief Justice Beatty said that to write a long and loosely constructed opinion required little effort, but to write a concise opinion is a most difficult task. He said he often reached a conclusion in very much less time than the same could be set forth in writing."[58]

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the court moved to 305 Larkin Street — a handsome and apparently then-new building that was located on the footprint of its future and present home, at McAllister and Larkin. Langley's San Francisco Directory (May 1891) at 63–64; *see also* Dear & Levin, *supra*, 4 Cal. Sup. Ct. Hist. Soc'y Y.B. at 75.

56 People v. Hayne, *supra*, 83 Cal. at 111. *See also post* note 72 [estimates concerning the number of cases affected]. In deciding to hear the matter, which went directly to the heart of its own functioning and as to which one of its own had already testified, it is possible that the court determined that the "rule of necessity" applied, although it did not address the point. *See, e.g.*, Olson v. Cory (1980) 27 Cal. 3d 532, 537 [a judge or justice is not disqualified from adjudicating a matter in which he or she has an interest if there is no other judicial officer or court available to hear and resolve the matter].

57 *Supreme Court Commission: Argument Heard on Judge Wallace's Decision, Remarks from the Bench* (Jan. 25, 1890) Daily Alta California, at 8. *See also The Court Commission, Argument in the Action to Oust Them from Office* (Jan. 25, 1890) San Jose Daily Mercury, at 1; *Pacific Coast, The Commissioner Case Is Argued* (Jan. 25, 1890) San Diego Union and Bee, at 1.

58 *Argument Heard on Judge Wallace's Decision*, *supra* note 57, at 8, italics added. The article also reported: "M. Wilson, who appeared for the respondent [the

The article reported that the "questions asked by the Justices . . . left an impression" that the court would "sustain[] the constitutionality of the act."[59]

The prediction proved correct. Justice Fox's majority opinion affirming the judgment was issued only twenty-seven days after the trial court's final ruling, and only twelve days after oral argument before the Supreme Court.[60] He spoke for *four* of his colleagues — including Justice Thornton, who as noted had recently testified as a fact witness in the trial court below,[61] but not Justice Works, who, after being reprimanded by the chief justice at oral argument, appears to have taken ill.[62] Chief Justice Beatty penned a concurring opinion. As both documents showed, the justices were quite able to write their own. This assumes, of course, they didn't get help from any of the five defendants.

Justice Fox's decision downplayed the role of the commissioners. First, he said, they are kind of like retained counsel, or amici curiae — but maybe even more friendly and helpful: "It is no more unconstitutional for this court to receive such assistance from Commissioners designated by itself, or from *amici curiae*, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause."[63] He described the

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commissioners], devoted most of his argument to the question how far does the work of the Commissioners affect or influence the Court, and would such influence be in any sense a usurpation of the judicial function. Mr. Wilson took the ground that the Commissioners were merely advisers of the Court. In support of his contention he referred at great length to the practice of the Judges of the English courts, from time immemorial, to call to their aid advice from a source competent to give it." *Id*.

59 *Id*.

60 People v. Hayne, *supra*, 83 Cal. 111 [filed Feb. 6, 1890].

61 In this respect, again, the court may have determined that the "rule of necessity" applied. *See ante* note 56.

62 Works is shown in volume 83 of *California Reports* as participating in other filed opinions on February 3, 1890. There's a notation in one opinion, issued that same date, that "Mr. Justice Works did not participate in the decision in this case." Russell v. McDowell (1890) 83 Cal. 70, 82. In yet another opinion filed February 5, he is shown as having signed. Cucamonga Fruit-Land Co. v. Moir (1890) 83 Cal. 101, 107. In the commissioners' case, People v. Hayne, *supra*, 83 Cal. 111, filed the next day, his absence is not noted. As observed in Johnson, *supra* note 19, at 160, Works "suffered considerable sickness through the years, particularly in the first half of his life" — a period that would have included this era.

63 People v. Hayne, *supra*, 83 Cal. at 118.

commissioners' work product as simply "*serviceable instrumentalities to aid us in performing our functions.*"[64] He reported that the justices reject "many" commissioner opinions that don't see the light of day, and others are adopted only in part.[65] And, he stressed, the commissioners' opinions don't become judgments unless we, the real judicial officers, say so.[66]

Chief Justice Beatty's concurring opinion was, in some respects, more candid. He said, in essence: Let's get real — our commissioners *write* some of our opinions[67] — yet there's nothing wrong with that. The 1879 Constitution, he pointed out, required that the court give its decisions "'in writing, [with] the grounds of the decision . . . stated.'"[68] But, he explained, this requires only that the justices *agree* on an opinion, not that they write one.[69]

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64 *Id*. at 121, italics added.

65 *Id*.

66 *Id*. at 122. Justice Fox rebuffed charges that the commissioners exercised undue influence over the justices. If that were true, Justice Fox intoned, that would not be a sign that the legislation is unconstitutional; instead, he wrote, that would be the justices' fault. But, he emphasized, the justices appreciate receiving well written draft opinions crafted by skilled and objective writers; and to the extent they are influenced by them, that is no more problematic than being persuaded by the well-reasoned prose of a self-interested retained counsel who acts "under spur of retainer, and in the direct interest of . . . clients." *Id*.

67 Beatty noted that the majority opinion, by relying on and distinguishing an Indiana case, could be read to suggest that the California Constitution "declares the duty of writing its opinions is specifically imposed upon the supreme court by the constitution." *Id*. at 123. And he conceded: "If I held to this view, I confess I could see no escape from the conclusion that the duties we assign to our commissioners, and which are performed by them, involve a delegation by us and a usurpation by them of judicial functions." *Id*.

68 *Id*. Language now found in California Constitution, article VI, section 14, is substantially similar.

69 Beatty said: "In order to comply with [the constitutional command], it is undoubtedly necessary that the court, or some member to whom the duty is assigned, shall in most cases prepare a written opinion, but there may be, and in fact are, many cases in which the labor of formulating a statement of the grounds of the decision has been performed in advance or may be properly delegated to others." *Id*. at 123–24. And he noted that the court sometimes had adopted opinions written by a superior court judge. *Id*. at 124. (The modern Supreme Court has done similarly, adopting, in whole or part, the opinions — or even the dissents — of the appellate court under review. *See*, *e.g.*, Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263, 267; Roe v. Workmen's Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 886; Brandt v. Superior Court (1985) 37

After briefly sketching how the system worked (and yet avoiding directly addressing whether the justices reviewed counsel's briefs),[70] Chief Justice Beatty responded to a practical question: "If the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission?" How does it save labor, or facilitate the disposition of cases? Echoing some of his and Justice Thornton's comments at oral argument, he answered himself: Writing opinions is difficult work. And yet "*[t]here are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a trifling task.*"[71] And so yes, he explained, this saves us time and energy, "without any abdication or delegation by the court of its constitutional functions."[72]

Cal. 3d 813, 817 [adopting the dissent].) Indeed, Beatty observed, sometimes the court adopts the arguments of counsel verbatim. Is this a violation of the Constitution? He answered: "I think certainly not. The object of the constitutional requirement is not to compel judges to formulate opinions in their own language, but to put upon the record the grounds of their decisions . . . ." People v. Hayne, *supra*, 83 Cal. at 124.

70 He explained: "The cases which are referred by us to the commission are those which are fully presented on the papers. The object of the reference is to obtain a report containing a brief and logical statement of the material facts exhibited by the record, and of the legal propositions upon which the judgment depends. When that report is submitted in the form of an opinion by one or more of the commissioners, with a suggestion that for the reasons stated a particular judgment should be given, it then becomes the duty of the court to compare the report with the record and with the printed arguments of counsel, and to determine for itself whether the reported opinion ought to be adopted, modified, or rejected. If upon such examination the court finds that the facts and the law have been correctly stated by the commission, and it adopts the opinion as its own, the case is not different from those in which the opinion of the trial judge is adopted. The court, though not the author of the opinion, by adopting it, makes it its own." People v. Hayne, *supra*, 83 Cal. at 124–25, italics added. By his phrasing, Beatty left unaddressed whether all of the justices actually undertook the described duties. *Compare ante* note 47 [characterizing the trial testimony as establishing that the justices "do not review the briefs" of counsel].

71 *Id*. at 125, italics added. (Author's note: From my own experience, I very much doubt that the writing of opinions was a "trifling task" for many commissioners. After doing it for thirty-seven years, I find it a struggle and challenge, though ultimately a joy, every time.)

72 The court's validation of the program was widely reported. *See, e.g., Supreme Court Commission — Its Labors Are Declared Constitutional and Beneficial* (Feb. 7, 1890) San Francisco Examiner, at 7 [noting that the commissioners had previously "assisted the court by examining and preparing for decision over 1,200 cases" and that

Meanwhile, the commissioners did not skip a beat. The next opinion filed by the court — just one day after rejecting the challenge in which Commissioner Hayne was the lead defendant — was written by Commissioner Hayne.[73]

IV. CONTINUING CRITICISM OF THE COMMISSION PROGRAM

The court's affirmation of the commissioner system did little to quell growing public criticism of the program. A January 1891 article in the *Los Angeles Times* called the commissioners "little better than clerks" and the system "a mere makeshift."[74] It reported on pending legislation sponsored by the bar associations of San Francisco and Los Angeles to reorganize the Supreme Court and create intermediate courts of appeal in those cities and in Sacramento.[75]

An August 1891 column in *The Wave*, a San Francisco literary weekly, criticized two recent opinions by the court's commissioners, and listed the names of the four commissioners who authored and signed those opinions.[76] Justice Patterson, who had a year earlier concurred in the *Hayne* opinion upholding the commissioner system, responded, apparently on behalf of the court: "There is a general impression that [the commissioners] exercise judicial powers, but that is a popular fallacy. Their functions are purely ministerial. They assist the Court in determining the law and the facts of cases submitted on the briefs, but they decide nothing. Their views are generally, but not always, approved."[77]

"[t]he validity of nearly half the court's judgments depended on the decision"]; *The Act Constitutional; The Supreme Court Commissioners Again Win Their Case* (Feb. 7, 1890) Daily Alta California, at 2 [stating that the commissioners "have, unchallenged, assisted the Court in the examination and preparation for decision of over 1000 cases" and asserting that "[t]hese judgments would not have been valid if the commission was not a lawfully constituted body"].

73 Fulweiler v. Mining Co. (1890) 83 Cal. 126.

74 *Work Before the Legislature* (Jan. 19, 1891) The Los Angeles Times, at 4.

75 *Id.*

76 *The Witness* (Aug. 29, 1891) Vol. 7, No. 17, The Wave, at 8.

77 *The Supreme Court, Justice Patterson Answers "The Witness"* (Sept. 5, 1891) Vol. 7, No. 18, The Wave, at 8.

And yet, as commentators have observed, although the justices "could review and modify the commissioners' opinions, . . . in practice [the court] simply issued them as its own."[78] It was unsurprising that, despite the court's protestations, many viewed the commissioners as "auxiliary judges."[79] Another observer asserted that the commissioners operated as "an auxiliary court in intent and effect."[80]

V. MUSICAL CHAIRS

Notwithstanding these ongoing debates, the commissioner system had become useful to the governor, the justices, and the serving commissioners themselves — facilitating the filling of vacancies, advancement, and job security, all without any diminution in pay. The last two features were especially handy at a time of highly partisan elections, when judges and justices were regularly unseated.[81]

Consider, for example, Niles Searls — one of the first class of three commissioners. He had served two years in that capacity when, in 1887, the chief justice died in office. Being experienced, a Democrat, and in the

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78 Kagen et al., *supra*, 76 MICH. L. REV. at 975.

79 *Id*.

80 SCHUCK, *supra* note 22, at 495.

81 From the Supreme Court's inception until 1911 its justices were selected in partisan elections. GRODIN, IN PURSUIT OF JUSTICE (U.C. Press, Berkeley, Cal. 1989) at 164–66; *see also post* note 82 [example of political party ticket including a candidate for the Supreme Court]. And there was considerable resulting turnover. Cf. McMurray, *supra* note 3, at 37 [under the Constitution of 1879, "the judicial office was thrown back into party politics"]. Reform legislation in 1911 converted those election contests to nonpartisan affairs. CAL. STATS. 1911, ch. 398, § 5, subd. 4, at 774; CAL. STATS. 1911, Ex. Sess., ch. 17, § 3, subd. 4, at 71. By initiative measure in 1934 California amended its Constitution to become the first state to adopt a "retention election" system for appellate justices, under which a justice appears on the statewide ballot unopposed, and the voters are asked to vote simply "yes" or "no" concerning the judicial officer. CAL. CONST., art. VI, § 16, subd. (d); *see* GRODIN, *supra*, at 165–66; *see also* Uelmen, *Symposium, California Judicial Retention Elections* (1988) 28 SANTA CLARA L. REV. 333, 339–40 [history of the 1934 initiative, Prop. 3 — and the failure of a corresponding measure designed to extend retention elections to trial court judges]; Levin, *A Brief History of the Court of Appeal for the Third Appellate District* (Autumn/Winter 2005) CAL. SUPREME COURT HIST. SOC'Y NEWSLETTER 2, 3 [describing how a 1932 appellate judicial election contest helped spur the 1934 reform].

right place at the right time, he was appointed by the governor to fill in as chief justice. In 1888 he sought to stay in that position, and was promoted on the Democratic ticket along with Grover Cleveland for President, and . . . Ben Morgan, for "Member of Congress, Third District."[82] But Searls lost the statewide partisan election to William H. Beatty. He went back to practice in Nevada City, but not for long: Four years later, and despite having lost to Beatty, he returned to the court to serve a final four years as a commissioner.[83]

And now back to Isaac Belcher, also in the first class of commissioners. As noted, he was an associate justice before serving as *chief* commissioner. When that office expired he became a regular commissioner until 1898.[84]

Others similarly traded hats as commissioners and justices. Jackson Temple holds the record, repeatedly bouncing in and out of the court, and between the bench and the Commission, over the course of thirty years. He was appointed to fill a vacancy when a sitting justice resigned, and served as a justice from 1870 to 1872. He ran as a Democrat to keep the seat, but lost. He was elected to the Supreme Court in 1886, but resigned three years later in ill health. After recovering, he returned to the court as a commissioner in 1891. Four years later, while still in that position, he ran for yet another term as an associate justice, and was once again elected to that position, serving until his death in office, in 1902.[85]

The justices appointed W. F. Fitzgerald, then a private lawyer in Los Angeles, as a commissioner in 1891. This may not have been the court's best hire. After moving up to San Francisco he served only about a year and a half, producing far fewer opinions than his contemporaries before he quit and briefly reentered private practice in that city. Then in early 1893 he was appointed by the governor to fill the vacancy created by a justice who had died in office.[86] He served a full two years, producing again comparatively few opinions that a reviewer described as "distinguished only by their brevity."[87]

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[82] *Regular Democratic Ticket!* (Nov. 1, 1888) Pacific Bee, at 3 [advertisement].

[83] Johnson, *supra* note 19, at 154.

[84] *Id*. at 122–23.

[85] *Id*. at 115–17.

[86] Johnson, *supra* note 19, at 191.

[87] *Id*. After he departed the court as a justice, he ran for, and was elected to be, attorney general. When that term expired in 1899 the governor appointed him to the Los Angeles Superior Court. But when that term was up the voters preferred another

Finally, one last round of musical chairs: The voters elected Ralph C. Harrison, with no judicial or other public office experience, to a twelve-year position as an associate justice in 1891. He was said to have been "meticulous in everything he undertook" and to have "discharged every assignment with finesse."[88] Many of his opinions appeared in casebooks prepared by "the first names in scholarship."[89] He wanted to run for a second term that would start in 1903, but political party machinations gave the nomination to another, and he resumed private practice. Yet not for long: The court appointed him a commissioner in 1904 — as a biographer said, "*making him for all intents and purposes once more a member of the Court*."[90]

The latter and similar sentiments didn't help matters. In light of the frequent position-trading, they only underscored one of the continuing criticisms — that unelected staff commissioners and elected justices were, in effect, interchangeable.

VI. MUDDLING ALONG, AND MAKING INCREMENTAL ADJUSTMENTS

After the constitutional validity of the commissioner system was upheld in 1890, the court's backlog remained, and the Legislature periodically renewed the statute commanding the court to employ commissioners.[91] But criticism of the Commission continued.

In apparent response, both the commissioners and justices made some conciliatory adjustments. Instead of routinely ending their opinions by telling the justices that a judgment "should" be affirmed or reversed, the commissioners sometimes used more deferential language, writing what they "think" or "advise" or "recommend" should happen to the judgment.[92] Yet

candidate, forcing him to the last stage of his legal career: representing *The Los Angeles Times* under publisher Harrison Gray Otis. *Id*. at 192.

88 Johnson, *supra* note 19, at 185.

89 *Id*. at 187.

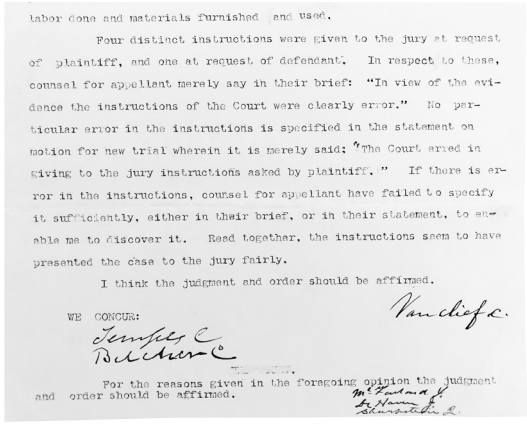
90 *Id*. at 187–88, italics added.

91 California Blue Book, or State Roster 1911 (State Printer, Sac., Cal. 1913) at 413 [listing six legislative renewals, and the succession of the commissioners appointed]. See the Appendix to this article for a roster of all 16 commissioners.

92 E.g., Meade v. Watson (1885) 67 Cal. 591, 595 ["think"]; People v. Monteith (1887) 73 Cal. 7, 9 ["advise"]; Lind v. City of San Luis Obispo (1895) 109 Cal. 340, 345 ["think"];

there was no standard language, and the original "should" form continued to appear frequently over twenty years, even after many if not most commissioner opinions eventually adopted more deferential phrasing.[93]

In line with the commissioners' sporadic efforts to show some deference, the justices in turn became a bit more transparent, signing their names when adopting the commissioners' opinions — signaling, apparently, that they had taken judicial ownership of them. A mid-July 1892 commissioner opinion, authored by Vanclief, C., started this new procedure. It concluded: "I *think* the judgment and order should be affirmed." Then the two other commissioners signed, showing they concurred: "Temple, C., and Belcher, C." Next, the justices wrote: "For the reasons given in the foregoing opinion, the judgment and order are affirmed." And then, squeezing their names onto the bottom of the original typed opinion, *they* signed: "McFarland, J., De Haven, J., Sharpstein, J."[94]



labor done and materials furnished and used.

Four distinct instructions were given to the jury at request of plaintiff, and one at request of defendant. In respect to these, counsel for appellant merely say in their brief: "In view of the evidence the instructions of the Court were clearly error." No particular error in the instructions is specified in the statement on motion for new trial wherein it is merely said: "The Court erred in giving to the jury instructions asked by plaintiff." If there is error in the instructions, counsel for appellant have failed to specify it sufficiently, either in their brief, or in their statement, to enable me to discover it. Read together, the instructions seem to have presented the case to the jury fairly.

I think the judgment and order should be affirmed.

Vanclief C.

WE CONCUR:

Temple C.

Belcher C.

For the reasons given in the foregoing opinion the judgment and order should be affirmed.

McFarland J.

De Haven J.

Sharpstein J.

Yndart v. Den (1897) 116 Cal. 533, 548 ["recommend"]; People v. Sears (1897) 119 Cal. 267, 272 ["recommend"]; Arques v. Union Sav. Bank of San Jose (1901) 133 Cal. 139, 144 ["advise"].

93 E.g., In re Asbill (1894) 104 Cal. 205, 208 ["should"]; People v. Town of Berkeley (1894) 102 Cal. 298, 308 ["should"]; People v. Slater (1898) 119 Cal. 620, 624 ["should"]; Allen v. Pedro (1902) 138 Cal. 202, 203 ["should"]; Jones v. Board of Police Commissioners (1903) 141 Cal. 96, 98 ["should"].

94 Joyce v. White (1892) 95 Cal. 236, 239, italics added. The original typed opinion, on file in the California State Archives, Sacramento, shows that the justices had to scrunch their signatures to fit at the bottom of the page. Beginning with *Joyce v. White* the justices' signatures appear regularly in the original filed opinions, and in turn are reflected, immediately after their unanimous adoption of the commissioners' opinion, in the bound volumes of the *California Reports*. (Curiously, no such notations identifying the justices by name appear in the corresponding "unreported" commissioner opinions later published in *California Unreported Cases* — *see ante* note 37.) And yet, as of this writing, electronic versions of the *Joyce v. White* opinion (and, significantly,

VII. CREATING THE COURTS OF APPEAL (ON THE SECOND TRY)

But even as some things changed, others remained the same: Still the court remained backlogged; there was criticism of the justices and their commissioners; and there were louder and more frequent calls to create appellate courts. A trenchant 1897 editorial in the *San Francisco Examiner* focused on the unhappy symbiosis of the dysfunctional department system and the Commission: "The trouble with the Supreme Court Commission is fundamental. It is built upon one of the bad features of our Supreme Court system and it intensifies instead of correcting the evil." For good measure, the editorial also slammed the decisions authored by the commissioners as "not highly regarded as authority by either the bench or bar."[95]

An article two years later in the *San Francisco Chronicle* reported that the court remained so far behind in its work that the justices had not been paid for eight months, having failed to decide and file its cases within ninety days after submission.[96] The same article critiqued the commissioner

hundreds of similar subsequent officially-reported opinions) fail to include this information and other key language contained in the official version(s), as published in the bound *California Reports*. For example, the versions of commissioner opinions issued after mid-1892, as presented on Westlaw.com and LexisNexis.com, omit the justices' names immediately after the key paragraph in which they unanimously adopt the commissioners' opinion. This highlights pitfalls lurking for those who might rely exclusively on electronic research, rather than consulting the original hard copy volumes.

[95] *In Place of the Commission* (Feb. 4, 1897) San Francisco Examiner, at 6. By contrast, Roscoe Pound, although criticizing commissioner systems generally (Pound, *supra* note 11, at 213), lauded California's department system, and those of other state high courts following that lead. *Id*. at 214–20.

[96] *Supreme Court — Proposed Amendment is not Satisfactory — Matter is Referred to a Subcommittee* (Feb. 4, 1899) San Francisco Chronicle, at 2. The California Constitution then (art. VI, former § 24) as now (art. VI, § 19), prohibits a judge or justice from being paid if any matter remains pending and undetermined before the judicial officer more than ninety days after having been "submitted" for decision. *See generally* Cal. Gov. Code. § 68210 [codifying the rule and requiring an affidavit signed by each judicial officer]. It appears that the 1898–99 salary snafu led the court to adopt the expedient practice of delaying "submission" until it was ready to file an opinion deciding the case, rather than submitting the matter immediately following argument. Decades later (and in the face of litigation in 1979 and 1986 challenging that practice) the court began to honor the ninety-day rule by "submitting" its cases immediately after oral argument, and in order to do so, it adopted procedures under which

system as a "fifth wheel on a coach," and generally supported the idea of a constitutional amendment designed to reorganize the Supreme Court and to create appellate courts.[97]

A few weeks later the Legislature finally adopted a proposed constitutional amendment that would revise the judicial article to provide for intermediate appellate courts. The would-be amendment also proposed to reduce the Supreme Court from seven to five justices and require the court to cease hearing oral arguments in Sacramento and Los Angeles, and instead hold all of its sessions at its headquarters in San Francisco.[98] Following litigation about whether the proposed amendment should appear on the ballot,[99] the measure was submitted to the voters at the 1900 General Election. Alas, it failed.

In 1903, after some additional proposals had been floated — including one to increase the court to ten justices working in three departments,[100] and another to double down on commissioners by increasing their number

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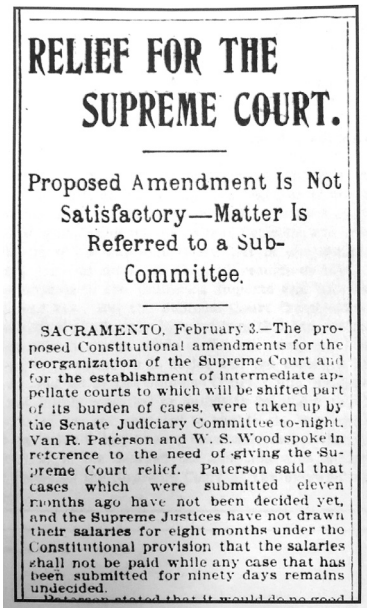
it "frontloads" some of its internal deliberation procedures. *See generally* Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel* (2014) 61 UCLA L. Rev. 1246, 1252–58. The court nonetheless still can vacate submission and resubmit a case — something it occasionally does, usually in conjunction with post-argument supplemental briefing — an action that restarts the ninety-day period. Cal. Rules of Court, rule 8.524(h).

97 San Francisco Chronicle, *supra* note 96, at 2.

98 Cal. Stats. 1899, ch. 37, at 503 (Sen. Const. Amend. No. 22) (adopted Mar. 18, 1899), § 2. As observed *ante* note 16, the court had maintained its headquarters in San Francisco since early 1874 but, as instructed by the Legislature in 1878, had continued to hold some oral arguments in Sacramento, and later added oral argument sessions in Los Angeles. To this day the court keeps its headquarters in San Francisco, but regularly hears oral argument in all three cities.

99 In the meantime, the Legislature, having had second thoughts about some details of the proposed constitutional amendment, adopted a revised version of that amendment. In People v. Curry (1900) 130 Cal. 82, 90, the court held that the subsequent version, because it had been adopted at an extraordinary session that had been called for reasons other than to propose constitutional amendments, could not be presented to the voters, and hence the Secretary of State was required to submit the original version to the electorate.

100 *To Increase the Number of Justices — Senator Caldwell Introduces a Constitutional Amendment Changing the Personnel of the Supreme Court* (Feb. 5, 1901) San Francisco Chronicle, at 2. The proposal also would have abolished the Commission. *Id.*



RELIEF FOR THE SUPREME COURT.

Proposed Amendment Is Not Satisfactory—Matter Is Referred to a Sub-Committee.

SACRAMENTO, February 3.—The proposed Constitutional amendments for the reorganization of the Supreme Court and for the establishment of intermediate appellate courts to which will be shifted part of its burden of cases, were taken up by the Senate Judiciary Committee to-night. Van R. Paterson and W. S. Wood spoke in reference to the need of giving the Supreme Court relief. Paterson said that cases which were submitted eleven months ago have not been decided yet, and the Supreme Justices have not drawn their salaries for eight months under the Constitutional provision that the salaries shall not be paid while any case that has been submitted for ninety days remains undecided.

to twelve[101] — the Bar Association of San Francisco regrouped and proposed a new constitutional amendment.[102] A few weeks later, the *Los Angeles Times* breathlessly reported on an "important amendment" to that legislation, a sweetener: The measure would be revised to provide that "when ratified by the people the offices of the Supreme Court Commissioners shall . . . be abolished."[103] Three days later the Legislature adopted Senate Constitutional Amendment No. 2.[104]

The question again went to the voters. This time the measure proposed to keep the Supreme Court at seven justices, and allowed them to continue to hear oral arguments in Sacramento and Los Angeles, as well as at their headquarters in San Francisco. The eleventh-hour amendment, designed to seal the deal with a skeptical public, was tacked on in a final section 25: "The present Supreme Court Commission shall be abolished at the expiration of the present term of office, and no Supreme Court Commission shall be created or provided for after January 1st, A. D. 1905."

Newspaper articles before the election reminded voters that the court was "embarrassed" by being 1,000 cases behind and "hopelessly in arrears" — despite its filing about 650 opinions annually.[105] The voters overwhelm-

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101 *For Relief of Supreme Court — Measures to Be Introduced to Increase its Personnel* (Feb. 2, 1903) San Francisco Chronicle, at 2.

102 *To Revise Court System — San Francisco Bar Association's Plan for State Appellate Tribunal* (Feb. 4, 1903) San Francisco Chronicle, at 7.

103 *Courts of Appeal — Important Amendment* (Mar. 11, 1903) The Los Angeles Times, at 4.

104 Cal. Stats. 1903, ch. 38, at 737 (adopted Mar. 14, 1903).

105 *Appellate Courts Provided for by Amendment* (Aug. 15, 1904) San Francisco Examiner, at 6. Fewer than twelve months later, and after the amendment had passed, the Supreme Court itself recounted that "for years" prior to the amendment it "had been unable to dispose of the business before it as fast as it accumulated, and the cases

ingly adopted the measure at the November 1904 General Election,[106] the intermediate appellate courts were born, and the Supreme Court Commission was eliminated. The "district courts of appeal" (note the "s" after "courts," but not after "appeal")[107] commenced work,[108] and the last published Supreme Court commissioner case was filed in mid-1905.[109]

With the departure of the last five commissioners (along with their own dedicated support, a secretary and stenographer), the seven justices were left with a spare staff roster: A reporter of decisions, an assistant reporter, two secretaries, two phonographic reporters, two bailiffs, a librarian — and three janitors.[110]

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were decided from two to three years after the appeals were filed." People v. Davis (1905) 147 Cal. 346, 349.

106 *Official Vote on Amendments* (Dec. 3, 1904) San Francisco Chronicle, at 3 [reporting "93,306 for and 36,275 against"].

107 As observed earlier, some prior proposals called for creation of a "court of appeals" — (note the sole plural) — a name akin to that employed for the federal counterpart, the "circuit court of appeals," as denominated in an 1891 federal act, 26 U.S. Stats. 826, ch. 517, § 2. But the drafters of the winning version of the amendment went with a singular word for "appeal" — ostensibly, I once read (but can't find the cite), because the cost-conscious state could not afford the "s." In any event, that joke helps one to remember, if not understand, the different terminology for the otherwise analogous intermediate appellate courts. Ultimately, although the word "district" was dropped from the title of California's appellate courts in the mid-1960s — *see* California Constitution Revision Commission, Proposed Revision of the California Constitution (San Francisco, Feb. 1966) at 90–91 [as approved by the voters at the General Election of November 8, 1966, via Prop. 1-a] — the singular "appeal" persists. Cal. Const., art. VI, § 3 ["The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions"].

108 In that early period, the new appellate court's jurisdiction was "narrowly limited" and its function was "primarily a device for assisting the supreme court by relieving it of very petty cases and giving preliminary screening to others. The Supreme Court continued to handle the major appellate load." Sloss, *supra*, 46 Cal. L. Rev. at 716. Regarding the early history of the Courts of Appeal, see N. P. Chipman, *The Judicial Department of California*, in California Blue Book, or State Roster 1907 (State Printer, Sac., Cal. 1907) at 657–60 [addressing backlogs, the Supreme Court Commission, and creation of the appellate courts].

109 Estate of Dole (1905) 147 Cal. 188.

110 *Compare* California Blue Book, or State Roster 1903 (State Printer, Sac., Cal. 1903) at 49, with California Blue Book, or State Roster 1907 (State Printer, Sac., Cal. 1907) at 53. The court also enjoyed services of a "Supreme Court Clerk" and deputies — yet at that time they were apparently not court employees. Starting with the

VIII. EPILOGUE — AND SAFE LANDINGS FOR THE COMMISSIONERS

The Supreme Court reacted to the amendment by articulating principles under which it operates today: It made clear that its oversight of intermediate appellate court work product would be discretionary[111] — and it would not expend time and energy to correct "mere errors" made by those lower appellate courts.[112] Its new role would be to preside over the orderly

first California Constitution in 1849 (art. VI, § 7), the position of Supreme Court Clerk was a statewide elective office. The 1879 Constitution (art. VI, former § 14), as originally adopted and as amended in 1904, continued that approach. Moreover, at that point the Supreme Court Clerk was, at least according to one source, considered to be within the executive department. *See*, *e.g.*, California Blue Book 1907, *supra*, at 59 [listing, under the executive department, "Clerk of Supreme Court" and eight staff — five in San Francisco, two in Sacramento, and one in Los Angeles]. Prior and subsequent editions of that publication likewise listed the court's clerk and employees as executive branch officers and employees. Notably, and by contrast, each new district court of appeal was directed to hire its own clerk — *see* Cal. Const., art. VI, § 21 [as amended in 1904] — and those appellate court clerks and the staff were listed as employees of the judicial branch. California Blue Book 1907, *supra*, at 54. Eventually the Supreme Court was implicitly given the same authority over its clerk and related staff when article VI, section 14 was amended Nov. 4, 1924, to delete any reference to the Supreme Court Clerk as an independent statewide elected official. The currently operative provision concerning the Supreme Court Clerk is set forth in Cal. Gov. Code § 68842 [appointment of Clerk/Executive Officer of Supreme Court]. Regarding the Supreme Court's authority to hire staff, see, e.g., Cal. Stats. 1927, ch. 565, § 1, at 950 [authorizing the court to hire "employees as it may deem necessary"], and Cal. Stats. 1951, ch. 655, § 5, at 1835 [similar]. For the current provision, see Cal. Gov. Code § 68806.

111 People v. Davis, *supra*, 147 Cal. at 349. The court during this period exercised its oversight of the appellate courts' work primarily by way of the Supreme Court's "transfer" authority. See *post* note 120. Similar oversight is today exercised via both the transfer power (Cal. Const., art. VI, § 12(a)) and the power to grant review of a Court of Appeal decision (*id.*, § 12(b)), which, under an amendment effective in 1985, allows the Supreme Court to confine review to selected issues in the appellate court's decision. *See*, *e.g.*, Snukal v. Flightways Mfg., Inc. (2000) 23 Cal. 4th 754, 767–73 [describing the history of the appellate jurisdiction provisions]; Cal. Rules of Court, rule 8.516. As explained in *Snukal*, prior to the 1985 amendment, the Supreme Court's review had been plenary, amounting to review of the trial court's judgment, and proceeded as if the Court of Appeal had never acted on the case. The 1985 amendment allowed the Supreme Court to realize the full potential of the original amendment creating the intermediate courts of appeal, by permitting the Supreme Court to "accord review of selected issues" decided by the lower appellate court. Snukal, *supra*, 23 Cal. 4th at 773 [and authorities cited].

112 People v. Davis, *supra*, 147 Cal. at 347 & 350.

development of the law, by deciding important issues and resolving conflicts in appellate decisions.[113] Doing otherwise, or more, the court reasoned, would defeat the purpose of the recent amendment.[114] But, the Supreme Court cautioned, when it declines to intervene in an appellate decision, that doesn't mean it endorses that decision or opinion.[115]

And yet, even after the creation of intermediate appellate courts, the Supreme Court continued to struggle with an ever-growing backlog.[116] It used the criticized department system fairly regularly for nearly fifty years, until the late 1920s, when the court began hearing each case in bank[117] — except for two last instances in the early 1940s.[118] The obsolete department

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[113] *Id*. at 348 & 350.

[114] *Id*. at 349. The court added: "The state has done its full duty in providing appellate relief for its citizens, when it has provided one court to which an appeal may be taken as of right. There is no abstract or inherent right in every citizen to take every case to the highest court. The district courts must be deemed competent to the task of correctly ascertaining the facts from the records before them in each case decided therein, and they should be held solely responsible to that extent for their judgments." *Id*. at 349.

[115] *Id*. at 350. In this early period the court sometimes went out of its way to stress the point, occasionally writing brief, substantive opinions when denying a hearing, so as to expressly disassociate itself from parts of the appellate court's decision. E.g., People v. Bunkers (1905) 2 Cal.App. 197, 210 [specifying "we are not to be understood as approving" an identified portion of the court of appeal's opinion].)

[116] As predicted by the court itself in People v. Davis, *supra*, 147 Cal. at 349, it remained significantly backlogged during these years, and for "several years to come." *See also* Salyer, *The California Supreme Court in an Age of Reform, 1910–1940,* in Scheiber (Ed.), *supra* note 18, at 190 [recounting reports in 1918 that the court was twenty months behind — and that previously it had been "as much as five years behind in its work"].

[117] Prince, *The Composition and Jurisdiction of the Supreme Court of California* in Johnson, *supra* note 19, at 4; McMurray, *supra* note 3, at 36. The court began to sit mostly in bank in 1922. Pound, *supra* note 11 at 214. Yet it sporadically filed a few department cases in the mid-1920s, and then revived the department practice for about sixteen months, filing approximately 250 such opinions between December 1927 and March 1929. At first blush, Sterrett v. The Curtis Corporation (1929) 206 Cal. 667, appears to be the caboose — yet, as shown *post* note 118, it's not quite.

[118] The court issued two department opinions back-to-back in March 1941 — shortly after Phil Gibson became chief justice, and nine months after the Supreme Court library was presented by Arthur Vanderbilt with a copy of Roscoe Pound's 1940 book, *supra* note 11, in which (at 214) Pound lamented the demise of the practice. *See* Grolemund v. Cafferata (1941) 17 Cal. 2d 679 ["Department 2," opn. by Curtis, J., with Traynor, J., and Shenk, J., conc.]; Wiseman v. Sierra Highland Mining Co. (1941) 17 Cal. 2d 690 ["Department 1," opn. by Shenk, J., with Carter, J., and Edmonds, J., conc.].

provisions were finally removed from the Constitution in 1966,[119] when the judicial article was also amended to conform the appellate jurisdiction of both levels of appellate courts to longstanding practice.[120] Proposals to embrace a new version of the department system were made — but did not advance — in the early 1980s and late 1990s.[121]

Meanwhile, the opening pages of the *California Reports* continued to show the erstwhile department assignments of the associate justices through volume 64 (1966), and ceased doing so only after the department provision was removed from the charter. *See post* note 119.

[119] As recommended by the California Constitution Revision Commission, *supra* note 107, at 84, the provision was deleted at the General Election of Nov. 8, 1966 [Prop. 1-a].

[120] It was not until "about 1941 [that] the Supreme Court adopted the practice of referring virtually all [of its cases on direct appeal from the trial court] to the district courts of appeal." Prince, *supra* note 117, at 4. *See also* California Blue Book 1946 (State Printer, Sac., Cal. 1946) at 115 [the court's practice at that time was to "transfer to the district courts of appeal for determination all cases except appeals involving the death penalty, tax cases and other matters of importance affecting the public interest or requiring the interpretation of new laws, and proceedings on review from the Railroad Commission" — and in fiscal year 1944–45 "approximately 28 percent of the petitions for hearing" from decisions of the appellate courts were granted]. Decades later, those drafting revisions to the 1879 Constitution recommended modernizing article VI, section 11 (addressing appellate jurisdiction of the Supreme Court and Courts of Appeal) to memorialize and extend the "long-standing practice" of referring most matters — except, most prominently, capital cases — to the intermediate appellate courts. California Constitution Revision Commission, *supra* note 107, at 81; *see also id*. at 90. The Legislature agreed, and voters enacted that change at the General Election of Nov. 8, 1966 [Prop. 1-a]. *See generally* Sosnick, *The California Supreme Court and Selective Review* (1984) 72 Cal. L. Rev. 720, 726–30.

[121] Mosk, *Opinion: A Two-Part State Supreme Court* (1983) 11 Pepperdine L. Rev. 1 [proposing to increase the Supreme Court to eleven justices siting in two departments — with five justices hearing criminal cases, and five hearing civil cases]. *See* Kopp, *Changing the Court for a Changing California* (July 19, 1998) The Los Angeles Times, at B15 [lamenting the demise of the court's department system and advocating a renewed version of Justice Mosk's bifurcated court proposal, creating a new seven-justice "Court of Criminal Appeals" — Sen. Const. Amend. 31 (Feb. 26, 1998)]; George, Chief: The Quest for Justice in California (Berkeley Pub. Policy Press, Berkeley, Cal. 2013) at 528–29 [criticizing these bifurcation proposals]. *See also id*. at 530–31 [describing Chief Justice George's own proposal to allow the Supreme Court to transfer capital appeals for decision by the Courts of Appeal, thus freeing the court to better focus on important legal issues arising in both capital and review-granted cases]. Regarding the capital appeals transfer proposal, see also George, *Reform death penalty appeals* (Jan. 7, 2008) The Los Angeles Times, at A15.

The Constitution's vaccination against Supreme Court commissioners remained enshrined in the judicial article for fifty-two years, long after that court and the Courts of Appeal had adopted less controversial methods of utilizing judicial staff.[122] The vestigial provision explicitly

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122 By 1930, the justices of the Supreme Court and Courts of Appeal were using judicial legal staff more discreetly, in a behind-the-scenes manner, under job titles such as "legal secretaries," "law clerks," and "chief law secretary." Often these incumbents became long-term, or even career, employees. *See generally* Oakley & Thompson, Law Clerks and the Judicial Process (U.C. Press, Berkeley, Cal. 1980) at 31–33 & n. 2.86. According to Bernard Witkin, during this era the justices, including the first one for whom he worked, exercised little oversight concerning the opinions drafted by their law clerks, whom he labeled "ghostwriters." Bakken, *Conversations with Bernard Witkin* (1998–99) 4 Cal. Sup. Ct. Hist. Soc'y Y.B. 109, 111. By contrast, Witkin stressed, the next justice for whom he worked as law clerk starting in 1939, Phil Gibson (who became Chief Justice in mid-1940), was substantially engaged in the process, and would "argue" with him about the cases. *Ibid.*; see also *An Interview with Bernard E. Witkin for the Roger J. Traynor Memorial Collection* (Sept. 3, 1986) at 14 (unpublished manuscript on file in the Witkin Archives, California Judicial Center Library, San Francisco). Finally, Witkin described how Justice Roger Traynor, upon joining the court in mid-1940, and thereafter, employed bright and skilled law clerks as collaborators. *Id.*, at 19; see also Bakken, *supra*, 4 Cal. Sup. Ct. Hist. Soc'y Y.B. at 111–12 [Traynor used law clerks as "participants in the thinking process that led to the decision as well as in the articulation by the opinion"].

By 1950, each Supreme Court justice could employ one "research attorney" (a career position today denominated a senior judicial staff attorney) and one "research assistant" (a recent graduate, often not yet admitted to the bar, today denominated an annual law clerk). Oakley & Thompson, Law Clerks and the Judicial Process, *supra,* at n. 2.86. An extensive (albeit outdated) discussion of allocation of work between the Supreme Court justices and staff in the mid-1970s can be found in Stoltz, Judging Judges (Free Press, N.Y. 1981) 352–59. Meanwhile, California's professional appellate staff attorneys emerged from seclusion and commenced holding annual statewide educational conferences, now known as the Appellate Judicial Attorneys Institute (AJAI). *See*, *e.g.*, Witkin, *The Role of the Appellate Research Attorney — Past, Present and Future* (Oct. 13, 1988), Keynote Address delivered at the California Appellate Attorneys Institute, San Diego (on file in the Witkin Archives, California Judicial Center Library, San Francisco) [extolling the model of career attorneys who assist appellate justices]. These conferences in turn prompted a prominent commentator who perhaps had forgotten about the nineteenth century commissioner predecessors to assert: "There was a time . . . when these folks, who share a plenty big chunk of the responsibility for the operation of the courts, were faceless, nameless mushroom-like secret operatives, tucked away in the back recesses of the appellate courthouses. Their very existence was kept pretty close to the vest . . . ." Lascher, *Lascher At Large* (Dec. 8, 1989) S.F. Daily Journal. The AJAI remains very active today.

prohibiting Supreme Court commissioners was deleted from the charter in the mid-1950s.[123]

But although the Commission had been abolished, never to arise again, the safe landing program continued for the last five commissioners. After considerable press speculation about whom the governor would appoint to the newly created judicial positions,[124] when the music stopped in 1905, each existing commissioner was made a new Court of Appeal justice. Ralph Harrison served as presiding justice, First District Court of Appeal, 1905–07.[125] Wheaton A. Gray served as presiding justice, Second District Court of Appeal, 1905–06. N. P. Chipman served as presiding justice, Third District Court of Appeal, 1905–11. J. A. Cooper served as associate justice, First District Court of Appeal, 1905–07, and presiding justice, First District Court of Appeal, 1907–11. Finally, George H. Smith, then the senior commissioner, having been in that position for the prior fifteen years, served as associate justice, Second District Court of Appeal, 1905–06.

These former commissioners and their eleven predecessor colleagues are little remembered today. Yet all of them played a significant role in helping the Supreme Court fulfill its responsibilities for two decades. Moreover, as we have seen, they also facilitated, perhaps unwittingly, creation of the state's intermediate appellate courts. These early court staff attorneys are — and should be honored as — indirect ancestors of the current appellate judicial attorneys who provide analogous assistance to both the Court of Appeal and the Supreme Court, and help those courts fulfill their challenging and demanding responsibilities today.

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123 Gen. Elec. of Nov. 6, 1956 [Prop. 17, removing art. VI, former § 25 from the California Constitution]. Yet as alluded to *ante* note 18, the state charter had long permitted trial courts to hire and use commissioners. That practice continued, and is reflected, as approved by the voters at the General Election of Nov. 8, 1966 [Prop. 1-a], in present Cal. Const., art. VI, § 22, allowing superior courts to appoint "officers such as commissioners to perform subordinate judicial duties."

124 E.g., *Many Ask Pardee For Appointment to New Bench* (Nov. 30, 1904) San Francisco Examiner, at 6.

125 Johnson, *supra* note 19, at 188. Two years later political machinations again intervened, derailing efforts to nominate Harrison to a full term. There being no Commission to which to return, he was forced to resume the practice of law, which he undertook with his son. *Id*.

ROSTER OF CALIFORNIA SUPREME COURT COMMISSIONERS,

By month and year of service on the court (listed by first service on the court)

JACKSON TEMPLE
Associate Justice, Jan. 1870–Jan.1872
Associate Justice, Jan. 1887–June 1889
Commissioner, March 1891–Jan. 1895
Associate Justice, Jan. 1895–Dec. 1902

ISAAC S. BELCHER
Associate Justice, March 1872–Jan. 1874
Chief Commissioner, May 1885–July 1891
Commissioner, Aug. 1891–Nov. 1898

NILES SEARLS
Commissioner, May 1885–April 1887
Chief Justice, April 1887–Jan. 1889
Commissioner, Feb. 1893–Jan. 1899

H. S. FOOTE
Commissioner, May 1885–Jan. 1893

ROBERT Y. HAYNE
Commissioner, May 1887–Jan. 1891

PETER VAN CLIEF
Commissioner, May 1889–Nov. 1896

JAMES A. GIBSON
Commissioner, May 1889–Jan. 1891

GEORGE H. SMITH
Commissioner, April 1990–May 1905
(Associate Justice, Second District Court of Appeal, 1905–1906)

RALPH C. HARRISON
Associate Justice, Jan. 1891–Jan. 1903
Commissioner, Jan. 1904–June 1905
(Presiding Justice, First District Court of Appeal, 1905–1907)

W. F. FITZGERALD
Commissioner, Feb. 1891–May 1892
Associate Justice, Feb. 1893–Jan. 1895

JOHN HAYNES
Commissioner, June 1892–Jan. 1904

E. W. BRITT
Commissioner, March 1895–April 1900

N. P. CHIPMAN
Commissioner, April 1897–May 1905
(Presiding Justice, Third District Court of Appeal, 1905–1921)

EDWARD J. PRINGLE
Commissioner, Feb.–April 1899

WHEATON A. GRAY
Commissioner, Feb. 1899–June 1905
(Presiding Justice, Second District Court of Appeal, 1905–1906)

J. A. COOPER
Commissioner, May 1899–June 1905
(Associate Justice, First District Court of Appeal, 1905–1907)
(Presiding Justice, First District Court of Appeal, 1907–1911)

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2020 WRITING COMPETITION VIRTUAL ROUNDTABLE

For the first time, the California Supreme Court Historical Society met by video conference to congratulate the 2020 winners of its annual Selma Moidel Smith Student Writing Competition in California Legal History.

The award-winning students introduced themselves and presented summaries of their papers. Participating in the discussion were California Chief Justice Tani Cantil-Sakauye, recently retired Justice Kathryn Mickle Werdegar, Society President Richard H. Rahm, and Selma Moidel Smith who initiated and conducts the competition.

Each year, the competition is judged by distinguished legal historians and law professors. The 2020 judges were: Stuart Banner, UCLA School of Law; Christian Fritz, University of New Mexico School of Law (Emeritus); and Sara Mayeux, Vanderbilt University School of Law, who was the first-place winner of the competition in 2010.

The following is a lightly edited transcript of the video conference that took place on August 26, 2020.[1] The complete papers appear immediately following in this volume of *California Legal History* (vol. 15, 2020).

[1] The video conference is available on the Society's website at https://www.cschs.org/programs/student-writings or on the Society's YouTube channel at https://www.youtube.com/watch?v=ToP6rkZpaxU.

RICHARD H. RAHM: I've been asked to do a "welcome and introductions," so I'd like to welcome everyone here. Chief Justice Tani Cantil-Sakauye has served as Chief Justice of California for nearly ten years now and during that time the Chief has championed the cause of bail reform, she leads an initiative called "The Power of Democracy" to support civil discourse — education for students — and finally, perhaps most importantly, the Chief serves as chair of the California Supreme Court Historical Society Board of Directors.

Next up, I'd like to introduce Justice Kathryn Mickle Werdegar who's been a champion of environmental law, recently retired after twenty-three years as associate justice of the California Supreme Court. Last year, Justice Werdegar established, in honor of Selma Moidel Smith, a student travel grant to help fund California legal history research. Justice Werdegar continues to serve as a long-time member of the Society's Board of Directors.

Next up is Selma Moidel Smith, whom we all know, formerly of the law offices of Moidel, Moidel, Moidel and Smith. I hope I didn't miss anyone there. Selma has been a leader in the legal profession generally, as well as bar associations, local, national, and international. In addition to being a long-time member of the Society's Board of Directors, Selma is not only chair of the Society's Publications Committee, she is editor-in-chief of the Society's *California Legal History* journal. In 2007, Selma initiated the Society's writing competition, which was renamed in her honor in 2014. Now, although Selma turned 100 last year, her powers of discerning first-rate writing are not diminished. The winning submissions this year are the best I've ever seen, and this is a tribute to Selma and her legacy. Thank you.

Excuse me, Chris,[2] do we know if Taylor Cozzens is going to be coming?

SMITH: I just got a message from our first-place winner. He will join us now. You just asked, and you just got it at the very moment it happened. What delayed him, and I do want to share this with you — his wife just gave birth, and he's been very carefully being with her at this time. He confessed, "I completely forgot what time it was." She was in the hospital and the baby was just born. And he did not want to miss this, and I'm sure you'll be able to give him congratulations, I want to say "in person," but I

[2] Chris Stockton, CSCHS Director of Administration.

Virtual Roundtable Participants —

top, left to right: **Chief Justice Tani Cantil-Sakauye, Justice Kathryn Mickle Werdegar (Ret.), Competition Chair Selma Moidel Smith, and Society President Richard H. Rahm.**

bottom, left to right: **Winning authors Taylor Cozzens, Gus Tupper, and Brittney M. Welch.**

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can't say "in person" — but it will look like we're all in person. So, you see, we have something from beginning to end here.

Actually, I do want to thank Richard very much — he has done a very selfless kind of thing in being here with us because he already was scheduled for surgery —

RAHM: It's just knee surgery —

SMITH: Let us begin now, and again, thank you, Richard — and I just want you to see how much that means for everyone. Yes, at that point, I hand that over to you to do the guiding along of the rest of our program.

RAHM: Now we have the student presentations. Each one of you, starting with Taylor, Gus, and then Brittney, if you could introduce yourself and summarize your paper for a couple of minutes, that would be great.

TAYLOR COZZENS: Thank you very much. My name is Taylor Cozzens. I just completed a master's program in history at the University of Oklahoma, and I'll be starting the Ph.D. program this fall. The paper that I wrote looks at the California Rural Legal Assistance, a legal service agency from the era of the War on Poverty, and specifically the agency's efforts to help mostly migrant farm workers.[3] As I studied that agency, I first started by looking at their efforts to ban the short-handled hoe in California agriculture,[4] and from there I looked at their work related to environmental justice — protecting workers from pesticides and other environmental hazards.

But as I worked on those other projects, I kept coming back to this truly dramatic standoff between Governor Ronald Reagan and this agency. That's what this paper was about. It was about Reagan's efforts to discredit and ultimately destroy this agency that the federal government was funding. Ultimately, he was unsuccessful, but it was, to me, a very dramatic and important story because it gets at the legal representation of mostly Latino farmworkers who had not had representation prior to that point. I really enjoyed writing the piece. Thank you.

RAHM: Thank you, and then Gus, would you like to introduce yourself and your paper?

GUS TUPPER: Hi, I'm Gus, a 2020 graduate of Berkeley Law, and my paper is about juvenile transfer, which is the process by which the juvenile court waives its jurisdiction over a juvenile defendant and transfers their case to adult court.[5] In the paper I was trying to do three things:

The first part maps this theory called "the cycle of juvenile justice" onto transfer policy in California. "The cycle of juvenile justice" is a widely accepted understanding of the development of the juvenile court over the twentieth century, and I argue that California's transfer policy follows a similar arc. At the turn of the twentieth century, the lenience that the juvenile court was founded on basically meant there were no rules governing transfer at all, which led to all kinds of abuses, including what I identify

[3] Taylor Cozzens, "Ronald Reagan v. CRLA: Politics, Power, and Poverty Law," *California Legal History* 15 (2020): 175–206.

[4] Taylor Cozzens, "Defeating the Devil's Arm: The Victory over the Short-Handled Hoe in California Agriculture," *Agricultural History* 89, no. 4 (Fall 2015).

[5] Gus Tupper, "Breaking California's Cycle of Juvenile Transfer," *California Legal History* 15 (2020): 207–253.

as a transfer project where older "incorrigible boys" in California's early reform schools were surgically sterilized. And then harsher punishments arose out of the increased crime of the Great Depression. The transfer process became more punitive, so that it was easier to transfer kids to adult court, but the deaths of two Mexican-American boys, Benny Moreno and Edward Leiva, in state custody in 1939 Los Angeles led to calls for more lenient treatment. And then federally mandated procedural rules were supposed to help alleviate some of the excesses of juvenile court punishment, but in the middle of the twentieth century and with the tough-on-crime era in the eighties and nineties and early 2000s, some of the harshest punishments were brought back into vogue. In the last few years, we've entered a period of backlash to these tough-on-crime policies, including California's punitive transfer policy.

The second part of my paper is about S.B. 1391 which took effect in 2019 and made it impossible for California's juvenile courts to transfer kids to adult court until they turn sixteen. Prosecutors are currently challenging the constitutionality of that law, and the Courts of Appeal are split. The vast majority are in favor of upholding it, and I argue in the paper that that majority of the Courts of Appeal are right, and the Supreme Court is hearing the case and will probably decide in the fall.

But I think the most interesting question is how to break out of the cyclical pattern, and that's the subject of the third part of my paper. Thomas Bernard, who's kind of the father of this "cycle of juvenile justice" theory, casts it as inevitable, but I think there's real promise in abolitionist organizing in California right now, particularly recent successful calls to defund school police and reinvest money in transformative justice projects. I think movements led by groups like the Black Organizing Project in Oakland and Youth Organize California might actually be able to keep us in this current lenient moment in the cycle of juvenile transfer.

RAHM: Thank you very much, Gus, and then finally, Brittney.

BRITTNEY WELCH: Hi, I'm Brittney Welch. I was born and raised on a farm in northeastern Ohio, about an hour from Cleveland, and the farm is actually where I spent all of my summer while working remotely for the Department of Justice Antitrust Division. I'm currently a 3L at Moritz College of Law at Ohio State. I'm in Columbus right now. And I'm really

passionate about public interest work and I hope to have a career working in government someday. I'll actually be clerking for a state supreme court after I graduate, in Vermont, which is a place I've never been but as a history nerd I can't wait to go and dig into New England's history.

My paper was actually inspired by my 1L summer job. I worked for the Department of Transportation in D.C. I didn't work on the rule that I wrote about — I was in the Federal Highway Administration — but it was something that I heard about from afar. My paper is about the One National Program Rule, which is a rule that was promulgated by the current administration which destroys, in my opinion, the iterative federalism scheme created by California in the realm of environmental regulations in favor of a national fuel emissions standard, which is much less considerate to the environment.[6] It examines the deeply embedded aspects of federalism in California's Clean Air Act waiver, which they've had for quite a long time, and which has continued to enable California to be a leader in auto emissions regulations for half a century. California's high environmental standards of regulation don't only touch California. There are about 120 million people who reside in states that have adopted California's standards, and the number is even higher when you consider that states bordering those compliant states can sell the California-compliant cars as well. So, in my paper, what I do after discussing the history, is that I propose a framework that emphasizes the central role that federalism should play in any analysis of an eventual court's decision on the rules, and there are in litigation now some cases related to the rules. Overall, my paper concludes that the continued existence of California's ability to opt out of the Clean Air Act standards, and go above and beyond those with their own emissions standards, is not only essential to advancements in environmental regulations, but it's essential to the vitality of modern-day federalism.

RAHM: Thank you very much, Brittney. I'm going to go off-script just a little bit and ask a question. It's really interesting to me that Brittney, with your paper, and Taylor, with your paper, they're almost like bookends in that Taylor is writing a paper about the success of the federal government in imposing a

[6] Brittney M. Welch, "Stop! Turn the Car Around Right Now for Federalism's Sake! The One National Program Rule and How Courts Can Stop Its Impact," *California Legal History* 15 (2020): 255–290.

standard and not getting it overturned or somehow sabotaged by Governor Reagan, and then Brittney, with yours, you're basically touting federalism in that, "Gosh, these states should have the right to go do what they want to do" — kind of at odds with Taylor's paper. Any comments?

WELCH: Taylor, you can go ahead first.

COZZENS: It is ironic. The easy answer is that it's political, I suppose. Whoever is in the Oval Office, whoever is in Sacramento, their policies at different times disagree, but in different ways. In the case of California, after Reagan, Governor Jerry Brown — I'm thinking of Miriam Powell's recent book, *The Browns of California* — both of his terms were very fundamental in perhaps moving California toward the direction that Brittney's paper analyzes.

WELCH: I found it really interesting while I was doing my research that federalism is a term I've almost always associated with a conservative viewpoint — that's what you hear when federalism is touted — and I hadn't really been looking into the environmental space before, and it kind of amazed me how federalism is being used in a way that I had never looked at and I had never seen. So I think it was a learning lesson for me that sometimes — and again, federalism is great if you agree with the point of view, but at the same time it's really easy to flip back on the other side and be like, "Oh, actually I don't agree with that kind of federalism." So I think it's just been a learning lesson to me in a lot about how these tools can be used for things you might agree with and things you might not agree with.

RAHM: Very good, and Gus, does your paper fit in somewhere in between this, or is it a case study in and of itself?

TUPPER: The sort of federal interplay, I guess, comes in more with Earl Warren who was a really important player at multiple stages in the development of juvenile policy in California, first as attorney general when he instituted a lot of reforms including creating the California Youth Authority, which was the youth prison system through the rest of the twentieth century, and then obviously as governor and chief justice. He wrote some of the most important U.S. Supreme Court cases about juvenile law, including *In re Gault*, which guaranteed due process rights to juveniles. So that's sort of the federal line that I see, definitely some interesting federalism questions there, too.

RAHM: Very good. Well, thank you all. Going back onto the agenda — sorry about that, Selma — Chief, if you have some closing remarks?

CHIEF JUSTICE: Thank you. I know, listening to your descriptions of these distinguished works, that all of us will benefit because of that inspired writing. I found all of your subject matters very interesting, and hearing you describe them.

As a jurist — I know that Kay Werdegar also, probably — lightbulbs were going off in our heads thinking about what you wrote about, Taylor, regarding the struggle and conflict in power enforcing policy and how the relationship of the three branches of government makes a difference — and brute power or incentivizing action — and I think those of us who either still remember the Reagan years, or remember jurists from the Reagan years, or have dealt with policies in the Reagan years, will find it fascinating — fascinating actually, when you talk about CRLA. You know, Justice Cruz Reynoso is a founder and an awesome megastar of CRLA and served on our court, and then after he left our court, he went on to teach young minds in law school and is considered still today to be an iconic influence in California policy.

And then I think of Gus's subject matter about juveniles and, again, the federal government plays a role, in the sense that — while it doesn't fund it like CRLA — it certainly started with the *Roper–Miller* line of cases, where Kay and I are very familiar with the young, growing, juvenile mind and the way the courts have finally begun to humanize our approach to the juvenile mind and rehabilitation. So, we watch with fascination the entanglements of transfer now at the California Supreme Court, having to do with Prop 57 and others.

And then, of course, I seriously enjoy Brittney's emphasis on federalism because this is what I try to preach over at the Legislature when they get out of their lane, violate separation of powers, and try to tell the judicial branch what to do. Or, often I hear it when the judicial branch at the state level tries to guide the trial courts at the county level. I find federalism fascinating; I wish more people knew about it, more people respected it and thought about it in an abstract way. I think it would improve our policies, at least in California.

And so I'm greatly excited and inspired by your minds, thinking about this and your view and approach. All of these issues come to us at the

Supreme Court, brought to us by good attorneys like Richard and Selma, and this is what moves policy forward. So thank you for this opportunity. I'm excited and impressed.

RAHM: Thank you very much, Chief. Justice Werdegar?

WERDEGAR: Yes, well, I enjoyed the Chief's remarks, and I enjoyed the image of the Chief trying to educate the Legislature, but if anybody could do it, she could. First, I want to congratulate Taylor on a new baby, am I right?

COZZENS: Yes, the baby just barely arrived. Thank you very much.

WERDEGAR: My goodness! Is it a baby boy or a baby girl?

COZZENS: A girl.

WERDEGAR: Her name?

COZZENS: Eleanor.

WERDEGAR: Well, congratulations to your wife and to you, and we're glad that you could still make an appearance. At least you didn't have to fly to California. As said by the Chief so eloquently and completely, all your topics touch us in the judiciary, and us in California. I was interested that you looked to Ronald Reagan as governor, which so many people forget — that he was governor of the State of California before he became president — and I do remember when the CRLA was going into effect and the issues of that time.

With Gus telling us about the juvenile transfer cycle, as a judge, I've watched that, I've lived through it, I've suffered through it, and it's an ongoing issue that this state faces.

And finally, the federalism about Britney's paper, "Stop! Turn the Car Around": We are living that now, too. So these are very timely, very important, topics, and I congratulate all of you for coming up with these, and I think you know it's unprecedented that each and every one of you would be published in our California Supreme Court Historical Society journal, and that's because, in addition to the first-place winner, the other two are also worthy of publication and will get the exposure they deserve. So congratulations to all of you.

RAHM: Thank you Justice Werdegar. Selma?

SMITH: Many, many thoughts have already been going through my mind, as I'm sure it is with you. I wanted to say simply that this has been quite a learning experience. This is the first time, of course, by force of circumstances that we are in this particular mode of doing it, and I'm looking forward to our ability to return — on behalf of all of us — to where we can all sit together and enjoy each others' personal company as well, but I'm very grateful that we have this, and I shall have many occasions to look back.

As each of you spoke, I was making mental notes, and when I see your names again in any of your activities — without your even knowing it — I will have an extra heartbeat for your endeavors and accomplishments. So, I shall not lose you; I shall simply be adding to my large, well — I'm the eldest here — so, I simply want to take advantage of that by saying, as we go along, we also keep learning. And these examples that you've given are splendid examples of what is done at a particular level, and the opportunities you make use of, and what you are giving to your work. I'm going to be particularly proud because all three of you, your papers, I can assure you will be in the fall journal, our scholarly journal of which I'm editor-in-chief. I just want you to know that I will be thinking of you, and I appreciate so much your taking your time, your efforts, to come and share with us, and I look forward to these names again. Thank you, all of you, for coming.

I want to thank our Chief, who is always available to me at any time that I am going to make an honor of this nature, as the result each year of these particular competitions, this very one, which they were kind enough to — simply because I came up with it — they put my name on it, so they call it that.

RAHM: That's not entirely true —

SMITH: At any rate, I just want to say thank you, and I'll be thinking of each one of you, wishing the very best for you.

Chief Justice Tani, in spite of the fact that you are not at *that* point — you are at a different point — I want to see all the recognition possible for you, and for all the splendid ideas and the manner in which you conduct yourself, the manner in which you hold court. I saw you as you became chief justice, and I look back to that moment, of our first glance to each other, and you came up to me so kindly to introduce yourself, and I

appreciated that. And now, I appreciate this opportunity in a very public way, again, to say we're very fortunate here in California, very fortunate.

Chief, it's delightful to see you again, and I'm sorry that at this time, contrary to all the other times we've had, when we were actually meeting together, we can't just reach out and make a hug — which we know is practically our signal to each other.

CHIEF JUSTICE: Thank you, Selma. I don't have much to say except to tell you, of course, that I miss you, and it's wonderful to see you, even if onscreen and to hear your voice. I know that Kay [Werdegar] and I have always enjoyed this celebration of the students who win the award, the terrific work of the historical society, but particularly, Selma, your leadership with this program that mentors young students. And they get to meet you, and I hope that all of you, if you have not already, that you "Google" Selma, because if I were to tell you about her background, we would be here until midnight, and I think she's only giving me a few minutes. And I will also say I thank Richard [Rahm] for his leadership, and Chris [Stockton], because of how important it is to have this focus. I'm also grateful that, in looking at where you all hail from, these are truly national winners. Your topics sound very exciting and provocative. So, thank you, thank you for this privilege of being able to share this celebration of these honors with you, with the great Selma Moidel Smith.

RAHM: Thank you.

SMITH: Thank you. You see, that's who we have that we can be so proud of. When I have national meetings, I'm so pleased and proud to be able to say, yes, I'm from California, and, of course, we have our "Chief Tani."

RAHM: I agree.

CHIEF JUSTICE: Thank you, Selma. It's a privilege; thank you.

SMITH: As she also knows, my closing words will be with Kathryn. She has gone with me from one to another of the occasions in which we have had our annual students' competition. On each occasion, she has added her good thoughts, her kindness. It's the kind of friendship that lasts, and has, over years, all on the Board of Directors in the California Supreme Court Historical Society. So, like it or not, we become captive to our attributes, to our wishes, to our good thoughts for others.

I just want to say, if I could possibly do it all at one time, I would reach out and make a big hug and thank you for all the contributions.

WERDEGAR: And we'd reach out to you —

SMITH: We'll see your articles in our journal in the fall, and all of you will see your papers and you will see each others'. And I just want to tell you that you've made a bright day, and a bright year, and added to a bright life. Thank you so much to all of you. And Chris, thank you for guiding the technical process, and I want you to know that I expect you will take my thank-you back to your office. And Richard Rahm gets my absolute thanks because not too many people who are scheduled for surgery — thank you again for moving out your really personal matter — and I hope you're never in that spot again. I wish you the very best on your knee operation, and I'll have a good thought for you, as I'm sure we all will.

Thank you, thank you, thank you, in every language that ever existed and one that comes only from the heart. Thank you all.

RAHM: Thank you so much, Selma. Actually, you remind me of a quick anecdote. Once, when I was working on an article for the *California Legal History* journal, I was in my office sending emails to Selma around midnight, thinking, you know, that sometime the next day we would discuss them, and — bam! — immediately, she replied at midnight, and there would be emails waiting for me at 7:00 in the morning. So, I don't know when she sleeps, but — just absolutely incredible.

I want to thank you, Taylor, and congratulations — what fantastic news — and thank you for your paper; I really enjoyed reading it. And likewise, Gus. Thank you very much, and congratulations. And, finally, Brittney, thank you so much for your paper. And then, Chief, thank you for your remarks. Thank you for being here. Justice Werdegar, thank you so much. And again, Selma, thank you. Chris, thank you for putting this together online. With that, I think we've concluded.

SMITH: Have a lovely day. And also — when my heart is in it, there they go [gesturing a hug to everyone].

RAHM: Yes!

ALL: Yes, definitely [gesturing the same].

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RONALD REAGAN v. CRLA:

Politics, Power, and Poverty Law

TAYLOR COZZENS*

On Christmas Eve, 1970, Lewis Uhler, director of the California Office of Economic Opportunity, shared a confidential 283-page report with Governor Ronald Reagan that catalogued four years and 127 cases of alleged misconduct by the attorneys of the California Rural Legal Assistance (CRLA).[1] Created in 1966 during President Lyndon B. Johnson's War on Poverty, the CRLA had eleven small offices throughout California in which federally funded attorneys provided free legal services to the rural poor, including many Mexican-American farmworkers. These attorneys, Uhler charged, were out of control. According to his report, they had been supplying inmates of the San Quentin State Prison with "subversive literature." They had also violated 1968 grant restrictions by working on criminal cases and by providing legal counsel to the United Farm Workers

This paper was awarded first place in the California Supreme Court Historical Society's 2020 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

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[1] "Reagan, CRLA In Test: Governor Vetoes Legal Aid Funds, Charges Violations," *Long Beach Independent*, Dec. 27, 1970. Box 67, Folder 2. CRLA Records (M0750). Dept. of Special Collections and University Archives, Stanford University Libraries, Stanford, Calif.

Union. On a more trivial level, a CRLA attorney in a visit to a local high school had used the F-word in front of students. In another instance, an attorney had appeared barefoot in court. As a wild example, the report charged that, in an effort to defend juvenile delinquents, the CRLA had "spirited away" a fifteen-year-old girl to Tijuana, Mexico, so she could marry without parental consent.[2] To borrow Uhler's words, "these represent only a few of the alarming examples of CRLA's failure to accomplish its mission, comply with its grant conditions, or control the sometimes outrageous and irresponsible conduct of its employees."[3]

On December 26, 1970, with the report in hand, Reagan exercised his prerogative as governor to block the CRLA's annual funding package of $1.8 million from the federal Office of Economic Opportunity (OEO), the entity from the Johnson era that administered War on Poverty programs. Explaining this decision, Uhler declared, "The failure of the CRLA has been so dramatically brought to this administration's attention that there is no choice but to recommend the disapproval of CRLA funding."[4] Once the governor's veto became official, Uhler, Reagan, and other members of Reagan's administration looked ahead to the new year when, if all went as planned, the young poverty law agency would wither and die.

The matter was far from closed, however. While War on Poverty legislation gave governors authority to veto funding packages for federal programs in their states, the OEO in Washington retained authority to override such vetoes if it saw fit. Thus, Reagan and Uhler still had to convince Frank Carlucci, the new OEO director of the Nixon administration, that the veto and the report on which it was based were legitimate. They also had to prepare for the CRLA's response to their charges. As soon as the report became public, dozens of attorneys whom they had slandered would present their version of the 127 cases. Given Uhler's obviously one-sided accounts, the Reagan administration had to bank on some political favoritism from Carlucci and the conservative Nixon administration.

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[2] See Lewis K. Uhler, "A Study and Evaluation of California Rural Legal Assistance, Inc, 1971." Carton 78, Folder 24, CRLA Records, Stanford.

[3] "Lack of Direction was Reason for CRLA Veto," *Antioch Ledger*, Jan. 5, 1971. Box 67, Folder 2, CRLA Records, Stanford.

[4] Ibid.

For the CRLA, the Uhler report brought intense scrutiny from the federal government as well as the imminent possibility of termination. If the Nixon administration wanted to dismantle or change federal programs from the Johnson era, Reagan's veto made it easy to do so. The CRLA, therefore, not only had to respond to Uhler's charges, but it also had to demonstrate that it was providing an essential service to impoverished citizens. Consequently, what should have been a regular refunding cycle became a fight for survival. In its four years of existence, the CRLA had fought — and won — several large lawsuits, including suits against the Reagan administration, on behalf of California's rural poor (hence Reagan's desire to be rid of the agency). This battle for survival, however, became one of the agency's most significant cases.

By defending itself, the CRLA defended, by extension, California farmworkers' access to the legal system and their ability to use the law to protect their civil rights. More broadly, in the fight for its own survival, the CRLA defended President Lyndon Johnson's idea that federal programs really could lift American citizens out of poverty. This idea directly challenged resurging conservative voices that called for state autonomy and a small federal government. This case represented a clash of political ideologies, as well as a power struggle between farmworkers and their federal allies on one hand and growers and their state allies on the other. The outcome would shape rural California society for decades.[5]

In the study of modern California farmworkers, scholars and popular society have paid far more attention to Cesar Chavez and the public protest

[5] Reagan's battle with the CRLA has received limited scholarly attention. In 1972, Michael Bennett and Cruz Reynoso published a thorough, first-hand account of the CRLA's early legal strategy and self-defense; see Bennett and Reynoso, "California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice," *Chicana/o Latina/o Law Review* 1, no. 1 (1972): 1–79. During the next decade, other legal scholars examined the vulnerability of legal service agencies to political pressure; see: Jerome B. Falk and Stuart R. Pollak, "Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services," *Hastings Law Journal* 24, no. 4 (1973): 599–646; Angela F. Turner, "President Reagan and the Legal Services Corporation," *Creighton Law Review* 15 (1982): 711–32. Overall, these articles do not fully examine the history of the CRLA and Governor Reagan's veto in the larger context of the War on Poverty and California farmworker history.

of the United Farm Workers Union (UFW) than to the CRLA.[6] The CRLA was significant, however, because it gave farmworkers something that they had never had in the past two hundred years, regardless of union involvement — namely, free access to attorneys and, in turn, legal protection. From Native American workers on Spanish missions, to Chinese and Japanese immigrants, to Anglo-American transients (or "bindlemen"), to Mexican immigrants, farmworkers in California history were migrants, foreigners, minorities, or all of the above. As such, they lacked the full benefits of citizenship, including legal protection, and they were often treated, in historian Richard Street's words, as "beasts of the field."[7] In the early 1900s, one journalist lamented, "California has passed laws for the protection of migratory birds, but it can not [*sic*] pass laws for the protection of migratory workers."[8] This lack of legal protection contributed to the poverty of all farmworker groups and to their powerlessness against racism, injustice, and violence. In the 1930s, Carey McWilliams concluded that "the exploitation of farm labor in California . . . is one of the ugliest chapters in the history of American industry." He added, "time has merely tightened the system of [land] ownership and control and furthered the degradation of farm labor."[9]

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6 Scholarship on Chavez and the UFW has overshadowed the CRLA. Historians who have examined Chavez and the union include: Jacques Levy, Richard Jensen, John Hammerback, Miriam Pawal, Frank Bardacke, Matt García, and Randy Shaw. Shaw goes so far as to argue that the legacy of Chavez and the UFW set the course for virtually all social justice projects that followed. This argument and much of the scholarship often overlooks the parallel role of the CRLA. Indeed, scholar Ellen Casper's 1984 dissertation, "A Social History of Farm Labor in California with Special Emphasis on the United Farm Workers Union and California Rural Legal Assistance" (Ph.D. diss., New School for Social Research, 1984), is one of the only book-length pieces of scholarship that gives the CRLA equal attention alongside the UFW; published as Ellen Casper Flood, "A Social History of Farm Labor in California with Special Emphasis on the United Farm Workers Union and California Rural Legal Assistance," *California Legal History* 15 (2020): 293–516. See also Randy Shaw, *Beyond the Fields: Cesar Chavez, the UFW, and the Struggle for Justice in the 21st Century* (Berkeley: University of California, 2008), Preface and Introduction.

7 Richard Steven Street, *Beasts of the Field: A Narrative History of California Farmworkers, 1769–1913* (Stanford: Stanford University, 2004), xv–xxv.

8 *San Francisco Bulletin*, Quoted in Street, *Beasts of the Field*, 526.

9 Carey McWilliams, *Factories in the Field: The Story of Migratory Farm Labor in California* (Boston: Little, Brown, 1944[1939]), 7; for a discussion of vigilantism against minority farmworkers, see 134–51.

The three decades preceding the 1960s witnessed even more tightening and degradation. During the Great Depression, Dust Bowl refugee families who were desperate for work flowed into the state. Despite John Steinbeck's tribute that "their blood [was] strong" and McWilliams' argument that *these* workers, as opposed to immigrants, were "American citizens familiar with the usages of democracy," they faced tremendous bigotry, poverty, exploitation.[10] As with other farmworker groups, transience, along with poverty and prejudice, effectively barred them from using the legal system in their defense. As one Dust Bowl refugee said of California growers, "when they need us they call us migrants, and when we've picked their crop, we're bums and we got to get out."[11]

The following decade, Mexican immigrants became the main source of labor because, as scholar Joon Kim argues, the California Farm Bureau Federation and the American Farm Bureau Federation had long recognized that these workers were easiest to deport once harvest season ended.[12] The state's trend toward temporary Mexican labor culminated in the Bracero Program, a bilateral agreement between the U.S. and Mexican governments. The program began during World War II when U.S. businesses needed Mexican workers to fill the jobs left by military recruits. However, as Miriam Pawal writes, "the agricultural industry found this new workforce so cheap and malleable that growers successfully lobbied to extend the program long after the veterans returned home."[13] In the postwar years of agricultural expansion, tens of thousands of Bracero laborers entered California each year to weed, thin, and harvest the crops. To growers, they were ideal stoop laborers. They accepted low wages, lived

[10] McWilliams, *Factories*, 306; John Steinbeck, *Their Blood is Strong* (San Francisco: Simon J. Lubin Society, 1938), 7–9, 20–23; During the mid-1930s, Steinbeck worked as a journalist, documenting the experiences of migrant workers in California. His real-life accounts of poverty, malnutrition, and death inspired his 1939 fictional masterpiece *The Grapes of Wrath*.

[11] John Steinbeck, *The Harvest Gypsies* (1936), in Eric Foner, *Voices of Freedom: A Documentary History*, vol. 2, 6th ed. (New York: W.W. Norton, 2020), 165 (163–65).

[12] Joon Kim, "California's Agribusiness and the Farm Labor Question: The Transition from Asian to Mexican Labor, 1919–1939" *Aztlan* 37, no. 2 (2012): 47–72.

[13] Miriam Pawal, *The Crusades of Cesar Chavez: A Biography* (New York: Bloomsbury, 2014), 54–55. The term *bracero* was derived from *brazo*, the Spanish word for arm, reflecting the laborers' role as extra hands.

wherever their employers directed, came and went based on their employers' needs, and had virtually no legal recourse.[14]

Braceros, of course, were not the only labor source. Many growers and workers avoided the bureaucracy of the Bracero Program by using unauthorized channels for immigrant labor.[15] Additionally, a third group of farmworkers included domestic Mexican Americans, many of whom had been born in the United States, spoke English, and saw themselves as different from temporary workers from Mexico. In rural California, Braceros, undocumented workers, and Mexican Americans competed for work, and many growers used Bracero laborers to break strikes, depress wages, and avoid negotiations with Mexican-American crews.[16] For agribusiness, the Bracero Program helped create a golden age of labor; for workers, as Walter

[14] Despite these deplorable conditions, hundreds of thousands of impoverished Mexican men signed up for the program year after year, enabling its longevity. In many cases, these men had been landless agricultural wageworkers or small, struggling farmers in rural regions, and the Mexican state's agricultural policies of the mid-twentieth century, which benefited large growers, marginalized them even more. For these men, work in the United States, even stoop labor, meant increased earnings and a sense of progress or modernity. The Mexican government embraced the Bracero Program because, as scholar Alexandra Délano notes, it represented a "safety valve . . . to muffle problems related to unemployment and social tension in the country, and guarantee the entry of dollars through remittances," which totaled $200 million between 1954 and 1959. See Délano, *Mexico and its Diaspora in the United States: Policies of Emigration since 1848* (New York: Cambridge, 2011), 98; see also Deborah Cohen, *Braceros: Migrant Citizens and Transnational Subjects in Postwar United States and Mexico* (Chapel Hill: University of North Carolina, 2011), 11; Timothy Henderson, *Beyond Borders: A History of Mexican Migration to the United States* (Malden, Mass.: Wiley-Blackwell, 2011), 59–63, 88–90; Hiroshi Motomura, *Immigration Outside the Law* (New York: Oxford, 2014), 42.

[15] See Ronald L. Mize and Alicia C. S. Swords, *Consuming Mexican Labor: From the Bracero Program to NAFTA* (North York: University of Toronto, 2011), 40; see also Motomura, *Immigration*, 38–40.

[16] Throughout the 1950s, growers used Bracero workers to break the strikes of Mexican American–led organizations such as the National Farm Labor Union. Furthermore, as the work of Miriam Pawal illustrates, grower associations in collusion with state officials perfected the practice of hiring Braceros over domestic workers. See Pawal, *Crusades*, 52–62; see also See Ernesto Galarza, *Spiders in the House and Workers in the Field* (South Bend: University of Notre Dame, 1970); Dionicio Nodín Valdés, *Organized Agriculture and the Labor Movement Before the UFW: Puerto Rico, Hawaii, California* (Austin: University of Texas, 2014).

P. Reuther of the AFL-CIO argued, it used "poor Mexicans to still further impoverish poor Americans."[17]

In the 1960s, federal policy began to interrupt agribusiness's golden age. The industry's use of cheap, transient labor fundamentally clashed with President Lyndon B. Johnson's vision of a Great Society that beckoned its people toward "an end to poverty and racial injustice."[18] Furthermore, Johnson's War on Poverty, with its aggressive spending on poverty-reduction programs, threatened to destabilize industries that relied on large numbers of poor workers. In rural California, two principles of the War on Poverty combined in the creation of the CRLA, which growers soon labeled "agriculture's oldest antagonist."[19] The first idea held that the poor throughout the nation needed and deserved access to attorneys. The second involved the Johnson administration's focus on migrant workers, especially Mexican-American farmworkers.

Johnson's idea that the poor deserved attorneys built on the work of President John F. Kennedy. In June of 1963, in the wake of massive civil rights demonstrations and police brutality in the Alabama and other southern states, Kennedy had emphasized the need for "legal remedies" to racial injustice, and, to provide such remedies, he had called on Congress to enact civil rights legislation.[20] In addition to laws, Kennedy also recognized the need for lawyers. This same month, he created the Lawyers' Committee for Civil Rights and invited 244 attorneys to the White House for an inaugural meeting. At the meeting, Vice President Johnson and Attorney General Robert Kennedy called on these lawyers to use the legal system to help American society put civil rights law into practice.[21]

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[17] Letter from Walter P. Reuther to President Lyndon Johnson, Oct. 27, 1964. Box 18: Labor (GEN LA 5, 10/1/1964); Folder: LA 5 Migratory Labor–Seasonal Labor 10/1/64–12/25/64. Lyndon Baines Johnson Presidential Library, Austin, Texas.

[18] Lyndon B. Johnson, "Remarks at the University of Michigan," May 22, 1964, in Bruce J. Schulman, *Lyndon B. Johnson and American Liberalism: A Brief Biography with Documents* (Boston: Bedford/St. Martin's, 2007), 193 (192–96).

[19] Don Razee, "Agricultural Work is Unfit, CRLA Contends," *California Farmer*, May 18, 1968. Box 65, Folder 6, CRLA Records, Stanford.

[20] "John F. Kennedy, Speech on Civil Rights, 1963," in Eric Foner, *Voices of Freedom: A Documentary History*, vol. 2, 6th ed. (New York: W.W. Norton, 2020), 266.

[21] See Michelle D. Bernard, *Moving America toward Justice: The Lawyers' Committee for Civil Rights Under Law, 1963–2013* (Virginia Beach: Donning, 2013); Ann Garity Connell, *The Lawyers' Committee for Civil Rights under Law: The Making of a Public*

Following Kennedy's assassination, Johnson continued to support the Lawyer's Committee. In a 1964 letter to committee leaders, he wrote, "I hope you will convey to all of the members . . . my personal interest in the work you are undertaking. Lawyers are uniquely qualified to play a leadership role in their communities in [the fight for civil rights] and I believe their active participation should be encouraged."[22]

For Johnson, however, the Lawyers' Committee was only a first step. In his vision, all poor citizens, especially minorities, had to have access to attorneys in order to challenge injustices in an effective, nonviolent way. In 1965, the Department of Justice and the OEO organized a Law and Poverty Conference at which members of the American Bar Association discussed this goal. "Equal justice for every man is one of the great ideals of our society," declared future Supreme Court Justice Lewis F. Powell. "We also accept as fundamental that the law should be the same for the rich and for the poor. But we have long known that the attainment of this ideal is not easy." The challenge, Powell continued, is that "our system of justice is based in large part on advocacy — on battle, if you will, in which lawyers have replaced warriors. When there is no one to do battle for an individual, his chances of obtaining justice are lessened."[23] By the mid-1960s, the concept of legal services was not new, but existing agencies were few in number, understaffed, and underfunded. As Howard Westwood, an experienced poverty lawyer, argued in 1966, "no single step could be more effective in securing competent, hard-hitting representation [for the poor] than to get away from the pauper level of compensation for legal aid staffs."[24] The OEO under Johnson responded to this need by investing millions of dollars in over one hundred new or revitalized legal service agencies that began waging battles for poor

Interest Law Group (Washington D.C.: Lawyers' Committee for Civil Rights Under Law, 2003).

22 Letter from Lyndon Johnson to Mr. Bernard Segal and Mr. Harrison Tweed, Jan. 21, 1964. Box 41: Judicial–Legal Matters, Gen JL 6 12/6/67–1/20/69; Folder: JL 7 Lawyers–Legal Aid. LBJ Library.

23 Lewis F. Powell, "The Response of the Bar," *American Bar Association Journal* 51 (Aug. 1965): 751.

24 Howard C. Westwood, "Legal Aid's Economic Opportunity," *American Bar Association Journal* 52 (Feb. 1966): 129 (127–30).

individuals and groups.[25] The program quickly became, in the words of one journalist, "at once the most successful and controversial of the OEO operations."[26]

Of all the poverty law agencies, the CRLA was the largest and most controversial, and its client base reflected a second focus of the War on Poverty: migrant workers, most of whom were Mexican Americans. During Johnson's first year in office, the federal government established this focus. As the OEO reported, "Cognizant of a situation wherein more federal money was being allocated for the feeding and care of migratory birds than for migratory humans in the United States, Congress specified in the EOA [Equal Opportunity Amendment] of 1964 that OEO was to implement programs for them."[27] In the following years, federal authorities tried to fulfill this mandate, giving credence to the idea that, as one religious leader wrote to Johnson in 1965, "the *most* voiceless and voteless citizens in this land are migratory farm workers."[28]

Johnson's personal interest in Mexican-American communities lent tremendous energy to this federal initiative. As a young man, he had worked as a teacher and principal in the "Mexican school" of Cotulla in southern Texas. Later, as an administrative aid to Congressman Richard Kleberg during the Great Depression, he witnessed the way that government aid could lift poor, rural communities to new levels of prosperity.[29] These experiences shaped his approach to the presidency.[30] As the work

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[25] For a list of over 120 legal service agencies across the nation and their grant amounts, see "Justice: Report of the Legal Services Program of the Office of Economic Opportunity to the American Bar Association, Aug. 8–11, 1966," 25–31; Box 41: Judicial–Legal Matters, Gen JL 6 12/6/67–1/20/69; Folder: "JL7 Lawyers–Legal Aid," LBJ Library.

[26] Ridgeway M. Hall, Jr., "Advocates for the Poor: Legal Services, Inc.," *The New Republic*, May 29, 1971. Box 45, Folder 8, CRLA Records, Stanford.

[27] Report, "The Office of Economic Opportunity During the Administration of President Lyndon B. Johnson, November 1963–January 1969," 1969, 390–91; Box 1: Administrative History of the OEO, Volume 1; Folder: "Part 1: Narrative History," LBJ Library.

[28] Rev. James L. Vizzard, "Meeting the Needs of Migrant Workers," Nov. 17, 1964. Box 18: Labor, Gen LA 5, 10/1/1964; Folder: LA 5 Migratory Labor — Seasonal Labor 10/1/64–12/25/64. LBJ Library; emphasis in original.

[29] Robert A. Caro, *The Years of Lyndon Johnson: The Path to Power* (New York: Knopf, 1982), 166–73, 241–60.

[30] To be sure, Johnson was an insecure man who relished power, wealth, and recognition. However, he satisfied his desire for power and recognition by helping the

of Julie Leininger Pycior makes clear, Mexican-American communities formed a central part of Johnson's political thinking, and, while the relationship between the president and these communities was sometimes contentious, Johnson had a firm desire to use federal programs to help Mexican-American communities break cycles of poverty.[31]

One of the Johnson administration's first efforts to help these communities involved promoting and supporting Congress's decision to end the Bracero Program.[32] As Johnson himself explained, "One of the goals of the Great Society is to guarantee all Americans the dignity and economic security that flow from the full use of their talents. The termination on December 31, 1964, of Public Law 78 [The Bracero Program] marked an important milestone in our efforts to find jobs for more Americans. It also signaled the end of a system that all too often ignored basic human values."[33] Another effort to help Mexican-American communities involved the creation in 1967 of the Inter-Agency Committee on Mexican American Affairs and the appointment as chairman of Vicente Ximenes, a civil rights leader from southern Texas. To the new committee, Johnson prescribed a mandate to "assure that Federal programs are reaching the Mexican Americans and providing the assistance they need" and to "seek out new programs that may be necessary to handle problems that are unique to the Mexican American community."[34]

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poor. Along with African-American communities, Mexican Americans were at the top of his list. See Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961–1973* (New York: Oxford University, 1998), 6; see also, Caro, *Path to Power*, xiii–xxiii.

31 Julie Leininger Pycior, *LBJ and Mexican Americans: The Paradox of Power* (Austin: University of Texas, 1997), xiii–xvi.

32 In 1963, Kennedy had responded favorably to the call from the Catholic Church and labor unions to end the Bracero Program, but the program was entrenched. See Délano, *Mexico and its Diaspora*, 98.

33 Letter from Lyndon B. Johnson to Reverend Cameron P. Hall, Apr. 17, 1965. Box 17: Labor (GEN LA 3 4/9/66); Folder: LA 5 Migratory–Seasonal Labor 11/22/63–6/2/65. LBJ Library.

34 See Letter from Vicente T. Ximenes to Joseph Califano, Dec. 17, 1967. Box: 386 (Ex FG 686A); Folder FG 687 Interagency Committee on Mexican American Affairs (11/22/63–12/31/67). LBJ Library; see also Michelle Hall Kells, *Vicente Ximenes, LBJ's Great Society, and Mexican American Civil Rights Rhetoric* (Carbondale: Southern Illinois University, 2018).

In California, Johnson's interests in farmworkers and in attorneys came together in the creation of the California Rural Legal Assistance. In May of 1966, the agency received its first annual federal grant of $1.27 million from the OEO, and, over the next six months, it began operating in eight field offices in El Centro, Santa Maria, McFarland, Salinas, Madera, Modesto, Gilroy, and Santa Rosa. Soon thereafter, the agency added an office in Marysville and established a central office in San Francisco.[35] Field offices corresponded to the highly productive agricultural valleys that were home to large numbers of rural poor: San Joaquin, Imperial, Sacramento, Salinas, Sonoma-Napa, and Santa Maria. To staff each office, CRLA directors recruited young lawyers who, in general, lacked experience but possessed talent and enthusiasm. In late 1966, the average age of a CRLA attorney was 30.5, and the average workday lasted more than fourteen hours.

Additionally, the CRLA hired bilingual community workers for each office, many of whom were former field workers. As CRLA directors explained, these individuals "were well acquainted with the problems and politics of rural California," and they could help the attorneys work with client communities. In its first six months, the CRLA handled 1,223 cases on behalf of approximately 1,650 clients. Many cases simply required legal advice and document preparation. Others involved court appearances.[36] As the agency became more widely known, demand for its services increased. In 1968, the central office lamented, "Every CRLA regional office has found that it is physically impossible to offer adequate legal services to all, or even a majority, of those who seek and are eligible for its services." This same year, the agency reported a potential clientele of some 577,000 people.[37]

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[35] In succeeding years, the CRLA opened offices in Arvin, Coachella, Delano, Fresno, Oxnard, San Luis Obispo, Stockton, Vista, and Watsonville. The Gilroy and McFarland offices were closed. See "Office Listing," California Rural Legal Assistance, Inc., https://www.crla.org/office-listing (accessed Jan. 20, 2020).

[36] "Report to the Office of Economic Opportunity and CRLA Board of Trustees on Operations of California Rural Legal Assistance, May 24, 1966–Nov. 23, 1966." Box 7, Folder 1, CRLA Records, Stanford; "A CRLA Casebook: Selected Clippings and Summaries of 1968 Cases." Box 28, Folder 1, CRLA Records, Stanford.

[37] "Report to the Office of Economic Opportunity and CRLA Board of Trustees on Operations of CRLA, Dec., 1967–Sep., 1968, in Support of Application for Refunding," 1968. Box 45, Folder 1, CRLA Records, Stanford.

While the CRLA served all sectors of the rural poor, approximately 50 percent of its clients were Mexican-American farmworkers, many of whom were migrants. CRLA attorneys recognized that farmworkers were the "largest and most cohesive group" of California's rural poor, and they quickly became specialists in problems involving housing contracts, immigration status, agricultural employers, and welfare. Given the vast number of individual cases, however, CRLA directors instructed community workers to handle these matters whenever possible. Attorneys, they stated, should "strive to take cases which affect a large number of people, will result in an important change in the law, or will prevent or rectify a great hardship or injustice."[38] As the lawyers followed these directions, they became, as one journalist observed, "ombudsmen for the poor," not only representing "individual indigents in minor court actions," but also "sue[ing] state and local governments on behalf of . . . large groups of [farmworkers]."[39]

Overall, around 80 percent of attorneys' time remained focused on day-to-day matters.[40] However, it was the other 20 percent, the large class-action cases, that marked CRLA attorneys as ombudsmen — and provoked the ire of growers and their government allies. In 1966, the lawyers of the McFarland field office issued formal complaints against the authorities of the nearby town of Wasco for providing the Mexican-American and African-American section of the town with unsanitary drinking water from an independent utility company, while the rest of the town enjoyed safe water from the municipal facility. If these administrative procedures did not yield results, the lawyers warned, "we will consider equity actions against the city of Wasco and damage actions . . . against the independent utility and the city."[41] With aggressive action of this kind, CRLA attorneys began shocking authorities who were not in the habit of worrying about or acquiescing to minority needs.

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38 "Report to the Office of Economic Opportunity," 1966.

39 "Poverty Law: Threat to the Ombudsmen," *Time Magazine*, Chicago, Illinois, Nov. 7, 1969. Box 65, Folder 6, CRLA Records, Stanford.

40 See Bennett and Reynoso, "CRLA: Survival," 19.

41 "Report on Operations," 1966. Box 7, Folder 1. CRLA Records, Stanford. Notably, while farmworkers received much of the CRLA's attention, the agency also helped other minority groups. In 1966 and 1967, the Santa Rosa office worked on cases for the Pomo Indian tribe involving job training and land rights.

The following year, the agency locked horns with Governor Ronald Reagan in the first of several battles. In November of 1966, Reagan had trounced two-term incumbent Governor Edmund "Pat" Brown, arguing that Brown, who had supported President Johnson, was doing "more and more for those who desire to do less and less."[42] He had further articulated an anti-welfare response to the liberalism of LBJ's War on Poverty. "We represent the forgotten American," he wrote, "— that simple soul who goes to work, bucks for a raise, takes out insurance, pays for his kids' schooling, contributes to his church and charity and knows that there just '*ain't no such thing as a free lunch.*'"[43] Making good on his campaign promise, the new governor immediately took steps to remove 1.5 million people from California's medical-assistance program. To his chagrin, the CRLA used litigation to prevent the removal.[44] Soon thereafter, the agency forced the governor to accept that there *was* such a thing as a free lunch — and it would be provided by his administration. Through its "hunger suits" from 1968 to 1970, the CRLA won victories that required the California Department of Agriculture to distribute surplus commodities to needy families and free milk to low-income school children, many of whom were Mexican American.[45] Again, Governor Reagan saw his policies thwarted.

The agency made even more enemies in the fall of 1967 when it used a lawsuit to end the Bracero Program for good. Although the federal government had officially ended the program in 1964, it had struggled to resolve growers' complaints of labor shortages. As a result, Secretary of Labor Willard Wirtz had been authorizing the importation of foreign labor (mostly Mexican) on a case-by-case basis for nearly three years. While some labor shortages did exist, California growers often exaggerated their severity because they preferred to import cheap Bracero laborers rather than

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[42] See Report by Marianne Means, Oct. 15, 1966. Box: 33 EX PL-ST 5 (6/15/64–9/30/64); Folder: PL/ST 5 (9/8/66–4/8/67), LBJ Library; see also Lou Cannon, *Governor Reagan: His Rise to Power* (New York: Public Affairs, 2003), 3–9, 160–61.

[43] "The Republican Party and the Conservative Movement," *National Review*, Dec. 1, 1964; emphasis in original, quoted in, Cannon, *Governor Reagan*, 132.

[44] "See "Poverty Law: Threat to the Ombudsmen."

[45] See Ron Taylor, "CRLA Creates Shock Waves in Hunger-Fighting Lawsuits," *Fresno Bee*, May 24, 1970. Box 65, Folder 6, CRLA Records, Stanford; see also, "Suit Settled: More Free Milk for State's Kids," *San Francisco Chronicle*, March 17, 1970. Box 65, Folder 3, CRLA Records, Stanford.

negotiating with and hiring domestic Mexican-American workers.[46] The CRLA exposed this strategy in 1967 by suing the Department of Labor in federal court for authorizing the entry of 8,100 Mexican workers for California growers. As the attorneys charged, these growers had not only overlooked Mexican-American workers, but they had actively discouraged the domestic workers by refusing to offer them minimum wages and written contracts and by "excluding [them] from local housing in order to retain such housing for braceros."[47]

At first blush, a suit against specific growers may have seemed more logical than a suit against the Department of Labor, which, during this time, was a fellow ally of farmworkers. In general, however, the CRLA demonstrated a proclivity for suing the entity in the highest position of authority. Plus, the agency surely foresaw less resistance from the Department of Labor than from California's agricultural industry. It was correct. In response to the CRLA's suit, Secretary Wirtz quickly rescinded the authorization for more Braceros and told California growers to hire the domestic workers. In an effort to subvert Wirtz's instructions, the Madera Union School District postponed the first day of school so that high school students could work in the fields. The CRLA nipped the plan in the bud by suing the school board and several employers.[48]

These growers and their allies were irate. Congressman B. F. Sisk wrote to the president, threatening to "take this matter to the Congress unless the intractable positions of the Department of Labor and OEO are reversed." "I cannot stand idly by while the Federal Government kicks my farmers around," he added.[49] Similarly, Senator George Murphy stated that, "the

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[46] See Letter from W. Willard Wirtz to James B. Utt, July 12, 1965. Box 18: Labor (GEN LA 5 10/1/1964); Folder: LA 5 6/24/65–8/26/65. LBJ Library.

[47] "Braceros in California: Summary of the CRLA Brief to the Department of Labor," Sep. 19, 1967. Carton 174, Folder 4, CRLA Records, Stanford. CRLA lawyers further charged that growers' blanket requirement that all employees be able to lift sixty pounds discriminated against domestic female workers, who, according to state law at the time, could only be required to lift twenty-five pounds. By the late 1960s, approximately one-third of all field workers were female, but many growers preferred the all-male ranks of the Braceros. The CRLA in this and other cases helped protect the rights of Mexican and Mexican-American women who wished to work in the fields.

[48] See Letter from Congressman Bernie Sisk to Lyndon Johnson, Sep. 22, 1967. Box 19: Labor (GEN LA 5 8/27/65); Folder: LA 5 6/11/67–1/31/68. LBJ Library.

[49] Ibid.

citizens of California have been horrified by the spectacle of CRLA lawyers, paid by their tax dollars, going to court against the Secretary of Labor . . . also paid by the taxpayers, in an action which will inevitably result in losses to farmers and higher food prices to American consumers."[50]

Neither Secretary Wirtz nor the OEO were intimidated. In fact, the OEO began to encourage aggressive litigation like that of the CRLA. In 1968, it required all legal service agencies in the nation to demonstrate, as a condition for refunding, a history of not only "routine legal services," but also of "law reform," which it defined as any "innovative [legal work] designed to make a substantial impact on more than an individual client and the cycle of poverty."[51] The CRLA preferred the term "impact cases" to "law reform" because it was not really reforming the law, but rather using the law to help large groups. But regardless of terminology, the agency led the way in this endeavor.[52] This same year, the American Bar Association and the National Bar Association named the CRLA the nation's outstanding legal services program, and OEO director Donald Rumsfeld increased its budget by $200,000.[53]

Many officials admired the CRLA's impact cases because they led to social change. The suit against the Department of Labor, for example, involved much more than 8,100 workers from Mexico. Namely, it challenged on a legal basis California's tried-and-true practice of glutting the labor market and pitting different farmworkers groups against each other. Likewise, it sought to ensure jobs and decent wages for the state's Mexican-American farmworkers. In so doing, the lawsuit attacked the entrenched and racist notion that Mexicans and Mexican Americans were uniquely suited to low-paying stoop labor. As Senator Murphy had stated three years earlier in his defense of the Bracero Program, "You have to remember that Americans can't do [field work]. It's too hard. Mexicans are really good at that. They are built low to the ground, you see, so it is easier for them to

50 U.S., Congressional Record–Senate 90th Congress, 1st Session, (Sep. 28, 1967), quoted in Bennett and Reynoso, "CRLA: Survival," 8.

51 Memo from Burt W. Griffin, [OEO National Director of Legal Services Program], "Priorities and Policies on Refunding," Oct. 1, 1968. Carton 75, Folder 8, CRLA Records, Stanford.

52 See Bennett and Reynoso, "CRLA: Survival," 3.

53 See "CRLA Background," in "The CRLA Commission Hearings." Carton 21, Folder 49, CRLA Records, Stanford.

stoop."[54] The War on Poverty espoused a fundamentally different vision for labor and laborers in the United States, and in California CRLA litigation forced this vision, to an extent, on politicians such as Senator Murphy and Governor Reagan.[55] Speaking of the agency's lawsuits, conservative journalist Amity Shlaes writes, "These were not mere thorns in the governor's side. They were body blows."[56] Indeed they were, but they were also blows against racialized poverty in rural California.

Opponents hit back. In 1967, Reagan urged Murphy to add a regulation in Congress that would prevent OEO legal agencies from suing government entities. Murphy tried to do so but the regulation did not pass.[57] The following year, under pressure from conservative politicians in Congress, the OEO prohibited legal agencies from accepting criminal cases.[58] Also in 1968, the California Office of Economic Opportunity, with support from the regional OEO office, mandated that the CRLA could not provide legal aid to the United Farm Workers Union.[59] With this restriction, the state OEO prevented the formation of a powerful farmworker coalition.[60]

While they succeeded in placing some restrictions on the CRLA, Murphy, Reagan, and other opponents could not prevent the agency's attorneys from working as ombudsmen. In 1969, these attorneys participated in lawsuits against the U.S. Department of Agriculture regarding growers' liberal

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[54] See Ruben Salazar, "Murphy Statement," in *Border Correspondent: Selected Writings, 1955–1970* (Berkeley: University of California, 1995), 153.

[55] To use Pierre Bourdieu's theory of social distinctions, the agency endowed farmworkers with social and cultural capital by allying them with credentialed, no-cost attorneys. The CRLA's bilingual staff catalyzed this attorney–farmworker relationship. Thus, in the legal realm, the agency removed the social and economic distinctions that had historically kept farmworkers from weighing in on policy. Many politicians resisted this change. See Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, translated by Richard Nice (Cambridge: Harvard University, 1984), 12–13, 114–15.

[56] Amity Shlaes, *Great Society: A New History* (New York: Harper Collins, 2019), 358.

[57] See Hall, "Advocates for the Poor."

[58] See CRLA Memo from M. Michael Bennett to all directing attorneys, Dec. 31, 1968. Box 45, Folder 2, CRLA Records, Stanford.

[59] Ibid. See also Letter from Joe P. Maldonado (acting regional OEO Director) to James Lorenz (CRLA Director), Nov. 2, 1968. Box 45, Folder 2, CRLA Records, Stanford.

[60] After all, Cesar Chavez and the UFW spent tremendous time and energy defending themselves in court from grower coalitions. CRLA attorneys could have helped them immensely.

use of the pesticide DDT.[61] They specifically emphasized the consequences of DDT exposure for pregnant mothers, especially those who worked in the fields.[62] In many ways, this case laid the legal groundwork for the environmental justice movement in rural California.[63] In 1969, the CRLA also sued the California Board of Education for its practice of placing farmworker children in classes for the "mentally retarded" because they did not understand English. This lawsuit eventually forced the board to administer IQ tests in Spanish, move thousands of farmworker children into regular classes, and begin bilingual education programs.[64] With this victory, farmworker families took a significant step in breaking the cycle of poverty.

As the agency continued winning cases, political opposition intensified at all levels. In 1970, the chairman of the San Joaquin Valley School Board verbalized the feelings of some officials regarding the CRLA's effort to protect farmworkers' right to education. "We've built this Valley to what it is and we've gotten to where we are because there's cheap labor around," he stated. "When you come in talking about raising the educational vista of the Mexican-American . . . you're talking about jeopardizing our economic survival. What do you expect, that we'll just lie down and let you reformers come in here and wreck everything for us?"[65] Another shade of opposition

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61 See Luke W. Cole and Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York: New York University, 2001), 221 n. 32; see also Julie Sze, "Denormalizing Embodied Toxicity: The Case of Kettleman City," in *Racial Ecologies*, eds. Leilani Nshime and Kim D. Hester Williams (Seattle: University of Washington, 2018), 111.

62 Ibid. See also "CRLA Press Release: July 27, 1969." Box 65, Folder 1, CRLA Records, Stanford.

63 The environmental justice movement, which, in name, began in the 1980s, addressed minority communities' disproportionate exposure to waste facilities and other toxic hazards, such as pesticides. The CRLA contributed immensely to this movement through its practice of "environmental poverty law," i.e. poverty law that addressed environmental injustice. See Luke W. Cole, "Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law," *Ecology Law Quarterly* 19, no. 4 (1992): 620–21, 635–36, 641; Ralph Santiago Abascal and Luke W. Cole, "The Struggle for Environmental Justice: Legal Services Advocates Tackle Environmental Poverty Law," *Clearinghouse Review: Journal of Poverty Law* 29, no. 4 (1995).

64 See Mary Ellen Leary, "Children Who Are Tested in an Alien Language: Mentally Retarded? *The New Republic*, May 30, 1970. Box 65, Folder 6, CRLA Records, Stanford.

65 See Fundraising letter from Alberto Saldamando to California communities, 1982. Box 279, Folder 1, CRLA Records, Stanford.

emerged as people questioned the logic of a government agency that paid attorneys to sue other parts of the government. As Fred Marler, Jr. of the California Senate wrote in 1970, "There is certainly a need for legal services for those who cannot afford them but . . . CRLA's activities have resulted in the taxpayer financing lawsuits against himself, a situation which I don't believe should be allowed to continue."[66] Though logical, this perspective failed to appreciate the fact that CRLA lawsuits represented virtually the first time farmworkers had exercised their voice to shape policy in rural California.

As the decade drew to a close, Johnson's decision to step down and the election of Richard Nixon, a conservative politician and former California senator, augured well for those who wished to be rid of the CRLA. In 1969, George Murphy tried to set Reagan up for a decisive victory by rallying the Senate to remove the federal OEO director's authority to override governors' vetoes. On the Senate floor, Edward Gurney of Florida accused OEO attorneys of "agitation," and Barry Goldwater of Arizona stated that they were "inciting trouble." Building on such sentiments, Murphy added an amendment to a poverty-law bill that gave governors absolute veto power.[67] The 1969 Murphy amendment, as it became known, passed in the Senate, but, fortunately for the CRLA, it was defeated in the House.

Reagan attacked anyway. For years, he had wanted to cut the CRLA's funding, but because of the Johnson administration's support of the agency, this move had not been possible.[68] Under Nixon, however, Reagan trusted that things would be different. If the Murphy amendment had passed, a governor's veto would have created a perfect storm for the CRLA, but since it had not, the governor had to hope that the OEO under Nixon would take his side. To make a convincing case for a veto, Reagan enlisted the aid of Lewis Uhler, the ultra-conservative director of the California Office of Economic Opportunity, to discredit the CRLA and, by extension, the entire OEO legal services program.

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66 Letter from Fred W. Marler, Jr. to Governor Ronald Reagan, Dec. 18, 1970. Carton 29, Folder 16. CRLA Records, Stanford.

67 "Poverty Law: Threat to the Ombudsmen." See also Hall, "Advocates for the Poor."

68 See CRLA Press Release, Jan. 17, 1967. Box 65, Folder 1, CRLA Records, Stanford; see also Hall, "Advocates for the poor."

Reagan's plan to defund the CRLA perpetuated a history of gubernatorial opposition to federally mandated civil rights reform.[69] In 1957, Governor Orval Faubus of Arkansas tried to defy President Dwight D. Eisenhower's executive order to desegregate Little Rock Central High School.[70] Six years later, Governor George Wallace notoriously blocked the Foster Auditorium of the University of Alabama in resistance to the Kennedy Administration's court-ordered desegregation.[71] It would be unfair to lump Reagan into the same category as these incorrigibly racist and confrontational governors. His opposition to the War on Poverty appears ideological and political, rather than racial. With respect to California's Mexican-American communities, however, Reagan nonetheless resisted federal initiatives that sought to grant them greater civil rights. His effort to defund the CRLA was his most concerted effort in this regard.

His plan moved forward swiftly. In the fall of 1970, Uhler distributed a "CRLA Questionnaire" to thousands of California communities and legal firms with the explanation that the state OEO was evaluating the agency and wanted to be "as thorough as possible." Far from thorough, however, the evaluation had a mere eight questions, each of which seemed designed to dig up dirt. Question 5 asked: "Are CRLA members in your community involved, on behalf of CRLA, in community activities of an activist or political nature? If yes, please explain or give details." Question 7 asked if the CRLA had represented individuals in criminal court or individuals whose income passed the poverty line.[72] While such questions bespoke a smear campaign more than a professional evaluation, they helped Uhler write the 283-page report that catalogued 127 cases of alleged misconduct by CRLA

[69] Admittedly, the main motive behind the federal government's previous efforts to address racial discrimination was a desire to avoid embarrassment on the international stage. In the context of the Cold War, U.S. leaders touted their nation as a beacon of democracy, while at home the experience of minorities was anything but democratic. See Mary L. Dudziak, "*Brown* as a Cold War Case," *Journal of American History* 91 (June 2004): 32–42.

[70] See Karen Anderson, *Little Rock: Race and Resistance at Central High School* (Princeton: Princeton University, 2010).

[71] See E. Culpepper Clark, *The Schoolhouse Door: Segregation's Last Stand at the University of Alabama* (New York: Oxford University, 1993).

[72] "California Office of Economic Opportunity: Evaluation of the California Rural Legal Assistance Program." Carton 29, Folder 14, CRLA Records, Stanford.

attorneys. Uhler shared the report with Reagan on Christmas Eve. Forty-eight hours later, the governor had issued his veto.

The secrecy of the report and the swiftness of the veto raised questions about due process, for neither Reagan nor Uhler gave the CRLA an opportunity to see and respond to the cases of alleged misconduct before the veto was issued.[73] In hindsight, it appears that the governor wanted to stay one step ahead of the CRLA. Given the lack of transparency, CRLA director (and future California Supreme Court Justice) Cruz Reynoso called the veto a "deliberate scheme on the part of the governor to sabotage CRLA."[74] The following month, however, Uhler had to release his report to the public, and when he did CRLA attorneys started working. Typewriters did not rest until the agency had provided its own version of the 127 cases — along with 3,000 pages of evidence. According to the CRLA, 119 of the charges were false, four were slanderous lies, and six discussed attorney misconduct that the CRLA had already corrected.[75]

Returning to some of Uhler's specific charges, the attorneys provided ample evidence that they had indeed visited inmates of the San Quentin State Prison but had not distributed literature. Never had a CRLA attorney appeared barefoot in court. While the agency had accepted criminal cases, it had done so prior to the 1968 grant conditions which established this limitation. In the case of the F-word, a CRLA attorney had been giving a lecture on free speech, and, as an example, he had written "F*ck Vietnam" on the chalkboard (asterisk and all). Regarding the fifteen-year-old, she was already married when she came to the CRLA for legal aid.[76] In every case, it appeared that Uhler had omitted details or fabricated accusations in what CRLA attorneys called a baseless "hatchet job."[77]

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[73] See Cruz Reynoso et al., in "United States Office of Economic Opportunity: Memorandum of Fact and Law in Support of Immediate Refunding of California Rural Legal Assistance, Inc." Box 45, Folder 6, CRLA Records, Stanford.

[74] "Uhler Denies Reagan 'Out to Get' CRLA," *Berkeley Gazette*, Dec. 29, 1970. Box 67. Folder 2. CRLA Records, Stanford. Ironically, Reynoso and Uhler had been classmates at UC Berkeley School of Law.

[75] "CRLA's Answer to Uhler Report." Carton 27, Folder 7, CRLA Records; see also "Report on California State Economic Opportunity Office, Mar. 8, 1971." Carton 75, Folder 6, CRLA Records, Stanford.

[76] "Report on California State Economic Opportunity Office, Prepared by CRLA," Mar. 8, 1971. Carton 75, Folder 6, CRLA Records, Stanford.

[77] "CRLA Report to Office of Economic Opportunity, Jan. 13, 1971." Carton 75, Folder 18. CRLA Records, Stanford.

Nevertheless, the new OEO director in Washington, the conservative Frank Carlucci, did not override the veto. But neither did he uphold it. As he told a colleague, "I'd hate to base a veto on that report."[78] Finding a middle ground, Carlucci formed a "high-level commission" of three state supreme court justices, and he assigned them "to complete a full and impartial review of the [CRLA]." Notably, all three appointees had been Republicans before their appointment as supreme court justices had necessitated political neutrality.[79] The commission's final report, it was understood, would serve as the basis for Carlucci's final decision to either support Governor Reagan or override his veto. In the meantime, Carlucci decided to refund the CRLA only through July 1971, which would give the commission time to conduct the investigation.

This temporary funding, as many saw it, left the CRLA "in death row status."[80] While Carlucci insisted that this temporary measure did not amount to a "phase out or transition grant," many believed that the agency's days were numbered. After all, it would come as no surprise if Carlucci and Nixon decided to discontinue controversial programs from the Johnson era. For his part, Governor Reagan assumed this would be the case. In February, he smugly stated that he was "very pleased and gratified" that the federal OEO had upheld his veto, and he announced a plan to replace the CRLA with "a more responsible" and "professional" program called "Judi-Care," which would operate through local bar associations.[81] In reality, Judi-Care was designed to help individual clients but avoid impact cases, especially suits against the government.[82] Meanwhile, the CRLA prepared meticulously, almost desperately, for the federal investigation.

Reagan's confidence, it turned out, was premature. After arriving in California, the federal commissioners made it clear that they would conduct a thorough and impartial investigation — and they would use Uhler's report as

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78 "Carlucci Opinion of CRLA Cited," *Oakland Tribune*, Apr. 27, 1971. Box 158, Folder 13, CRLA Records, Stanford.

79 "The CRLA Commission Hearings." Carton 21, Folder 49. CRLA Records.

80 "CRLA Press Release," June 29, 1971. Carton 66, Folder 21, CRLA Records, Stanford.

81 "California: CRLA Compromise," *San Francisco Sunday Examiner & Chronicle*, Feb. 7, 1971. Box 158, Folder 11, CRLA Records, Stanford.

82 See "Study Shows It Would be More Costly Than CRLA," *Sacramento Bee*, Feb. 26, 1971; see also Ron Taylor, "Judicare in Place of CRLA," *Fresno Bee*, Feb., 1971. Box 158, Folder 11, CRLA Records, Stanford.

a starting point. From late April through early June, they held hearings in multiple cities, including San Francisco, Salinas, El Centro, and Soledad, and they heard nearly two hundred witnesses and examined hundreds of documents.[83] As they did so, it became increasingly evident that Uhler's charges were baseless.

The greatest indication of falsehood was Uhler's inability to substantiate his own claims. In the first hearing in San Francisco on April 26, Justice Robert Williamson, head of the commission, asked Uhler: "Will you accept the responsibility to present and examine witnesses [and to] offer and lay foundations for evidence . . . and furnish counsel?" A lawyer by trade, Uhler responded with a vague, "It is well understood we will provide all possible assistance." Justice Williamson was not satisfied. "Answer yes or no," he said twice. Finally, Uhler declared, "we cannot perform or participate in the form outlined by those questions." Now, even less satisfied, Williamson stated that if Uhler was not prepared to substantiate his report, the hearings would proceed without his participation. Uhler walked out. He later told reporters that he and Reagan were "standing solidly behind our report," but that it was never his intention to present witnesses or evidence. "What is the point of retracing a report on which a veto has been sustained?" he asked flippantly.[84]

Uhler seemed to be the only one who did not understand the importance of evidence. As one writer summarized, "Mr. Uhler is in the position of a prosecuting attorney who insists on a conviction but refuses to present his case."[85] Because of the Reagan administration's lack of cooperation, one judge appointed to the panel resigned and another was appointed in his stead. A different judge criticized the governor's office for not "accepting its responsibility to call witnesses and present other evidence in support of its many and serious charges." In any criminal or civil case, the CRLA pointed out, "the unwillingness of the accuser to defend his charges would spell the instant conclusion of the proceedings."[86]

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83 See "Before the Office of Economic Opportunity Commission on California Rural Legal Assistance, Inc: Closing Memorandum of the CRLA." Carton 75, Folder 16, CRLA Records, Stanford.

84 Lee Fremstad, "Uhler Refuses CRLA Case Challenge," *Sacramento Bee*, April 26, 1971. Box 158, Folder 13, CRLA Records, Stanford.

85 "Editorial: U.S. Says 'Prove it," Reagan's Team Can't," *San Luis Obispo Telegram Tribune*, May 7, 1971. Carton 29, Folder 2, CRLA Records, Stanford.

86 "The CRLA Commission Hearings." Carton 21, Folder 49. CRLA Records. Stanford.

Feeling some embarrassment, Governor Reagan first tried to smooth things over by publicly correcting Uhler and promising the state's presence, participation, and full support in the hearings.[87] Yet Reagan had no more evidence than Uhler did. Once the commission began reviewing the charges, Reagan claimed that there had been a "misunderstanding" and that he had expected the commission to gather its own evidence against the CRLA. His complaint yielded nothing. Given his office's lack of evidence, any testimony against the CRLA would have to come from witnesses who voluntarily chose to participate. By contrast, the CRLA had a long and well-organized list of witnesses and documents in its defense. As the table turned, one CRLA attorney confidently observed that the main question now was "how forcefully . . . the commission is going to reject and repudiate [Uhler's] charges."[88]

In his deferential biography of Reagan, Lou Cannon suggests that the governor simply responded to a report that he had been given. Cannon points out that Uhler, a former member of the John Birch Society, had more extreme political views than the governor and that the two men were not close. In fact, Uhler had only joined the Reagan administration earlier in 1970.[89] While Reagan may not have known Uhler well, the idea that he did not realize the false and inflammatory nature of the report ignores his crescendoing conflict with the CRLA. In a way, too, it underestimates his intelligence. If the governor had even just glanced at the report (it was Christmas, after all) he would have known that it was concocted. The fact that the report came out right when the OEO was renewing federal grants, and that Reagan seized on it immediately, suggests that the governor had planned a way to get rid of the CRLA. In fact, the agency later charged that Reagan had brought Uhler into his administration for the precise purpose of helping him take down the CRLA, which was highly plausible.[90]

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87 "The State and the CRLA Hearings," *Los Angeles Times*, Apr. 20, 1971. Box 158, Folder 13, CRLA Records, Stanford.

88 "Reagan, Uhler Are Strangely Reticent Toward Inquiry Into CRLA Charges," *Sacramento Bee*, Apr. 28, 1971. Box 158, Folder 13, CRLA Records, Stanford. See also, "Fremstad, "Uhler Refuses CRLA Case Challenge."

89 See Cannon, *Governor Reagan*, 369–70.

90 See Fundraising letter from Alberto Saldamando to California communities, 1982. Box 279, Folder 1, CRLA Records, Stanford.

Relying on Uhler, however, proved unwise. As additional evidence, the San Francisco Bar Association appointed several lawyers to investigate his report. These attorneys first pointed out that in August of 1970 the CRLA had undergone a week-long evaluation by a team of attorneys and other professionals appointed by the OEO. The team had "warmly endorsed" the agency's activities and recommended refunding for the next year. In comparison to this evaluation, Uhler's report, which he wrote just two months later, was "misleading at best and false at worst." The lawyers added, "the Uhler Report is filled with half-truths, misrepresentations, misunderstandings, and recriminations. Some of its mistakes would be hilarious were the repercussions not so serious."[91]

The repercussions would indeed be great. In the commission's hearings and in the public debates that paralleled them, it became clear that at stake in the case was not only the legal protection of the rural poor but also the power of the state government. Regarding legal protection, hundreds of individuals and organizations wrote the governor's office to express their support of the CRLA, including churches, unions, clubs, businesses, teachers, and other residents.[92] "In the past, poor people had little opportunity to use the courts to enforce [their] rights," wrote one resident. "They lacked money or organization to engage attorneys. Under the Rural Legal Assistant program they now enjoy the same opportunity that affluent citizens and powerful corporations or associations have always enjoyed."[93]

Other individuals applauded the CRLA's success in restoring Mexican Americans' trust in America's promise of justice for all. During the late 1960s, as disillusioned minority groups around the nation turned to riots and other forms of violent protest, the presence of the CRLA in eleven offices across the state of California encouraged farmworkers to trust in the law and not resort to violence. As Mario Obledo, general counsel of the Mexican American Legal Defense Fund, declared during one of the commission's hearings, "For many years, the migrant was without legal

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91 *Barrister' Bailiwick*, February 1971, 3, 5. Carton 66, Folder 9, CRLA Records, Stanford.

92 See the letters of support in Box 25, Carton 23, and Carton 24. CRLA Records, Stanford.

93 See "Improve Legal Aid, Don't Ban It," *Santa Barbara News Press*, Dec. 15, 1970. Carton 23, Folder 25, CRLA Records, Stanford.

services. [He] had disrespect for the law and [he] didn't have faith in the judicial system. . . . The only way he knew the courts . . . and the lawyers was when he was a defendant in a criminal case." Then, Obledo continued, "the CRLA came along and [migrants] found out that they could . . . resort to the courts and not to the streets."[94]

Obledo's comments reflected more than idealistic rhetoric. In 1968, two UC Berkeley law students conducted a survey on how knowledge of the CRLA in Santa Carla, San Benito, and Monterey Counties influenced residents' attitudes toward lawyers, courts, and judges. In response, 52 percent of Mexican-American adults and 76 percent of Mexican-American youth said that because of the CRLA their attitude toward the legal system had improved.[95] During the hearings, R. Sargent Shriver, the original OEO director under Johnson, as well as CRLA director Cruz Reynoso further discussed how the CRLA helped farmworkers find a place in the existing political and legal system. "The poor whom we have represented have seen that the law can be a friend," said Reynoso, "[and] that the powerful, too, can be accountable."[96] Shriver added that agencies like the CRLA helped legislators and administrators within the system become more aware of injustices faced by poor and minority communities.[97] Considering these accomplishments, some residents lambasted the governor for attacking the CRLA. As one Monterey citizen wrote, "It would seem that the voices of Watts, Berkeley, East Los Angeles et al., would be audible to even the most self-serving and expedient politico. And yet, Reagan, with his . . . scuttling of the CRLA is saying in the words of Marie Antoinette, 'Let them eat cake.' "[98]

In the public debate, the most telling of all support letters came from Spanish speaking residents themselves, who were likely farmworkers. "To Governor Reagan," wrote Mariana Romero in handwritten Spanish, "As a poor person I write to respectfully ask that you do not take away the

94 "The CRLA Commission Hearings." Carton 21, Folder 49, CRLA Records, Stanford.

95 See study by Albert F. Moreno and Philip J. Jimenez, "Do Mexican Americans Get a 'Fair Shake.' " Box 65, Folder 1, CRLA Records, Stanford.

96 Fundraising letter from Alberto Saldamando to California communities, 1982. Box 279, Folder 1, CRLA Records, Stanford.

97 See Falk and Pollak, "Political Interference," 603.

98 Jim Brown, "Marie's Fate: Editorial," *Monterey Peninsula Herald*, Feb. 9, 1971. Box 158, Folder 11, CRLA Records, Stanford.

lawyers because they are the people who help us with our problems, and since we don't have money to pay another lawyer [in] any problem that may arise, we plead with you not to take them away."[99] In a similar tone, Guadalupe Serna wrote the governor (also in Spanish): "I am one of the low-income people who have received benefits through the CRLA program. They have helped me a lot when I have needed it."[100] Through the CRLA, the Johnson administration had achieved, at least to an extent, its goal of helping California's rural poor tackle certain aspects of their poverty. The letters from these individuals, and from all the other sectors of society in favor of the agency, underscored the argument made by Cruz Reynoso in defense of the agency: "The CRLA has proven that a degree of social and economic change is possible within the system [and] that the system is available and open to the powerless."[101]

In addition to legal protection and social justice, the case also involved the power of the state government itself. In a sense, the Uhler Report was a test to see how far the governor could go. In his statement at the hearings in San Francisco, William F. McCabe, an attorney for the CRLA, declared that Uhler's report "will stand as a monument to [Joseph] Goebbels' theory that if the lies which government tells are sufficiently outrageous, the majority of the populace will be inclined to believe them." At stake, in other words, was the power of the government to erase opposition to its policies and subvert federal initiatives by twisting facts. As McCabe predicted, however, the Reagan administration would soon find itself in check. "The reason [that Goebbels' theory] can never work in the United States," he declared "is that we have dearly preserved the right of people to challenge what government says and above all else we have insured that when a government official . . . makes charges of the kind Mr. Uhler has leveled against CRLA he had better be prepared to back them up."[102]

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[99] Letter from Mariana Romero to Ronald Reagan. Carton 23, Folder 25, CRLA Records, Stanford; translation by author.

[100] See Letter from Guadalupe Serna to Ronald Reagan. Carton 23, Folder 25, CRLA Records, Stanford; translation by author.

[101] CRLA Press Release, Dec. 27, 1970. Carton 29, Folder 54, CRLA Records, Stanford.

[102] "Before the Office of Economic Opportunity Commission on California Rural Legal Assistance, Inc: Closing Memorandum of the CRLA." Carton 75, Folder 16, CRLA Records, Stanford.

Uhler never could back anything up, yet he had seriously hoped the Nixon administration would back him. Although an attorney by trade, he wrote the report with the hope that the federal OEO would deliver the coup de grâce regardless of the facts. Reagan evidently hoped the same. They were mistaken. Unprepared for the high commission's close examination of their report, which hurt their image far more than it hurt the CRLA's, the two men tried to save face by protesting the commission's methods. Uhler maintained that the justices should conduct "an investigation of CRLA," apart from his report.[103] Reagan complained that the commissioners had demonstrated an "unwillingness to allow or hear testimony that might be detrimental to CRLA's activities," and as a result he had lost confidence in the federal investigation.[104] This latter complaint made the governor look childish. After all, it was Reagan and Uhler's refusal to follow through with their own fight that led to a greater showing of evidence on behalf of the CRLA. A political cartoon in May 1971 depicted a muscular CRLA boxer and a battered California OEO boxer in opposite corners of a ring. During a timeout, the slick-haired governor had stepped into the ring to scold the referee, the federal investigation commission. "Under my rules," Reagan contended, "you're supposed to fight the [CRLA] instead of playing referee."[105]

Despite Reagan's weak protests, numerous witnesses did in fact come to testify against the poverty law agency. Growers, understandably, attacked. In the hearings, the California Farm Bureau declared that Uhler's accusations were correct.[106] Likewise, many residents entered the public debate by expressing support for the governor's veto. "A vast majority of taxpayer-supported CRLA employees are carpet-baggers," charged one resident, "coming here from other parts of the country in order to stir up

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103 George Murphy, "CRLA Probers Set Ground Rules — 'Narrower Scope,'" *San Francisco Chronicle*, Apr. 1, 1971. Box 158, Folder 13, CRLA Records, Stanford.

104 Doug Willis, "Reagan Claims Nixon Panel Curbs Anti-CRLA Testimony," *San Diego Union*, May 19, 1971; see also "Pensive Governor," *Inglewood Daily News*, May 19, 1971. Box 158, Folder 15, CRLA Records, Stanford.

105 See Political Cartoon, *Modesto Bee*, May 4, 1971. Carton 29, Folder 3, CRLA Records, Stanford.

106 See "Scathing Farm Bureau Charges Against CRLA," *Berkeley California Gazette*, June 18, 1971; see also the articles from Farm Bureau magazine. Box 45, Folder 6, CRLA Records, Stanford.

trouble."[107] This accusation, along with the Farm Bureau's testimony, were as baseless as Uhler's report and almost as absurd as the hate mail that arrived on the desk of Cruz Reynoso: "Hello Comrad [*sic*], You are doing a good job. I am sure Comrad [*sic*] Mao is happy that you lawyers have started trouble in Soledad. And for tax money too."[108]

Slightly more legitimate were voices of opposition from city and county officials who, in response to an inquiry from Uhler, sent letters and passed resolutions urging the governor and the federal OEO to dismantle the CRLA. The Stanislaus Board of Supervisors described the CRLA as a case of "wasted money and manpower and duplication of efforts of existing governmental agencies."[109] The City of Madera accused the agency of "wantonly and viciously [using] its authority, money and ability to attack governmental administration of schools, welfare and health, thus devoting taxpayer's money to . . . harass local government[s]."[110] Other officials voiced similar opinions.[111] In many cases, it seemed that local authorities accepted legal services in theory, but they did not agree with the CRLA's lawsuits against government entities. Yet impact cases against existing institutions were a necessary part of systemic change. As E. Clinton Bamberger, former director of the OEO legal services program, argued at the San Francisco hearing, conflict between successful legal service programs and state and local governments was inevitable.[112] By and large, the Johnson administration had embraced this conflict. Carlucci's final decision regarding the CRLA would determine if the Nixon administration agreed.

On May 21, the investigation became more complicated when, at around 2:00 am, an unknown party hurled a crude firebomb into the

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[107] Editorial: "Carpetbaggers," *Peninsula Herald*, Sep. 15, 1971. Box 45, Folder 6, CRLA Records, Stanford.

[108] Anonymous letter to Mr. Cruz Reynoso, Apr. 10, 1971. Box 75, Folder 25, CRLA Records, Stanford.

[109] Resolution of the Board of Supervisors of Stanislaus County, Dec. 1, 1970. Carton 29, Folder 16, CRLA Records, Stanford.

[110] See Letter and Resolution of City of Madera to Lewis Uhler, Dec. 17, 1970. Carton 29, Folder 16, CRLA Records, Stanford.

[111] See, for example, letters from the district attorneys of Monterey and Madera Counties and from the mayor of Delano to Governor Reagan, Dec., 1970. Carton 29, Folder 16, CRLA Records, Stanford.

[112] See "Carlucci Opinion of CRLA Cited."

office of William Moreno and William P. Carnazzo, two private attorneys who had testified in the Salinas hearings against the CRLA. Specifically, Moreno had testified about the agency's ties with the UFW and, Carnazzo, about the agency's anti-eviction suits on behalf of farm strikers.[113] Moreno had also provided Uhler with extensive anti-CRLA fodder for his report the previous fall. While the bomb caused no injuries, it did cause considerable damage. As Salinas authorities investigated the arson, some observers, including Moreno, suggested that the bombing was an act of retaliation for their testimony against the CRLA and that perhaps the agency was behind it. In response, Dennis Powell, director of the CRLA's Salinas office, argued that "CRLA has everything to lose and nothing to gain by such acts." The crime could have been committed by a CRLA sympathizer, he admitted, but it could just as well have no connection to the agency or it even could have been committed by a CRLA opponent who wished to associate the agency with arson.[114]

Governor Reagan availed himself of the association. While he did not directly accuse the agency, he did paint the crime as opposition to true but unpopular testimony. In a telegram to Moreno, he wrote, "Our nation will continue to be strong only if men like yourself continue to speak out with the truth in face of threats and terrorism."[115] Reagan's idea of truth, of course, was relative. While the possibility of some association with the crime may have hurt the CRLA's image momentarily, Salinas authorities never found any connection, and, in the end, the incident did not bear on the high commission's investigation of the agency.

One of the most complicated questions involved the CRLA's relationship with the UFW. While federal regulations prohibited the agency from aiding the union, many CRLA clients were also members of the union. Moreover, the CRLA and the UFW were, in many ways, fellow advocates of California farmworkers. At the same time, however, the two

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113 "Firebomb Damages Offices of Witnesses Against CRLA," *Oxnard Press Courier*, May 22, 1971. Box 159, Folder 14, CRLA Records, Stanford.

114 "Bombing Causes Shock; Outrage Among Leaders," *Salinas Californian*, May 22, 1971; see also "Firebombing Probe Continues in Salinas," *Monterey Peninsula Herald*, May 22, 1971. Box 159, Folder 14, CRLA Records, Stanford.

115 "Bomb Hits Office of CRLA Foe," *Santa Monica Evening Outlook*, May 22, 1971. Box 159, Folder 14, CRLA Records, Stanford.

organizations used different strategies and fought separate battles.[116] In the commission's investigation, the justices heard testimony that two CRLA attorneys had participated in the union's picket lines in El Centro and Calexico.[117] Another witness, former CRLA clerk Ollie Rodgers, testified that ten to fifteen union members had slept in CRLA offices during a melon strike in El Centro and that two CRLA employees had been given full-time assignments to work with the UFW.[118] While these accounts did indicate that the CRLA office in El Centro had overstepped its bounds, the commissioners looked into all charges of illegal union involvement, and, overall, they found that the CRLA was keeping its distance. [119] Another accusation that required considerable energy involved the CRLA's involvement with Black activist Angela Davis and three Soledad Prison inmates. On this matter, too, the commission eventually found that Uhler's charges had "no merit" and dismissed them.[120]

By the summer of 1971, the federal commission was more than ready to side with the poverty law agency. In late June, the justices prepared their final report, noting that "no evidence whatsoever has been produced to support any claim of misconduct by the CRLA." Furthermore, "[our] evidence has overwhelmingly demonstrated that CRLA has operated effectively within the terms of its grant provisions to provide legal services to California's rural poor."[121] In a way, Reagan's veto had had the unintended consequence of showcasing CRLA attorneys' successful practice of poverty law throughout California. "The next time the Reagan administration starts making such charges," wrote one observer, "it should get itself a better attorney. There are a lot of good ones in CRLA."[122]

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116 See Lori Flores, *Grounds for Dreaming: Mexican Americans, Mexican Immigrants, and the California Farmworker Movement* (New Haven: Yale University, 2016), 172–84.

117 "Unionizing by CRLA Probed," *Los Angeles Herald Examiner*, May 22, 1971. Box 158, Folder 14, CRLA Records, Stanford.

118 "Chavez CRLA Help is Charged," *Fresno Bee*, May 22, 1971. Box 158, Folder 14, CRLA Records, Stanford.

119 See "Study Clears CRLA of Union Link," *Oakland Tribune*, May 18, 1971. Box 158, Folder 14, CRLA Records, Stanford.

120 "CRLA Charges Unfounded Says U.S. Commission, *Santa Cruz Sentinel*, May 21, 1971. Box 158, Folder 14, CRLA Records, Stanford.

121 "The CRLA Commission Hearings."

122 "Editorial: U.S. Says 'Prove it,' Reagan's Team Can't."

In explaining his final decision to override Governor Reagan's veto, Frank Carlucci was not quite so complimentary. "On the whole," he wrote, "California Rural Legal Assistance has provided a useful service to the rural poor . . . and is operating within existing statutory and administrative regulations." In a tribute to Reagan, however, he immediately added, "The Governor is determined that his Administration shall play a major role in finding new ways to improve the legal services program and expand its impact."[123] To Carlucci, the CRLA was "useful" but not essential; Reagan's veto was designed to "improve" legal services, not destroy them; and "expand[ing] the impact" of legal services meant eliminating impact cases. It was clear from Carlucci's statement that although he could not base a final veto on Uhler's smear report, he sympathized in many ways with Governor Reagan. While Reagan and Uhler had lost this match, the agency's future was still not secure. Yet as political debate over legal services continued, Governor Reagan's spectacular loss to the CRLA provided a convincing reason for many politicians to leave the program alone. The investigation had demonstrated that the War on Poverty, or at least the legal services program, was working in rural California — perhaps not perfectly, but it was working quite well. Thus, year after year, as the CRLA applied for refunding, it not only survived but expanded into what are now seventeen offices.

In her recent book on the shortcomings of the Great Society and War on Poverty, Amity Shlaes argues that President Nixon allowed Carlucci to override Reagan's veto solely to assert his own authority. "This was not about ideas," she writes. "A governor was attacking a part of Nixon's budget. Nixon was defending himself. For the Nixon Administration, CRLA was a simple turf war."[124] Perhaps there was an element of turf war between Reagan and Nixon, yet Shlaes' argument ignores the investigation of the federal commission, which was all about ideas. Count by count, these justices found that the CRLA really was helping the rural poor. Johnson's vision of lifting Mexican-American farmworkers out of poverty with the help of attorneys was, at least to an extent, coming to fruition. Conservatives such as Shlaes may echo Reagan's argument of the 1980s that the War

123 "Carlucci's Press Release." Carton 21, Folder 51, CRLA Records, Stanford.

124 Shlaes, *Great Society*, 370–73.

on Poverty actually impoverished people by increasing their dependence on the government and that, in short, "poverty won the war."[125] If they are honest, however, they must recognize that this was certainly not the case with the CRLA in California.

In addition to ideas about federal involvement in American society, the case had called into question the role of Mexican-American farmworkers in California society. By attacking the CRLA, politicians like Senator Murphy and Governor Reagan sought to remove Mexican-American farmworkers' most powerful ally and, in many ways, return the state's agricultural labor system to the 1950s. Yet try as they might to weaken, discredit, defund, and destroy the CRLA, in the end they could not return their state to the good old days of the Braceros. The poverty law agency had changed California society, and the change, though incomplete, lasted.

Legal scholar Mark Tushnet has argued that "litigation is a social process" that begins with recognition of an injustice and continues through legal proceedings and into the future as officials grapple with implementation of court rulings.[126] In California, the legal work of the CRLA, including its 1971 battle for survival, helped underpin the process of social change in which institutions and authorities began to take farmworker voices and farmworker needs into greater consideration. Perhaps this social change is best visualized in the CRLA's final battle with the Reagan administration. In 1973, through a petition and lawsuit against Reagan's Industrial Safety Board, the agency won a ban on the short-handled hoe, a tool that made workers stoop at a ninety-degree angle to thin and weed row crops and that caused debilitating back damage as well as constant humiliation. With this victory, along with other CRLA cases, farmworkers won the right to stand a little taller in rural California.[127]

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[125] Eleanor Clift, "Reagan Condemns Welfare System, Says It's Made Poverty Worse Instead of Better," *Los Angeles Times*, Feb. 16, 1986, https://www.latimes.com/archives/la-xpm-1986-02-16-mn-8585-story.html (accessed Apr. 25, 2020).

[126] Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina, 1987), 138, 143–44.

[127] See Taylor Cozzens, "Defeating the Devil's Arm: The Victory over the Short-Handled Hoe in California Agriculture," *Agricultural History* 89, no. 4 (Fall 2015).

BREAKING CALIFORNIA'S CYCLE OF JUVENILE TRANSFER

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Introduction

Frankie Guzman is a poster child for juvenile rehabilitation in California: he attended UCLA and UC Berkeley and used his personal story and law degree to advocate for young people — all after spending four years incarcerated in a juvenile facility.[1] Frankie was fifteen when he and a friend bought guns and stole $300 from a liquor store on a Saturday afternoon in 1995.[2] They were caught immediately.[3] Little did they know that the months separating their birthdays would send their lives in wholly different directions.[4] Frankie was tried as a juvenile and served four years.[5] But his friend, who had recently turned sixteen, vanished into the adult system after he was deemed unfit for treatment in the juvenile court.[6]

Between 2001 and 2016, prosecutors were able, at their discretion, to file charges directly in adult court against anyone over the age of fourteen, like Frankie and his friend. But recent changes to California law will shield many children from prosecution in adult criminal court. In 2016, Proposition 57 required that a judge (rather than a prosecutor) decide whether a young person be transferred to adult court — the process by which the juvenile court waives its jurisdiction over a delinquency proceeding and "transfers" the case to adult criminal court.[7] Two years later, SB 1391 established sixteen (rather than fourteen) as the minimum age of transfer. Since 2019, prosecutors' constitutional challenges to SB 1391 have divided the California Courts of Appeal.[8] Regardless of the ultimate decision about

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[1] Lisa Weinzimer, *From Juvie to Juvenile Law: Frankie Guzman's Unlikely Journey*, The Chronicle of Soc. Change (Oct. 4, 2016), https://chronicleofsocialchange.org/news-2/from-juvie-to-juvenile-law-frankie-guzmans-unlikely-journey.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] The transfer process is variously called "waiver," and "certification," but common parlance in California is "transfer," which is the term this article uses throughout. *See* People v. Superior Court (Lara), 4 Cal. 5th 299 (2018) (declaring Prop 57 constitutional and retroactive).

[8] *See* O.G. v. Superior Court, 40 Cal. App. 5th 626, 627–28 (2019) (collecting cases).

the new law's constitutionality, these recent changes have inaugurated a new era for juvenile transfer in California.

California's juvenile transfer history is little studied, but relevant to current and future decisions about transfer policy and juvenile punishment generally. The first juvenile court was a Progressive-Era institution intended to care for children; it originally had no formal process for transferring children to adult court. But transfer quickly became a way to punish and, in extreme cases, sterilize older boys whom the juvenile system deemed "incorrigible." Since then, the California Supreme Court has recognized that transferring a child to adult court is "the worst punishment the juvenile system is empowered to inflict."[9] Juvenile transfer became a cornerstone of racist punishment as politicians stoked racialized fear of young, so-called superpredators. However, recent popular movements have begun to undo the legacy of the "tough on crime" era — mobilizing against racist policing and incarceration and eventually inspiring legislative change.

These swings from judicial discretion and disparate treatment to strict procedural rules and harsh punishment lead to what scholars identify as a cycle of juvenile justice. Proponents see judicial discretion as a way for a juvenile court judge who knows the individuals and their circumstances to mete out appropriate sentences, but this often leads to disparate outcomes based on race, geography, and income level and has not reliably produced lesser sentences.[10] Increasing procedural justice is supposed to address some of the implicit bias inherent to discretion and cause judges to treat criminal defendants with neutrality and dignity, but often leads to inflexible rules that compound the inequalities already prevalent in criminal law.[11] In the cycle of juvenile justice, punishment is increased in response to a perceived "crime wave" or spectacular incident of violence and will

[9] *See* Marcus W. v. Superior Court, 98 Cal. App. 4th 36, 41 (2002) (citing Ramona R. v. Superior Court, 37 Cal. 3d 802, 810 (1985)).

[10] *See*, *e.g.*, Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 5 (2012) (describing problems with judicial discretion in the criminal and employment law contexts).

[11] *See*, *e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2058–62 (2017) (reviewing the legal literature that privileges procedural justice over more transformative reforms).

then decrease in response to an instance of police abuse or when some other crisis causes a public outcry against the cruelty of the system.[12]

Thomas Bernard and Megan Kurlycheck propose that the cycle is triggered when the juvenile court is forced to choose between the harshest punishments and doing nothing at all.[13] Frank Zimring argues that transfer allows the juvenile court to provide lenient treatment and rehabilitation for "deserving" young people, while the "worst" can be transferred to a more punitive adult court.[14] But the history of transfer in California shows an unworkable procedure swinging from one extreme to another with the passions of the people, not the well-designed safety valve Zimring describes. Bernard and Kurlycheck write that the cycle

> cannot be broken by any particular juvenile justice policy since every conceivable policy confronts the same dilemma: after it is implemented people will continue to feel that juvenile crime is exceptionally high, that it was not a serious problem in the good old days and that it would not be a serious problem today if we only had the proper justice policies in effect . . . . Caught in this cycle, we are doomed to repeat history instead of learning from it and moving toward real progress.[15]

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[12] *See*, *e.g.*, J. Lawrence Schultz, *The Cycle of Juvenile Court History* 19 Crime and Delinquency 4 (1973) (discussing juvenile justice cycles in the first half of the twentieth century); Thomas Bernard & Megan Kurlycheck, The Cycle of Juvenile Justice (2010) (examining the cyclical pattern of "reform and bust" in juvenile justice on a national scale); Nell Bernstein, Burning Down the House: The End of Juvenile Prison, 204 (2014) (describing a pattern of juvenile prison officials' abuse leading to lawsuits and increased oversight); Paul Donnelly, The Cycle and Dynamics of Reform and Neglect in a State Juvenile Corrections Agency: The Texas Experience (2018) (unpublished Ph.D. dissertation, on file with the University of Texas at Dallas) ("What many observers see as new or improved insight, motivations, policies or practices are more accurately described as mere turns of the wheel. Reform initiatives, then, can be framed not as improvements but reactions . . . to critical events and calls for change by influential persons or groups . . . .").

[13] Bernard & Kurlycheck, *supra* note 12 at 3.

[14] *See* Franklin Zimring, *Juvenile or Criminal Court? A Punitive Theory of Waiver*, *in* American Juvenile Justice, 195 (2d. ed. 2019) (arguing that transfer is necessary and desirable when governed by strict procedural rules).

[15] Bernard & Kurlycheck, *supra* note 12 at 29.

California's 120-year history with juvenile transfer may support this bleak outlook, but modern groups like #BlackLivesMatter, the Black Organizing Project, and Youth Organize California are starting to create durable alternatives to juvenile courts and redirect resources to transformative projects with the potential to change what the law alone cannot.[16]

Organizers and movements like these recognize that court orders and legislation alone are not enough to achieve the lofty goal of California's original Juvenile Court Law: "to substitute for the inflexible system to which criminal courts must be subject, the sympathy and strength of personal influence."[17] For his part, Frankie Guzman says it was community college, not prison, that helped him.[18] "Instead of hundreds of thousands of dollars, it took a few supportive people."[19] New kinds of social services, inspired by decades of community organizing and made possible by current movements led by young people and people of color, have the potential to break this cycle of juvenile transfer.

Part I of this article describes California's historical transfer policies from the establishment of the juvenile court in 1903 to the present. Part II covers SB 1391, which raised the minimum age of transfer to sixteen, and recent constitutional challenges to the law. It argues that the California

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[16] *See Healing in Action: A Toolkit for Black Lives Matter Healing Justice & Direct Action*, Black Lives Matter (2018), https://blacklivesmatter.com/wp-content/uploads/2018/01/BLM_HealingAction_rl.pdf (describing restorative and transformative projects employed by the movement to address harm done within the community without resorting to police or prisons); *The People's Plan for Police-Free Schools OUSD Implementation Proposal*, Black Organizing Project (2019), http://blackorganizingproject.org/wp-content/uploads/2019/11/The-Peoples-Plan-2019-Online-Reduced-Size.pdf (proposing a plan for the divestment from the Oakland Unified School District's police department — the Oakland Unified School Board unanimously approved a similar plan on June 23, 2020); *Young People's Agenda*, Youth Organize California (n.d.), https://yocalifornia.org/ypa (outlining an agenda, written by young people, for less policing, prison abolition, and transformative justice).

[17] City and County of San Francisco, Ca., A Report on the Juvenile Court, S. 1–34, Special Sess., 4 (1906), https://babel.hathitrust.org/cgi/pt?id=uc1.b4093710;view=1up;seq=6 (establishing courts with jurisdiction over people under the age of twenty-one accused of a crime).

[18] Weinzimer, *supra* note 1.

[19] Robert Salonga, *Reformed Bay Area Teen Convicts Push Pending Bill to Spare Young Offenders*, Mercury News (Sept. 26, 2018, 6:00 AM), https://www.mercurynews.com/2018/09/26/reformed-teen-convicts-push-pending-bill-to-young-offenders.

Supreme Court is likely to find SB 1391 constitutional. Part III revisits the notion of a cycle of juvenile punishment and discusses the possibility of keeping young people — especially young people of color — and their communities safe without resorting to juvenile transfer at all.

I. TRACING JUVENILE TRANSFER'S CYCLICAL HISTORY FROM EUGENICS, THROUGH DUE PROCESS, TO SUPERPREDATORS

This part discusses the major phases in California's historical methods for transferring young people out of juvenile court and into criminal court. Section A describes the founding of California's juvenile court and its lack of clear transfer policy. Racist and pseudoscientific understandings of childhood marred the early decades of the juvenile court with exclusionary policies and violence, and eugenics was an early driver of the first official transfer rules. Section B covers the extension of due process to the juvenile courts and their transfer decisions. In the middle of the twentieth century, the U.S. Supreme Court decided its first modern cases about juvenile defendants and extended many protections of criminal procedure at the price of the traditional lenience of the juvenile court. Section C explains how the seemingly oppositional goals of improving conditions in juvenile prisons and of increasing punishment defined California's transfer policy in the 1970s, '80s, and '90s, and Section D discusses the turn toward lenience over the past few years.

A. EARLY JUVENILE JUSTICE: WHEN KIDS WERE DIFFERENT

In the Progressive Era, states revolutionized the treatment of children who committed crimes. Illinois established the world's first juvenile court in 1899.[20] Other states and countries quickly followed suit, developing juvenile courts that differed widely in scope and procedure, but shared an understanding that children who violated the law should not be treated as adults.[21] Asserting *parens patriae*, the legal doctrine that "the state must

[20] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

[21] *Id.* at 107–8.

care for those who cannot take care of themselves,"[22] the California Legislature passed The Juvenile Court Law in 1903.[23]

Parens patriae explained the need for a juvenile court where "[s]pecialized judges, assisted by social service personnel, would act in the best interest of the child."[24] The new court, said one of San Francisco's first juvenile judges, was created "to teach the boy and girl, no matter how unfortunate, that society is trying, at least, to be his friend."[25] Tension arose immediately between the tenor of the law ("that the care, custody, and discipline of a . . . delinquent person . . . shall approximate as nearly as may be that which should be given by his parents") and its application to young people charged with especially egregious behavior.[26] From the outset, transfer practice reflected this tension.

Transfer practice has its roots in these first decades of the twentieth century, when total judicial discretion and a lack of oversight characterized California's juvenile court. Not until 1920 did the California Supreme Court conclude that juvenile courts actually had the power to waive their jurisdiction and transfer juvenile cases.[27] In that seminal case, a superior court magistrate — who would only have had jurisdiction over an adult criminal defendant — convicted sixteen-year-old Roy Wolff of murder after the juvenile court transferred his case.[28] The California Supreme Court approved the juvenile court's action, holding that on a finding of "incorrigibility," a minor could be transferred to adult court for trial.[29] At the

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22 Parens Patriae *Definition*, Black's Law Dictionary (9th ed. 2009), available at Westlaw. Some also argue that *parens patriae* is a meaningless phrase serving only to justify judicial overreach. *See* Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of Parens Patriae*, 22 S.C. L. Rev. 147 (1970). The doctrine legitimized state intervention in the parent-child relationship but made no distinction between children's criminal and noncriminal conduct. *See* Barry Feld, *Criminalizing the American Juvenile Court*, 17 Crime & Just. 197, 205 (1993).

23 A Report on the Juvenile Court, *supra* note 17 at 4 (1906).

24 Barry Feld, *Criminalizing the American Juvenile Court*, 17 Crime & Justice 197, 205–6 (1993) (internal citations and punctuation omitted).

25 A Report on the Juvenile Court, *supra* note 17 at 3.

26 *See Juvenile Court Law*, *in* California Laws of Interest to Women and Children, 152 § 27 (Friend Wm. Richardson, ed., 1912).

27 *People v. Wolff*, 182 Cal. 728 (1920).

28 *Id*. at 732.

29 *Id*. at 731.

same time that *Wolff* began a new phase of the cycle by explicitly allowing transfer to adult court for the first time, the Court left many questions unanswered. For instance, it did not decide a minimum age of transfer, nor set any standards for a juvenile court's transfer decision.

As the Progressive Era drew to a close and the early creative energy of the juvenile court faded, its reality became darker and more punitive. Eugenics underlay an informal transfer policy that resulted in the sterilization of many older teens. Eugenics is the most macabre version of *parens patriae*, in which the state controls the very genes of those it decides "cannot take care of themselves." This pseudoscience justified an extrajudicial form of transfer. Louis Terman, a Stanford professor and early proponent of eugenics, tested and sorted children convicted of crimes based on their "innate intelligence."[30] California's first juvenile prison, the Whittier State School, relied on Terman's classification system to determine which of its young wards to transfer to psychiatric hospitals.[31] In those psychiatric hospitals, these children were among the 20,000 people the state of California sterilized in the first half of the twentieth century.[32]

The informality of the early juvenile court — exemplified by the lax *Wolff* standard for transfer — allowed Fred Nelles, the director of the Whittier State School and a close friend of Louis Terman, to experiment with lenient treatment for boys he found deserving and to mete out surgical sterilization to "incorrigible" kids with little judicial supervision. Nelles believed that older boys (those sixteen and up) were usually "too old

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30 Daniel E. Macallair, After the Doors Were Locked: A history of Youth Corrections in California and the Origins of Twenty-First Century Reform, (2015), 90.

31 *Id*.

32 *Id*. at 91; *see also* Nicole L. Novak & Natalie Lira, *California Once Targeted Latinas for Forced Sterilization*, Smithsonian (March 22, 2018), https://www.smithsonianmag.com/history/california-targeted-latinas-forced-sterilization-180968567/ (reporting that of the 8,515 sterilization operations performed in the U.S. before 1928, 5,820 took place in California); E. S. Gosney, Sterilization for Human Betterment; A Summary of the Results of 6,000 Operations in California 1909–1929, 174 (1930) (describing in chillingly clinical terms the logic of eugenics at the time). California's eugenics victims were overwhelmingly women, Black, disabled, or Latinx, and almost exclusively poor. Miroslava Chávez-Garcia, States of Delinquency: Race and Science in the Making of California's Juvenile Justice System 47–48 (2012).

and too difficult to reform."[33] Nelles' beliefs led to Whittier's complicity in this perverse form of transfer that, like all eugenics projects, inherently privileged Whites over Black and Latinx people. Thankfully, budget constraints ended Nelles' classification and transfer system during the Great Depression.[34]

But Nelles' legacy is complicated — and few administrators of the juvenile system were better. While he enabled the reform school's horrifying eugenicist project, his research in psychology, pedagogy, and social work was cutting edge for its time, and he helped dismantle the traditional militaristic environment of youth prisons.[35] Nelles' experiments with smaller housing units — cottages — are a model to this day, and escape attempts decreased dramatically during his tenure.[36] He instituted solitary confinement but ended corporal punishment.[37] Despite embracing bigotry, hatred, and bad science, Nelles seemed to have a way with the kids he deigned to work with; escape rates "shot up" when the school came under new management upon Nelles' death.[38] At the end of the 1930s, the transformative rhetoric of the Juvenile Court Law in no way matched the harsh reality of cruel, mismanaged institutions and ill-defined transfer policy based on vague criteria like "incorrigibility" and "innate intelligence."

B. A LONG ROAD TO DUE PROCESS AND INCREASED EFFICIENCY IN JUVENILE TRANSFER

A series of tragic deaths and stories of guard misconduct in the late 1930s motivated major changes in juvenile law. On August 11, 1939, guards found thirteen-year-old Benny Moreno hanging in his cell at the Whittier State School.[39] Benny's family and friends claimed that he was either murdered or pushed to suicide by staff abuse.[40] An internal investigation found

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33 Chavez-Garcia, *supra* note 32 at 55.

34 *See* Macallair, *supra* note 30 at 122.

35 *Id*. at 55.

36 *Id*. at 123.

37 *Id*.

38 Chavez-Garcia, *supra* note 32 at 47.

39 Jennifer Uhlman, *Communists and the Early Movement for Mexican-American Civil Rights: the Benjamin Moreno Inquiry and its Aftermath*, 9 Am. Communist History 2, 111–12 (2010).

40 *Id*. at 112.

"beyond a reasonable doubt" that the prison and its guards bore no responsibility for Benny's death.[41] Another boy, seventeen-year-old Edward Leiva, killed himself months later while also imprisoned at Whittier.[42] The Whittier School's obfuscation about the deaths of the Mexican-American teens fueled outrage in Los Angeles' Latinx community and beyond.[43] Finally, an independent investigation led to public hearings documenting "widespread physical and sexual violence in all the state reform schools."[44]

These scandals prompted a quick government response that did not address any of the concerns motivating communities to protest the deaths of Benny and Edward: the creation of a new state-run youth prison system. California's Attorney General — and later Governor — Earl Warren drafted the Youth Corrections Act to create the California Youth Authority (CYA).[45] CYA's stated mission was to make juvenile corrections more scientific and developmentally appropriate, but it did not provide culturally specific treatment for Mexican-American youth as recommended by the committee that investigated the deaths of Benny Moreno and Edward Leiva, nor did it increase protections for young people in transfer

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[41] *Id*. at 114, 116–17 (arguing that the communists running the investigation "bungled" it).

[42] *See* Chavez-Garcia, *supra* note 32, at 152, 158. In dark irony, Edward Leiva and Benny Moreno both passed away in solitary confinement units designed by Fred Nelles. *See* Chavez-Garcia, *supra* note 32, at 158. Young people in adult prisons today are often held in solitary confinement to protect them from sexual and physical violence at the hands of older inmates, but isolation is recognized as traumatic, especially for kids. *See* Michele Deitch and Neelum Arya, *Waivers and Transfers of Juveniles to Adult Court: Treating Juveniles Like Adult Criminals*, *in* Juvenile Justice Sourcebook 241, 252 (Wesley T. Church, et al. eds., 2d ed. 2018); s*ee also Black August and the Struggle to Abolish Solitary*, Critical Resistance (Aug. 21, 2015), http://criticalresistance.org/black-august-and-the-struggle-to-abolish-solitary.

[43] Macallair, *supra* note 30 at 133–35; Chavez-Garcia, *supra* note 32 at 170–71.

[44] Chavez-Garcia, *supra* note 32 at 164, 168. Ultimately, two reform school administrators were criminally prosecuted for Leiva's death. *Id*. at 168. One of the saddest stories the investigation brought to light was that of an eight-year-old boy committed to Whittier for stealing a bike. He reported sexual and physical assaults too numerous to count by staff and other wards. He told school management, including the superintendent, many times, and nothing was done — he left Whittier traumatized. *See* Macallair, *supra* note 30 at 135.

[45] Macallair, *supra* note 30 at 139–44. As governor, Warren further centralized juvenile detention and probation services under CYA.

proceedings.[46] In addition to creating CYA, the 1939 Youth Corrections Act created the Welfare and Institutions Code, which merely codified *People v. Wolff*'s holding that on a finding of "incorrigibility," a minor could be transferred to adult court.[47] Like *Wolff*, the Code set no minimum age for transfer, and provided little guidance about what constituted incorrigibility.[48] Even as the juvenile prison system formalized and began to look more like its adult counterpart, the transfer process remained opaque.

A 1939 Court of Appeal case applying the new Code illustrates the failure of these new rules to limit judicial discretion. An adult court convicted a seventeen-year-old of grand theft auto without the juvenile court first transferring his case.[49] Sam Renteria, the defendant, testified that he had merely slept in the car and had not intended to steal it.[50] Sam had just been released from the Preston State Reform School and was living out of a suitcase trying to make enough money as a professional fighter to rent an apartment.[51] The probation officer, when asked whether Sam was, in fact, incorrigible, turned and spoke directly to Sam, saying that his two prior probation violations — both for running away from state reform schools — "rather settle[] my mind as far as you are concerned."[52]

The court's loose evidentiary standards meant this was enough to doom Sam. The jury was instructed to decide whether Sam was "incorrigible" based solely on the probation officer's testimony — a power supposedly

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46 *Id*. at 140–42.

47 Joel Goldfarb & Paul M. Little, *1961 Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure*, 51 Calif. L. Rev. 421, 423 (1963). Hereafter, all references to the "Code" are to the Welfare and Institutions Code, unless otherwise specified.

48 *Id*.

49 People v. Renteria, 60 Cal. App. 2d 463 (1943). *Renteria* is not mentioned specifically in the literature as a watershed ruling or a catalyst, but it exemplifies many of the concerns motivating these "process" reforms. For more information, see Elizabeth Escobedo, From Coveralls to Zoot Suits: The Lives of Mexican-American Women on the World War II Home Front 22–24 (2013) (discussing Bertha Aguilar, the young woman who turned Sam Renteria in the first time he escaped from reform school).

50 *Renteria*, 60 Cal. App. 2d at 467.

51 *Id*. at 463–64, 467.

52 Probation reports were a new requirement of the 1939 Code. *Id*. at 427.

reserved to the juvenile court.[53] He was found incorrigible, transferred to adult court, convicted, and given the maximum sentence all at once, and all without the approval of a juvenile court judge.[54] The Court of Appeal upheld his conviction. It found that the probation officer's negative assessment of Sam's capacity to change overrode procedural concerns like the prosecution's uncontested failure to carry its burden of proof that Sam was unfit for the juvenile court. Just as Nelles exploited the lack of juvenile court oversight to sterilize children, the Court of Appeal was able to ignore scant procedural rules to declare Sam Renteria incorrigible. Continuing to overlook the Code's minimal requirements throughout the 1940s and '50s, juvenile courts often automatically transferred cases to adult courts when a child defendant contested the charges rather than admitting guilt.[55]

As governor, Earl Warren convened a special commission that recommended substantial changes to juvenile procedure, fulfilling one aim of the original Welfare and Institutions Code and setting clear rules for transfer.[56] The commission's main goals were to limit informality, impose clear standards, and allay concerns about disparate treatment in the juvenile court.[57] But Warren left California before these reforms came to fruition as the Arnold-Kennick Juvenile Court Act in 1961. The Act set the minimum age of transfer to adult court at sixteen.[58] In order to waive jurisdiction, a juvenile judge needed to make two findings: (1) that the charged offense would have been a felony if committed by an adult, and (2) that the young person was not "amenable to treatment in the juvenile court."[59] Prosecutors bore the burden of proving these elements by substantial evidence.[60] The cycle of juvenile transfer thus entered a new phase. Decision makers responded to complaints about unreasoned rulings by placing procedural

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53 *Id.*

54 *Id.* at 467–68.

55 Goldfarb & Little, *supra* note 47 at 442 n.134.

56 *Id.* at 421.

57 *Id.*

58 California Senate, Committee on Public Safety: Hearing on SB 1391, Apr. 3, 2018.

59 Goldfarb & Little, *supra* note 47 at 444.

60 *Id.* The Act also provided the first evidentiary standards for juvenile court proceedings, mandated privacy in juvenile court, and required an "informal nonadversary atmosphere." *Id.* at 442; California Senate, *supra* note 58.

burdens on prosecutors seeking transfer, without reevaluating the systems that punished and controlled kids. While the Arnold-Kennick Act's streamlined transfer procedure might have protected Sam Renteria, it also constrained judges' discretion to impose lenient sanctions and expanded the availability of harsh punishment to prosecutors.

The U.S. Supreme Court — led at that time by Earl Warren — issued several rulings in the 1960s that changed juvenile transfer practice in California. First, *Kent v. United States* required that juvenile courts make specific findings on the record before transferring a case to adult criminal court.[61] (California's still-lax transfer scheme under the Arnold-Kennick Act met this baseline.) While it imposed token procedural standards, *Kent* also recognized *parens patriae* and lenience as the foundations of the juvenile court.[62] Next, *In re Gault* guaranteed Fourteenth Amendment rights of counsel, confrontation, and notice to minor defendants in juvenile court.[63] But due process in juvenile court also threatened the informality that was supposed to foster rehabilitation.[64] It fundamentally changed California's transfer hearings, which now had to comport with many constitutional protections. *In re Winship* held that juvenile judges must find guilt beyond a reasonable doubt,[65] but did not affect transfer hearings because jeopardy has not yet attached, and the minor defendant's guilt is supposedly irrelevant.[66]

In 1967, in the wake of *Gault* and facing mounting criticism over the enormous discretion of juvenile courts, the California Legislature and courts again revamped the transfer process.[67] A new law maintained the minimum age of transfer at sixteen but gave juvenile and adult courts

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61 Kent v. United States, 383 U.S. 541 (1966). Earl Warren played an outsized role in California's transfer policy, from beginning the process that led to the Arnold-Kennick Act, to ordering procedural standards in *Kent*.

62 *See id*.

63 In re Gault, 381 U.S. 1 (1967).

64 Goldfarb & Little, *supra* note 47 at 422.

65 In re Winship, 397 U.S. 358 (1970).

66 *See generally* Ralph E. Boches, *Juvenile Justice in California: A Reevaluation*, 19 Hastings L.J. 47, 48–49 (1967) (describing procedure in California's juvenile courts).

67 *Id*. at 48–49 (1967); *see generally* Howard James, *Juvenile Justice: The Worst of Both Worlds*, Christian Science Monitor, May 10, 1967, (discussing the crisis caused by lack of procedural safeguards in juvenile courts nationwide in the 1960s); President's Comm'n on Law Enf't & Admin. of Justice: The Challenge of Crime in a

concurrent jurisdiction over people between eighteen and twenty-one.[68] Judges continued to apply loose, subjective standards in transfer hearings.[69] But in 1970, the California Supreme Court stepped up where the Legislature failed to act — requiring additional findings before a young defendant could be sent to adult court.[70] In that case, Jimmy H. had been transferred to adult court based only on his age and the gravity of the charged offenses.[71] The Supreme Court interpreted the new Welfare and Institutions Code Section 707, governing transfer, to require that the lower court, at the very least, consider behavior patterns, prior delinquent history, and the probation report before sending Jimmy to adult court.[72] After *Jimmy H.*, defense attorneys could present testimony about child clients' mental state and history of trauma.[73]

While *Jimmy H.* imposed a new set of procedural requirements to make transfer less biased and more respectful of individual circumstances, activists pushed legislators to keep children out of the court system altogether.[74] Around this time, Chicano Power student activists were leading the "Blowouts," a series of walkouts in Los Angeles schools.[75] Students called for "affirmation of community experiences in the curriculum" and demanded an end to other forms of institutionalized racism like discriminatory criminal punishment.[76] In response to intense organizing,

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Free Society (1967) (detailing procedural defects across jurisdictions, specifically in Tables 14 and 15).

68 Boches, *supra* note 66 at 96. Prosecutors could elect to file charges in juvenile court or adult superior court, and either court had the authority to transfer minor defendants to the other. Because of the difference in juvenile court vocabulary, these laws use language like "charged with an act which would constitute a crime if committed by an adult" but since the Welfare and Institutions Code relies on the Penal Code's definitions of crimes, it amounts to the same thing. *Id.*

69 *Id.*

70 Jimmy H. v. Superior Court, 3 Cal. 3d 709 (1970).

71 *Id.* at 713–14.

72 *Id.* at 714.

73 *Id.* The court even considered presuming children "fit for treatment" (as they are today) in the juvenile court, although it reserved the question. *Id.* at 709 n.1.

74 California Youth Authority, AB 3121 Impact Evaluation 24–25 (1978).

75 Emily Bautista, Transformative Youth Organizing: A Decolonizing Social Movement Framework 185–86 (2018) (unpublished Ph.D. dissertation, on file with Loyola Marymount University).

76 *See id.*

especially by young people of color, legislation prohibited sending young people to jail for status offenses like truancy or curfew violations.[77] This included all young people regardless of "offense history," even sixteen- and seventeen-year-olds.[78]

C. ABANDONING THE REHABILITATIVE IDEAL IN THE "TOUGH ON CRIME" ERA

In the 1970s and '80s, rather than committing to and experimenting with the promise of informality and rehabilitation outside of court, California embraced strict procedure and harsh punishment.[79] Youth prisons still paid lip service to the rehabilitative ideal and no longer openly promoted differential treatment based on race, gender, and ability. But at the same time, juvenile courts were recast in the retributive image of criminal courts to stem a perceived juvenile crime wave.[80] As it imprisoned more and more children in the 1970s, the California Youth Authority adopted criminal law scholar and incarceration advocate David Fogel's "justice model," the idea that rehabilitation is impossible and jails and prisons should focus only on incapacitating and punishing.[81] However, imposing these rigid rules and stricter punishments did not reduce crime.

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[77] *See* Stephen J. Skuris, *For Troubled Youth — Help, Not Jail*, 31 HASTINGS L.J. 539, 547 (1979).

[78] CALIFORNIA INTERIM COMMITTEE ON CRIMINAL PROCEDURE, JUVENILE COURT PROCESSES, REPORT, 1970 Interim Session 1 (1971) (report on AB 3121).

[79] Hicks v. Superior Court, 36 Cal. App. 4th 1649 (1995) (giving a thorough overview of the steady reduction in the minimum age of transfer and increase in punishment available for use against children).

[80] Ted Palmer, *Martinson Revisited*, 12 J. OF RESEARCH IN CRIME & DELINQUENCY 133 (1975).

[81] *See* David Fogel, *We Are the Living Proof: The Justice Model for Corrections* (1975); *see also* Letter from Attorney General George Deukmejian in support of Assem. B. No. 1374 to California Governor Edmund G. Brown, Jr. (Jun. 27, 1980) (expressing similar views). Another scholar, Robert Martinson, built on Fogel's work but focused specifically on juvenile justice in California in a report about the impossibility of rehabilitation in CYA. Palmer, *supra* note 80. While Martinson's thorough study and dismal assessment of California's juvenile system was interpreted to mean that mass incarceration was the only appropriate response to juvenile delinquency, his study made no such causal conclusions. *See id*. at 135. Decision makers could, and likely should, have interpreted it to mean that CYA was dysfunctional, that its methods were insufficient to help young people, and that perhaps incarceration made the "delinquency problem" worse.

In 1977 this punitive turn came to juvenile law — the Legislature amended the Code section governing transfer to include a presumption that people over sixteen and charged with certain crimes were "unfit for treatment" in the juvenile court.[82] Young people now had to overcome this presumption to avoid transfer, rather than prosecutors' carrying the burden of proving minors unfit.[83] In the next full year, juvenile courts in Los Angeles County saw a 318 percent increase in prosecutor-filed transfer petitions and a 234 percent increase in successful transfers.[84] Courts even broke from the tradition of privacy in juvenile proceedings — ordering that transfer hearings be held open to the press except in "extreme circumstances."[85] Then–Attorney General George Deukmejian supported a Welfare and Institutions Code amendment that Governor Brown ultimately signed, which opened juvenile proceedings to the public. Deukmejian wrote,

> Minors are committing more serious and violent crimes than ever before and are becoming more criminally sophisticated. The news media, victims of crime, and the public are entitled to have as much knowledge as possible about the juvenile justice system and what it is doing to better serve public safety needs.[86]

Id.; *see also* Macallair, *supra* note 30, at 195 ("it was in the Youth Authority I learned that there was no god because no god would ever put a kid through this.").

82 Boches suggested the opposite approach in 1967. *See* Boches, *supra* note 66 at 95 ("One helpful step would be to provide for a statutory presumption that any minor of 16 or 17 is amenable to the care, treatment, and training . . . of the juvenile court."). The California Supreme Court had considered adopting Boches' proposed rule in *Jimmy H*. but had reserved the question. *See* Jimmy H., 478 P.2d at 35.

83 People v. Superior Court (Steven S.), 119 Cal. App. 3d 162, 176 (1981).

84 Eric Klein, *Dennis the Menace or Billy the Kidd: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 Am. Criminal L. Rev. 371, 386–87 (1997).

85 Tribune Newspapers W., Inc. v. Superior Court, 172 Cal. App. 3d at 443, 450 (1985). Privacy in juvenile proceedings and records is a focal point for juvenile justice reform. *See*, *e.g.*, Sue Burwell, *Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes*, *in* A New Juvenile Justice System: Total Reform for a Broken System, 333 (Nancy Dowd, ed., 2015).

86 *See* Letter from Attorney General George Deukmejian, *supra* note 81. Governor Pete Wilson signed a law in 1995 that barred reporters from interviewing adult and child inmates in California correctional institutions. *See* Evelyn Nieves, *California Governor Plays Tough on Crime*, New York Times (May 23, 2000).

Deukmejian's letter encapsulates a driving force behind California politics for the next decades.

Many shared Deukmejian's perception that juvenile crime was increasing throughout the 1980s and 1990s and that transferring juvenile cases to adult court was the solution,[87] even though the same number of kids were arrested for violent crimes in 1980 and 1989.[88] During the same period, the population of the California Youth Authority — like the population of adult prisons — skyrocketed.[89] Republican Governor Pete Wilson campaigned on lowering the minimum age for transfer from sixteen to fourteen.[90] In 1994, he signed such a bill into law.[91] Juvenile law scholar Frank Zimring argues that states enacted tough legislation like California's 1994 reform because "the minimum punishment felt necessary exceed[ed] the maximum punishment within the power of the juvenile court."[92] Zimring warns that this dichotomy (society's perceived demands for harsher punishment and the juvenile court's inability to provide them) "leaves the juvenile court vulnerable to swift legislative change."[93]

Journalist and activist Nell Bernstein explains the same era a different way, writing that researchers in the 1990s twisted juvenile crime statistics and demographic projections to stir up racialized fears of young people of color.[94] John DiIulio, for example, proposed a new "breed" of young person, "morally impoverished" and so fundamentally *other* that rehabilitation was impossible.[95] This rhetoric harks back to the early 1900s and the

87 *See* Sara Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to Juvenile System and Reasons to Repeal It*, 30 Golden Gate U. L. Rev. 233, 241–43 (2000).

88 Martha E. Bellinger, *Waving Goodbye to Waiver for Serious Juvenile Offenders: A Proposal to Revamp California's Fitness Statute*, 11 J. Juvenile L. 1, 4 nn.7–9 (1990).

89 Macallair, *supra* note 30 at 201.

90 *Id*. at 214.

91 *Id*. at 214; California Senate, *supra* note 58; *see also* Hicks, 36 Cal. App. 4th at 1649–54 (discussing the legislative history and ultimately upholding the constitutionality of AB 560 (the 1994 bill that reduced the minimum age of transfer from sixteen to fourteen)).

92 *See* Frank Zimring & Jeffrey Fagan, The Changing Borders of Juvenile Justice 208 (2000).

93 Frank Zimring, Choosing the Future for Juvenile Justice, 199 (2014).

94 *See* Bernstein, *supra* note 12 at 72.

95 William Bennet, John DiIulio, & John Walters, *Body Count: Moral Poverty — And How to Win America's War on Drugs*, 82–84 (1996).

development of transfer practice — the first juvenile prisons claimed that certain older boys were "too difficult to reform" to justify their sterilization.[96] Not coincidentally, DiIulio is also credited with coining the term "superpredator" to refer to mostly Black and Latinx teenagers.[97] Pundits, First Ladies, and other powerful Americans adopted John DiIulio's racist terminology to justify increased punishment and more permissive juvenile transfer.[98] In spite of widespread disillusion with unchecked judicial discretion and indeterminate sentences of years past, opposition to the 1994 crime bill was fragmented.[99] Even the San Francisco–based Prisoners Union and other radical organizations supported the bill, and its opponents, like the National Center for Crime and Delinquency and the American Friends Service Committee, were not united around an alternative.[100]

Public perception of high crime rates reflected the divisive rhetoric of DiIulio and Deukmejian rather than the reality that juvenile arrests had peaked in 1994 and declined precipitously afterward.[101] Nonetheless, in 2000 voters passed Proposition 21, which gave prosecutors unilateral authority to file charges in adult court against kids as young as fourteen — a judge no longer had to authorize the decision and transfer hearings became

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96 *See* Chavez-Garcia, *supra* note 32.

97 *See* Robin Templeton, *Superscapgoating*, FAIR (1998), https://fair.org/extra/superscapegoating.

98 Kristen Savali, *For the Record*, *Superpredator is Absolutely a Racist Term*, The Root (Sept. 30, 2016), https://www.theroot.com/for-the-record-superpredators-is-absolutely-a-racist-t-1790857020. DiIulio attempted to retract the thesis of *Body Count* when the second President Bush appointed him director of the White House Office of Faith-Based and Community Initiatives: "If I knew what I know now, I would have shouted instead for prevention of crimes." Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators' Bush Aide Has Regrets*, New York Times (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html.

99 Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, *in* Sentencing and Society: International Perspectives 43, 47 (Cyrus Tata & Neil Hutton, eds. 2002).

100 *Id*.

101 Jill Tucker and Joaquin Palomino, *Vanishing Violence*, San Francisco Chronicle (Mar. 21, 2019), https://projects.sfchronicle.com/2019/vanishing-violence.

much less common.[102] Proposition 21 *required* that prosecutors charge a minor in adult court for certain crimes, while in other cases prosecutors had discretion to choose their preferred venue.[103] In addition to removing judges' discretion to hear transfer petitions, Proposition 21 removed probation officers' discretion to release minors charged with certain offenses.[104] Those kids instead had to stay in juvenile prisons. Furthermore, informal probation — one of the least restrictive methods of control in the juvenile system — was no longer available for kids charged with felonies.[105] And if a person committed a "serious or violent offense" after turning fourteen, their juvenile record could never be sealed or destroyed.[106]

Prop 21 also faced fervent opposition, but nascent social movements were not strong enough to fend off the initiative. For example, Critical Resistance Youth Force, an Oakland-based group, organized against Prop 21 and called for reinvestment in education and decarceration.[107] And in 2001,

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102 See *Text of Proposition 21*, Legislative Affairs Office (Mar. 21, 2000), https://lao.ca.gov/ballot/2000/21_03_2000.html; see also Diane Matthews and Kerri Ruzicka, *Proposition 21: Juvenile Crime*, Cal. Initiative Rev. (2000), https://www.mcgeorge.edu/publications/california-initiative-review/initiatives-prior-to-november-2005/march-2000-initiatives/proposition-21) (including a detailed catalog of Prop 21's other provisions and its legislative history. Such "prosecutorial transfer" is common in the U.S. and is problematic both because prosecutorial discretion is unreviewable and because it is disparately deployed against Black, Latino, queer, and rural defendants. *See* Josh Gupta-Kagan, *Rethinking Family Court Prosecutors*, 85 U. Chi. L. Rev. 743, 775 (2018); Kristin Henning, *Correcting Racial Disparities in the Juvenile Justice System: Refining Prosecutorial Discretion*, *in* A New Juvenile Justice System: Total Reform for a Broken System, 193 (Nancy Dowd, ed., 2015).

103 *See* Matthews & Ruzicka, *supra* note 102.

104 *See id*.; Richard Mora and Mary Christianakis, *Fit to Be T(r)ied: Ending Juvenile Transfers and Reforming the Juvenile Justice System*, *in* A New Juvenile Justice System: Total Reform for a Broken System, 234 (Nancy Dowd, ed., 2015) ("Racialized, 'tough on crime' policies, such as direct file laws, perpetuate racial and ethnic disparities across the system."); *see also* Mike Males, *Justice by Geography: Do Politics Influence the Prosecution of Youth as Adults?* Ctr. On Juvenile Crime and Crim. Justice (Special Report, 2016).

105 *See Text of Proposition 21*, *supra* note 102.

106 *See id*.

107 *See* Louise Cooper, *Youth Confront California's Prop 21*, Against the Current 81 (2000) https://solidarity-us.org/atc/86/p942/ (cataloguing and describing the social movements organizing against Prop 21); *It's the Prisons*, Critical Resistance (2000), http://collection-politicalgraphics.org/detail.php?module=objects&

San Luis Obispo Chief Probation Officer John Lum was so disgusted with conditions in the California Youth Authority that he refused to transport kids who had been transferred to adult court from juvenile hall to state custody.[108] Lum was fired after publicly denouncing Prop 21 and CYA.[109] While Lum's story is perhaps heartening to reformists, it also shows the alarming degree of discretion held by probation officers,[110] who, as agents of prosecutors and the police, tend to be *more* punitive rather than less.[111]

Furthermore, voters imposed harsher punishments on "serious delinquents" just as outrage was building about conditions in California Youth Authority prisons. The Prison Law Office (PLO) filed a lawsuit against California claiming that conditions in the Youth Authority violated inmates' statutory civil rights, as well as the First and Fourteenth Amendments to the U.S. Constitution.[112] Governor Gray Davis fiercely resisted the litigation.[113] After Davis was recalled, Governor Arnold Schwarzenegger created a commission headed by former Governor Duekmejian to study the youth corrections system and to coordinate with the PLO to attempt to reform

type=browse&id=1&term=Prisons+%26+Prisoners&kv=11511&record=21&page=1 (memorializing Critical Resistance's political art campaign against Prop 21).

108 Macallair, *supra* note 30 at 219.

109 *Id*. at 222.

110 *See generally* Rudy Haapanen, *Understanding Ethnic Disparities in Juvenile Probation: What Affects Decisions?* Dept. of Justice (unpublished report, 2017).

111 Jill Viglione et al. *The Many Hats of Juvenile Probation Officers*, 43 Crim. Justice. Rev. 252; Haapanen, *supra* note 110 at 84 (finding that 70 percent of first referrals to the juvenile court, regardless of their seriousness, resulted in probation rather than detention). For a discussion of the deeply negative impact probation officers can have, see Michelle Alexander, The New Jim Crow (2010) at 164–66; Xocheezy as told to Katrina Kabickis, *If We'd Had Housing Support, Maybe I Wouldn't Have Spent My Teen Years Locked Up*, Chronicle of Soc. Change (Oct. 26, 2018), https://chronicleofsocialchange.org/youth-voice/xocheezy-foster-care-juvenile-justice-crossover.

112 Macallair, *supra* note 30 at 222–23.

113 *Id*. at 223. During the 1999 election, Davis had received nearly a million dollars in contributions from the prison guards' union, the leading opponent to reform of the juvenile justice system. Joshua Aaron Page, The "Toughest Beat": Incarceration and the Prison Officers Union in California, (2007) (unpublished Ph.D. dissertation, on file with the University of California, Berkeley) (describing the immense influence of the guards' union and how it grew even as most public sector unions were in decline — as well as its entanglements with Gov. Davis). Davis was also one of few Democrats who supported Prop 21's more punitive transfer policy. *Id*.

CYA.[114] But in February 2004, two CYA staff members were caught on tape brutally beating two of the young people in their custody.[115] Deukmejian's Commission held hearings, and, much like the hearings in 2000[116] and 1941, they uncovered guards' shocking mistreatment of young people.[117] One parent's story of a child's suicide was "shockingly similar to that of Benny Moreno" in 1939.[118] After the attack, the hearings, and public outcry, California agreed to minor reforms, replacing CYA with the Division of Juvenile Facilities as part of a settlement with the PLO.[119]

Prosecutors held the power to decide in most cases which court would hear juvenile cases for the next sixteen years; "the worst punishment the juvenile system is empowered to inflict" became the norm.[120] Between 2003 and 2015, California prosecutors charged more than 10,000 children in adult court.[121] More than 70 percent of those cases were direct-filed,

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114 *Review Panel*, *State Auditor Release Report on California's Correctional System*, The Capitol Connection (2004), 4, http://www.courts.ca.gov/documents/CapCon0604.pdf.

115 Jennifer Warren, *Videotape of Beating by CYA Officers Is Released*, LA Times (Apr. 2, 2004); http://articles.latimes.com/2004/apr/02/local/me-cya2. Sue Burrell and Ju Seon Song, *Ending "Solitary Confinement" of Youth in California*, 31 Children's Legal Rights J. 42, 49 (2019).

116 Joint Oversight Hearing of the Senate and Assembly Committees on Public Safety Regarding the California Department of the Youth Authority (May 16, 2000), https://archive.senate.ca.gov/sites/archive.senate.ca.gov/files/committees/2013-14/spsf.senate.ca.gov/jointinformationalhearingonthecaliforniayouthauthoritymay162000/index.html; *see also* Daryl Kelly, *Arrests Prompt Call for CYA Resignations*, LA Times (Feb. 3, 1999), http://articles.latimes.com/1999/feb/03/local/me-4349. (describing male staff members' systematic abuse of young girls and female staff at the Ventura Youth Correctional Facility).

117 Macallair, *supra* note 30 at 224.

118 *Id*.

119 Burrell & Song, *supra* note 115 at 52.

120 See Marcus W. v. Superior Court, 98 Cal. App. 4th 36, 41 (2002) (citing *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 810 (1985)); s*ee also* Manduley v. Superior Court, 27 Cal. 4th 537 (2002) (declaring Proposition 21 constitutional).

121 Martin F. Schwarz, *Children are Different: When the Law Catches Up with Science*, 59 Orange Cty. Lawyer 30, 33 (2003 was the first year data was made available, and 2015 was the last full year of prosecutorial waiver). In the same period prosecutors petitioned juvenile courts to transfer 3,095 additional children to adult court. Laura Ridolfi, *Youth Prosecuted as Adults in California: Addressing Racial, Ethnic, and Geographic Disparities after the Repeal of Direct File* 1, Burns Institute (2017), http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=9081&Inline=True.

meaning a prosecutor alone determined whether a young person would be tried in adult court.[122] Between 2006 and 2016, 50 percent of Latinx kids and 60 percent of Black kids who faced transfer hearings were transferred to adult court, compared to only 10 percent of White kids.[123] Unsurprisingly, young people of color also received longer sentences in adult court than White young people.[124] The US Supreme Court in this period again issued landmark juvenile law decisions: ruling in 2005 that minors could not be executed and in 2010 that they could not be sentenced to life without the possibility of parole for a crime other than homicide.[125] Some states took these rulings as impetus to entirely revamp their juvenile systems, but not California.[126]

D. A GLIMMER OF HOPE: LIMITING TRANSFER IN THE LATE 2010s

Finally, California began to relax juvenile punishments in response to organizing against mass incarceration and harsh prosecution, although the first steps were small and only tangentially related to transfer.[127] Perhaps anticipating the coming changes to the law, Governor Brown signed amendments to the criteria a judge must consider in a transfer hearing.[128] Welfare and Institutions Code Section 707 lists five factors that judges use to decide whether to transfer a case to adult court. The factors had not changed since 1975, but

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122 Schwarz, *supra* note 121.

123 Sara Tiano, *Bill Would Prohibit Californians from Sending Youth Under 16 to Adult Courts*, Chronicle of Soc. Change (Aug. 14, 2018), https://chronicleofsocialchange.org/news-2/new-bill-would-prohibit-ca-from-sending-youth-under-16-to-adult-courts/31931.

124 *See* Kareem L. Jordan & Tina L. Frieberger, *Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in Adult Court*, 21 Crim. Justice Pol. Rev. 185, 186–89 (2010).

125 Roper v. Simmons, 532 U.S. 551 (2004); *Graham v. Florida* 560 U.S. 48 (2010).

126 *See*, *e.g.*, Burrell & Song, *supra* note 106 at 49; Barry Krisberg, *A New Era in California Juvenile Justice: Downsizing the State Youth Correctional Facilities*, Berkeley Ctr. for Crim. Justice (2010); Cara Drinan, The War on Kids, 150 (2017).

127 For example, AB 703 allowed the Judicial Council to set minimum standards for court appointed counsel in juvenile cases. *See* Schwarz, *supra* note 121 at 34. The Council's new rule required that court-appointed attorneys receive eight hours of youth-specific training to better address common problems with mental health issues, sexual identity, undiagnosed learning disabilities, adolescent behavior among other factors. *See* Cal R. Court 5.664.

128 *See* Cal. Welf. & Inst. Code § 707; *see also* Schwarz, *supra* note 121 at 34.

new legislation explained them in greater detail and permitted defense attorneys to present mitigation evidence. Of course, in 2015 prosecutors charged most minors directly in adult court, and the new law only applied to those few transfer hearings actually argued before a judge.[129]

However, in 2016, Proposition 57 restored full judicial discretion to transfer hearings — requiring prosecutors to petition the court for transfer and prove that a kid was "not a suitable candidate for treatment in the juvenile court system."[130] Only 158 young people were transferred to adult court in 2017, the first full year after Prop 57, compared to 566 in 2015.[131] Judicial discretion still suffers from implicit bias, especially where it applies multi-factor tests about "criminal sophistication" and family support systems, but a judge's transfer decision, unlike a prosecutor's, is at least reviewable by extraordinary writ.[132] Prop 57 did away with California's "once an adult, always an adult" provision, which had required that defendants who were transferred automatically be treated as adults in subsequent prosecutions.[133] Juvenile defendants also previously had to rebut a "presumption of unfitness," but now prosecutors bear the burden of proving young people unfit by a preponderance of the evidence.[134]

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129 *See* Ridolfi, *supra* note 122 and accompanying text.

130 *See* Cal. R. Ct. 5.770(a); Cal. Evid. Code § 606. At the time, fourteen and fifteen-year-olds could be transferred at the discretion of the court if charged with one of thirty "serious felonies" enumerated in Code Section 707. SB 1391 removed this provision from Section 707 on January 1, 2019.

131 Division of Juvenile Justice Statistics, California Attorney General (2017); Division of Juvenile Justice Statistics, California Attorney General (2015).

132 Cal. R. Ct. 5.770. A juvenile court's decision to transfer a case can only be reviewed by extraordinary writ within twenty days of the jurisdictional order. Defendants have no opportunity to contest the transfer decision once convicted in criminal court. *See* People v. Chi Ko Wong, 18 Cal. 3d 698 (1976). The Court of Appeal reviews the juvenile court's decisions of law *de novo*, and its conclusions of fact for substantial evidence. *See* Haraguchi v. Superior Court, 43 Cal. 4th 706 (2008) (allowing reversal of a lower court only if its holding was "arbitrary and capricious").

133 Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. Dept. of Justice (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

134 *See Rodrigo O.*, 22 Cal. App. 4th at 1297; J.N. v. Superior Court, 23 Cal. App. 5th 706, 711 (2018); *cf.* Jimmy H. v. Superior Court, 478 P.2d 32, 35 (1970) (declining to presume minors "fit for treatment").

The Legislature capitalized on the anti-carceral energy Proposition 57 represented. SB 1391, signed by Governor Brown on September 30, 2018, abolished transfer entirely for kids younger than sixteen.[135] Furthermore, young people can now stay in juvenile prisons or jails until age twenty-five.[136] But this legislation did not merely restore the pre-1994 status quo[137] — now, juvenile judges must make findings on the record to the five statutory factors in Section 707.[138] In 1994, each of the factors had to weigh in favor of the juvenile defendant, whereas judges now apply a totality of the circumstances analysis.[139]

A 2018 Court of Appeal decision exemplifies the state of the law at this historically anti-transfer moment.[140] The defendant, J.N., and two friends were hanging out in a public park when an adult gang member approached them with a knife. S.C., J.N.'s friend, took out a gun. The adult wrestled with S.C. for the gun, shots were fired, and J.N. and the other boy "stood frozen, nearby." The man died. But J.N. and his friends claimed they had

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135 SB 1391 Letter from Edmund G. Brown Jr., Office of the Cal. Governor, to the Members of the Cal. State Senate (Sept. 30, 2018). This was a symbolically important bill, but even without it no one under sixteen was transferred in 2017, the first full year of judicial waiver without SB 1391's age restrictions. Division of Juvenile Justice Statistics, California Attorney General (2017).

136 Welf. & Inst. Code § 1769 (as amended June 2018).

137 *Contra* People v. Lara, 4 Cal. 5th at 305), ("Proposition 57 . . . largely returned California to the historical rule.")

138 Cal. R. Ct. 5.770. Jeopardy has not yet attached at a transfer hearing, and guilt or innocence is supposedly irrelevant to a judge's decision to impose the most severe penalty available in juvenile court. Cal. Welf. & Inst. Code § 707(a)(1). Although this is true in every jurisdiction with judicial waiver, it is a legal fallacy for the judge to consider "the gravity" of a charged offense that may never have happened, and "whether the minor can be rehabilitated" before determining if they have even done wrong. This odd state of affairs has persisted since before 1961, when juveniles risked immediate transfer to adult court if they contested the charges. *See* Cal. Welf. & Inst. Code § 707; People v. Superior Court (Rodrigo O.), 22 Cal. App. 4th 1297, 1304 (1994) ("the criteria the court must use to determine fitness are based upon the premise that the minor did in fact commit the offense"); *see also* Goldfarb & Little, *supra* note 47.

139 *Compare* People v. Superior Court (Zaharias M.), 21 Cal. App. 4th 302, 308 (1993) ("the trial court must find that the minor is amenable to treatment under each and every one (not any one) of the five criteria set forth in § 707." (internal citations and emphasis omitted)) *with* Ridolfi, *supra* note 122 at 1 (describing current totality of the circumstances test).

140 *J.N.*, 23 Cal. App. 5th at 720.

no intention to kill anyone; they only wanted "to spray graffiti and go home."[141] Nevertheless, a prosecutor direct-filed murder charges against J.N. in adult court.[142]

The Court of Appeal reversed the lower court and held that J.N.'s evidence of childhood trauma and limited culpability rendered him suitable for treatment in the juvenile court. Three pages of the short opinion are devoted to J.N.'s biography: his mother had relationships with several men who were physically and emotionally abusive to J.N., his mother, and his siblings.[143] The family moved to a one-bedroom apartment in a new neighborhood, where there were frequent shootings and stabbings, and J.N. himself was shot three times in the leg.[144] Even though J.N. had previously been arrested for "strong arm robbery" — he allegedly took $25 from another boy at school — because he had served his juvenile sentence, returned with a "changed attitude," graduated from high school, successfully completed probation, and got a job, the court still found him suitable for juvenile court.[145] Even though at the time of the *J.N.* decision juvenile courts could only maintain jurisdiction until the twenty-third birthday, and J.N. was almost twenty-one by the time his case was decided, he was not transferred. The Court held that the prosecution had failed to carry its newly heavy burden of proving him unfit for treatment in the juvenile court.[146]

Also recognizing the anti-punitive turn in public opinion, the California Supreme Court later declared that Prop 57's requirement that judges, not prosecutors, make the transfer decision applied retroactively, calling transfer "too severe" a punishment clearly disfavored by voters.[147] Voter

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141 *Id*. at 711.

142 Seventeen months passed between the events at issue and the filing of charges. *Id*. at 711, n.1. After Prop 57 passed, the case was remanded to juvenile court for a fitness hearing. The judge quickly found J.N. unfit for treatment by the juvenile court. *Id*. at 706–8.

143 *Id*. at 712–13. No transfer decision issued between 2000 and 2015 discussed facts about a minor defendant's background or upbringing.

144 *Id*. at 720.

145 *Id*. at 715, 720.

146 *Id*. at 711.

147 *See* People v. Superior Court (Lara), 4 Cal. 5th 299 (2018) (disapproving all Courts of Appeal but one in declaring Prop 57 retroactive); *see also* Prop 57 itself — as "urgency" legislation it took effect immediately.

intent to impose a lighter penalty on criminal defendants can overcome the general presumption that laws do not apply retroactively.[148] When voters or legislators choose to reduce punishment, California courts interpret the new law to apply to as many cases as possible given the "obvious" inference that the old punishment was too harsh.[149] The Supreme Court found that Proposition 57 represented a reduction in punishment, comporting with the idea that transfer is the juvenile court's worst punishment. In explicitly deferring to voters' apparent desire for lenience, the California Supreme Court "protect[ed] the juvenile courts from political risk," by keeping them in step with public opinion — just as it had when it upheld Proposition 21's imposition of harsher transfer policy in 2002.[150] Having lost their challenges to Prop 57, district attorneys across the state are now challenging the constitutionality of SB 1391.

II. THE SUPREME COURT WILL LIKELY UPHOLD SB 1391 AND INAUGURATE A NEW PHASE IN THE CYCLE OF JUVENILE TRANSFER

This part discusses the pending constitutional challenge to SB 1391. District attorneys have challenged the constitutionality of this law and appealed transfer decisions to the California Supreme Court. The question is whether SB 1391 is a permissible modification of Proposition 57, with which voters authorized judges, rather than prosecutors, to decide whether people between fourteen and eighteen could be transferred.[151] Most Courts of Appeal have upheld SB 1391, with which the Legislature banned transfer of fourteen- and fifteen-year-olds, but the Second District (following dissenting justices in the Fifth and Sixth Districts) found SB 1391 unconstitutional

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148 Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1224 (1988); *Lara*, 4 Cal. 5th at 312 (explaining that the court does not distinguish between electoral and legislative intent).

149 *Lara*, 4 Cal. 5th at 308 (citing People v. Superior Court (Estrada), 63 Cal. 2d 740, 748).

150 Zimring, Choosing the Future, *supra* note 95 at 212; s*ee also* Manduley v. Superior Court, 27 Cal. 4th 537 (2002) (declaring Proposition 21 constitutional).

151 *See* Sara Tiano, *Landmark Juvenile Justice Reform Challenged by California DAs*, The Chronicle of Soc. Change (20 Jan. 2019) (listing the cases filed up to that point that challenged the constitutionality of SB 1391).

because "the Legislature cannot overrule the electorate" by setting a higher minimum age of transfer than voters implicitly approved with Prop 57.[152] The great weight of authority favors upholding SB 1391,[153] and it is unlikely — though not unimaginable[154] — that the Supreme Court will strike it down. However the case comes out, the Supreme Court's decision will set up the next phase of California's cycle of juvenile transfer.

A. STANDARD OF REVIEW

Legislation cannot alter the scope or effect of an initiative like Prop 57 "whether by addition, omission, or substitution of provisions," without express language in the initiative authorizing such an amendment.[155] In invalidating SB 1391, the Second District found that SB 1391 unconstitutionally amended Prop 57 because it "prohibit[ed] what the initiative authorize[d]."[156] Even the Courts of Appeal that have upheld SB 1391 acknowledge that it is an amendment of Prop 57 — it prohibits transfer of fourteen- and fifteen-year-olds to adult court, which Prop 57 at least implicitly authorizes.[157]

The California Constitution still allows the Legislature to amend an initiative where the proposition expressly permits amendment, which

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152 *See* O.G. v. Superior Court, 40 Cal. App. 5th 626, 627–28 (2019).

153 At least eight Courts of Appeal have upheld SB 1391. *See* People v. Superior Court (Alexander C.), 34 Cal. App. 5th 994 (2019); People v. Superior Court (K.L.), 36 Cal. App. 5th 529 (2019); People v. Superior Court (T.D.), 38 Cal. App. 5th 360, 375 (2019); People v. Superior Court (I.R.), 38 Cal. App. 5th 383 (2019); People v. Superior Court (S.L.), 40 Cal. App. 5th 114 (2019); B.M. v. Superior Court, 40 Cal. App. 5th 742 (2019); Narith S. v. Superior Court, 42 Cal. App. 5th 1131 (2019); People v. Superior Court (Rodriguez), __Cal. App. 5th __, 2020 WL 2765766 (2020).

154 For example, the Supreme Court disagreed with all but one Court of Appeal in declaring Prop 57 retroactive. *See Lara*, 4 Cal. 5th at 308.

155 *See* Brown v. Superior Court, 63 Cal. 4th 335, 354 (2016); *see also* Michael Cohen, *Can Fourteen- and Fifteen-Year-Olds be Transferred to Adult Court in California?: A Conceptual Roadmap to the Senate Bill 1391 Litigation*, 67 UCLA L. Rev. Discourse 200 (2019), https://www.uclalawreview.org/can-fourteen-and-fifteen-year-olds-be-transferred-to-adult-court-in-california-a-conceptual-roadmap-to-the-senate-bill-1391-litigation/ (giving a detailed primer on the split in the District Courts and the constitutional question at issue in *O.G.*).

156 People v. Superior Court (*Pearson)*, 48 Cal. 4th 564, 571 (2010).

157 *See*, *e.g.*, *Alexander C.*, 34 Cal. App. 5th 994; *K.L.*, 36 Cal. App. 5th 529.

Prop 57 does.[158] Prop 57's Section 5 requires it be "broadly construed to accomplish its purposes," and allows all legislative amendments that are "consistent with and further the intent of this act."[159] A court reviewing amendatory legislation starts "with the presumption that the Legislature acted within its authority . . . if, by any reasonable construction, it can be said that the statute furthers the purposes of the initiative."[160] The court must resolve all doubt in favor of upholding the statute.[161] And courts may rightly consider other "indicia of voter intent" like the Voter Information Guide or a "general description of the initiative's purpose offered by its proponents."[162] The most relevant question for the Supreme Court is whether SB 1391 furthers the intent of Prop 57 — the Second District held that it does not.

B. SB 1391 IS LIKELY A PERMISSIBLE AMENDMENT OF PROPOSITION 57

Prosecutors' challenges to SB 1391 usually center on the claim that SB 1391 is an unconstitutional modification of Prop 57. *O.G. v. Superior Court*, the case before the Supreme Court, begins by framing the principal purpose of Proposition 57 as restoring judicial discretion to grant or deny transfer petitions.[163] It follows that SB 1391 is then a *restriction* on judges' newly reinstated power because it disallows juvenile courts to transfer fourteen- and fifteen-year-olds. This limitation would thus unconstitutionally nullify Prop 57's supposed intent to expand judicial discretion.[164] However, the Supreme Court has already found the intent of Prop 57 to be "ameliorating the possible punishment for a class of persons, namely juveniles."[165]

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158 Cal Const. art. IV § 1, art. II § 10(c).

159 Cal. Proposition 57 § 5.

160 Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055, 1119 (2004); *People v. DeLeon*, 3 Cal. 5th 640, 651 (2017).

161 Foundation for Taxpayer & Consumer Rights v. Garamendi, 132 Cal. App. 4th 1354, 1365 (2005).

162 Robert L. v. Superior Court, 30 Cal. 4th 894, 900–1 (2003); Proposition 103 Enforcement Project v. Quackenbush, 64 Cal. App 4th 1473, 1490–91 (1998).

163 *See*, *e.g.*, *O.G.*, 40 Cal. App. 5th 626.

164 *See id*. at 628.

165 *Lara*, 4 Cal. 5th at 308.

Furthermore, Prop 57 lists five purposes in its text — the Second District focused only on one.

First, Prop 57 intends to "[p]rotect and enhance public safety."[166] As the United States Supreme Court has discussed at length, subjecting young people to the full force of adult criminal punishment undermines rather than enhances public safety by increasing recidivism.[167] The arguments in favor of Prop 57 in the voter pamphlet also discussed the broad consensus that the more lenient and evidence-based treatment of the juvenile system reduces recidivism.[168] So voters — theoretically — agreed that treatment in the juvenile system enhances public safety, which accords with the mission of SB 1391. Furthermore, Governor Brown considered a common argument against SB 1391 in his signing statement, writing that if a young person is considered a "threat," a prosecutor can petition for them to remain in custody beyond their original sentence.[169]

Second, Prop 57 was intended to "[s]ave money by reducing wasteful spending on prisons," a purpose SB 1391 indisputably serves.[170] It keeps kids out of adult court where they can be subject to longer sentences at much greater cost. Third, Prop 57 aimed to "[p]revent federal courts from indiscriminately releasing prisoners."[171] Reducing the number of prisoners in state custody and the lengths of their sentences does not undermine this purpose, and prosecutors have never argued the contrary. Fourth, Prop 57 aimed to "[s]top the revolving door of crime by emphasizing rehabilitation . . . ."[172] The juvenile system's mission is ostensibly rehabilitative, while the adult system's

166 Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

167 *See* Miller v. Alabama, 567 U.S. 460, 467 n.5 (2012); *see also* Kristin Johnson et al., *Disregarding Graduated Treatment: Transfer Aggravates Recidivism*, 57 Crime & Delinquency 757 (2011).

168 *See* Cal. Atty. Gen., *Argument in Favor of Proposition 57*, Prop. 57 Criminal Sentences. Parole. Juvenile Criminal Proceedings and Sentencing. Initiative Constitutional Amendment and Statute. California Proposition (2016), https://www.courts.ca.gov/documents/BTB24-5H-1.pdf.

169 SB 1391 Letter, *supra* note 135.

170 *See* Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

171 *See id*. Other sections of the initiative were meant to help the state comply with a federal court order to reduce the population of California prisons to 137.5 percent of their design capacity, which is not necessarily relevant to the constitutionality of SB 1391. *See* Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 962 (E.D. Cal. 2009).

172 Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

is not. One Court of Appeal has considered a prosecutor's argument that an older kid would not be subject to juvenile court jurisdiction long enough to benefit from these rehabilitative services.[173] The Court ruled that this situation was not enough to justify invalidating SB 1391, which promotes juvenile rehabilitation in general. And again, the prosecutor can always petition the court to keep kids in custody beyond their original sentences.[174]

Finally, Prop 57 sought to "[r]equire a judge, and not a prosecutor, to decide whether juveniles should be tried in adult court."[175] Challengers read judicial discretion as the thrust of Prop 57's purpose and claim that SB 1391 undermines it by banning transfer of everyone under sixteen. Proposition 57, however, does not set any minimum age for transfer. It applies, by its own terms, to "[c]ertain categories of minors," and SB 1391 simply narrows the category of minors to which it applies.[176] Under SB 1391 a judge — and not a prosecutor — still makes every transfer decision.[177] To be sure, the ballot materials for Prop 57 made clear that fourteen- and fifteen-year-olds could be tried in adult court,[178] but the Supreme Court explained that Prop 57 sought to "ameliorate[] the possible punishment for a *class of persons*, namely juveniles."[179] The Supreme Court declared Prop 57 retroactive because voters had expressed such clear intent to reduce punishment,[180] and the same preference for the lenient treatment of the juvenile court underlies SB 1391.

The Second District Court of Appeal and other dissenting justices make various, less compelling arguments to strike down SB 1391. For one, an early draft of Proposition 57 set sixteen as the minimum age of transfer, but the initiative was revised during the public comment period.[181] The updated measure provided that "[t]ransfers were generally limited to minors

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173 People v. Superior Court (T.D.), 38 Cal. App. 5th 360, 373–74 (2019).

174 SB 1391 Letter, *supra* note 135.

175 Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

176 *Lara*, 4 Cal. 5th at 305; Rodriguez, __Cal. App. 5th __, 2020 WL 2765766 at *5.

177 Rodriguez, __ Cal. App. 5th __, 2020 WL 2765766 at *5; T.D., 38 Cal. App. 5th at 373.

178 SB 1391 Letter, *supra* note 135; *see* Cal. Atty. Gen., *supra* note 168; *see also* Cohen, *supra* note 155 (discussing the district attorney's arguments in *O.G.*).

179 *Lara*, 4 Cal. 5th at 308 (emphasis added).

180 *See id*.

181 Brown v. Superior Court, 63 Cal.4th 335, 340 (2016).

aged sixteen or older, but were permitted for fourteen- or fifteen-year-olds accused of certain serious crimes."[182] Thus, prosecutors claim, SB 1391 imputes to Proposition 57 a provision intentionally rejected by the voters.[183] For this argument to hold water, prosecutors would have to prove that voters knew that a provision had been omitted from the final version of Prop 57 and relied on that omission more than the general ameliorative tenor of the initiative.

In *O.G.*, the Second District lamented other courts' failure to consider important precedent. However, the Second District misapplied its own chosen precedent.[184] In *Pearson*, the case the Second District cited to strike down SB 1391, the Supreme Court found that the legislative enactment at issue did not modify the relevant initiative.[185] Therefore, it had no reason to reach the question of whether the initiative, by its own terms, permitted such a legislative change.[186] But in the case of SB 1391, no Court of Appeal disputes that the Legislature modified Prop 57 — the only question that remains is whether that modification accords with the constitutional standard. Because SB 1391 matches so closely the purposes of Prop 57, the Supreme Court will likely uphold it.

III. MOVING BEYOND THE CYCLE OF TRANSFER

Even in the unlikely event that the Supreme Court agrees with the Second District and declares SB 1391 unconstitutional, California has entered a new phase in its cycle of juvenile transfer. Recent steps toward abolishing

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182 *Id.*

183 *See*, *e.g.*, SB 1391 Letter from Santa Clara Cty. Dist. Atty.'s Office, to Susan S. Miller, Clerk of the Court of the Sixth District Court of Appeal 11 (Oct. 10, 2018), https://yoloda.org/wp-content/uploads/2018/10/SB-1391-CHALLENGE-LETTER-MODIFIED-10-10-18-FINAL-FINAL-2.pdf, ("If the voters passed an initiative that increased taxes on all persons except those making under $10,000 dollars a year, and the legislature then passed a statute eliminating the exemption for those making under $10,000 dollars, would this Court have any hesitation in finding the statute inconsistent with the initiative notwithstanding the general thrust of the initiative was to reduce taxes? Of course not!").

184 *See* Cohen, *supra* note 155 for a thorough discussion of this argument.

185 *Pearson*, 48 Cal. 4th at 570–71.

186 *Id.*

transfer could be more than a new phase — they may represent an effort to allow something new to grow in the place of the juvenile system. The dire predictions of Bernard and Kurlycheck's cycle presume a largely unchanged juvenile legal system, with law making tweaks at the margins, for example, by imposing stricter conditions on a judge's decision to transfer decision or implementing racial bias training.[187] But tinkering is not the only option — the social movements of the spring and summer of 2020 and sustainable reforms they have already inspired around California may provide the impetus to break this grim cycle. This part discusses the promise and limits of law changes to ending the cycle of juvenile transfer and the necessity of extralegal organizing.

A. WHAT THE LAW CAN DO: GIVING KIDS AND FAMILIES SOME BREATHING ROOM

Scholars across disciplines and the political spectrum have recognized that criminal procedure and the prison system function to subordinate poor people, queer people, and people of color.[188] Some estimate that one in every three young Black men will spend part of his life in jail or prison.[189] Police, too, target Black people and people of color and use excessive force in response to the myriad social issues they are asked to address.[190] The

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187 *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Georgetown L.J. 1479, 1513–17 (2016) (arguing that police training encourages, rather than discourages, violence); see also Alex S. Vitale, The End of Policing 8–11 (2017) (arguing that police training is ineffective and should not be considered a reform).

188 *See*, *e.g.*, Alexander, *supra* note 111; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 Calif. L. Rev. 3 (2010); Andrea J. Ritchie & Delores Jones-Brown, *Policing Race, Gender, and Sex: A Review of Law Enforcement Policies*, 27 Women & Criminal Justice 21 (2017); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 Mich. L. Rev. 2018.

189 *See* Becky Pettit, Invisible Men: Mass Incarceration and the Myth of Black Progress 58 (2012) (interpreting statistics from the early 2000s).

190 Franklin E. Zimring, When Police Kill (2017) (discussing the explosion of research and critique into police treatment of people of color since the Ferguson rebellion); Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 Sup. Ct. Rev. 157 (2016) (discussing the virtually unchecked nature of police discretion to arrest and kill); Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 209 (2015) (arguing that policing is a form of social control); Jeffrey Fagan & Garth

juvenile system suffers the same structural defects as adult courts and prisons.[191] Despite decades of "reform," a 2019 study found that California's juvenile prisons are still "hotbeds of violence and trauma" where officers often use physical force against youth and where "young people experience or witness fights, riots, or beatings on a regular basis."[192] One young person reports: "if you weren't bleeding or dying, you wouldn't get medical attention."[193] If years of progressive reforms and steadily increasing spending[194] have not improved the detention facilities or lives of incarcerated youth who leave state custody "unprepared for life after release,"[195] perhaps it is time to consider shrinking jurisdiction and directing money elsewhere.

Scholars of crime and punishment, including a growing group of legal scholars, propose an alternative to procedural fairness or unconscious bias training: the transformation of systems of punishment — what some call an abolitionist horizon for reform.[196] Abolitionists recognize that the

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Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 Fordham Urb. L.J. 457 (2000) (dissecting the racialized nature of policing); Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (2006) (cataloguing ways that police target the poor); Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 Harv. L. Rev. 1270 (1998) (giving an overview of the role of police in maintaining racial subordination of Black people).

191 *See*, *e.g.*, Bernstein, *supra* note 12 at x–xv, 110–13 (comparing adult and juvenile prison systems, and abolition movements).

192 *See* Maureen Washburn, *State Spending Soars to Historic Levels Amid Reorganization of California's Youth Correctional System*, Ctr. on Juvenile and Criminal Justice 1 (Feb. 2020), http://www.cjcj.org/uploads/cjcj/documents/state_spending_soars_to_historic_levels_amid_reorganization_of_californias_youth_correctional_system.pdf.

193 *Id*. at 52.

194 Mike Males, *Who Knows Why California Crime by Youth is Plummeting?* Juvenile Justice Info. Exchange (Oct. 23, 2019), https://jjie.org/2019/10/23/who-knows-why-california-crime-by-youth-plummet.

195 *See* Washburn, *supra* note 192 at 1.

196 *See Introduction*, *in* Developments in the Law — Prison Abolition, 132 Harv. L. Rev. 1568, 1568 (2019); Paul Butler, Chokehold: Policing Black Men (2017); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1168 (2015); Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law (2d ed. 2015); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U. Cal. Davis L. Rev. 197 (2018);

occasional instance of excess in policing, jail, or prison is not the fundamental problem with the criminal system, nor is the lone bad actor, nor a lack of resources and training.[197] When much of the violence of police and prison guards seems to be constitutional and sanctioned by the law,[198] the problem is the system of punishment itself.[199] The systemic issues manifest

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Amna A. Akbar, *An Abolitionist Horizon for Police Reform*, 108 Calif. L. Rev. __ (2020) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670952; Priscilla A. Ocen, *Beyond Ferguson: Integrating the Social Psychology of Criminal Procedure and Critical Race Theory to Understand the Persistence of Police Violence*, *in* A Theory of Criminal Justice: Law and Sociology in Conversation (Sharon Dolovich & Alexandra Natapoff eds., 2017); *see also What Is Abolition?*, Critical Resistance (2012), http://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf ("We take the name 'abolitionist' purposefully from those who called for the abolition of slavery in the 1800s.").

197 *See* Akbar, *An Abolitionist Horizon*, *supra* note 196 (deconstructing the idea that "giving more to the police" — in the form of technology, anti-bias training, and funding — actually improves outcomes, and instead arguing for divestment from the police).

198 For example, after the Baltimore and Ferguson rebellions in 2016 and incidences of police brutality and terror, the United States Department of Justice declared that police behavior comported with the law. U.S. Dep't. of Justice, Civil Rights Div., Investigation of the Baltimore City Police Department (2016); U.S. Dep't. of Justice, Civil Rights Div., Investigation of the Ferguson Police Department (2015); U.S. Dep't .of Justice, Civil Rights Div., Investigation of the Chicago Police Department (2017); *see also* McLeod, *Police Violence*, *supra* note 190 at 158–59 (arguing that law authorizes rather than limits police violence); Jamison v. McClendon, __F. Supp. 3d __ ; 2020 WL 4497723 (Aug. 4, 2020) (lamenting the inability of the law to redress an instance of police brutality).

199 This is the core claim of the penal abolition movement. *See Abolishing Carceral Society*, Common Notions 4 (2018), https://www.commonnotions.org/abolishing-carceral-society ("Today we seek to abolish a number of seemingly immortal institutions, drawing inspiration from those who have sought the abolition of all systems of domination, exploitation, and oppression."); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, *in Developments in the Law — Prison Abolition*, 132 Harv. L. Rev. 1575, 1578 (2019) ("abolition is not merely a practice of negation — a collective attempt to eliminate institutionalized dominance over targeted peoples and populations — but also a radically imaginative, generative, and socially productive communal (and community-building) practice"); Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 242 (2007) (describing California's massive prison-building project and arguing that abolishing the prison institution is the only way to achieve the fundamental social reordering required to address the problem of mass incarceration); Angela Y. Davis, Abolition Democracy: Beyond Prisons, Torture, Empire 73 (2005) ("prison abolition requires us to recognize the extent that our present social order — in which are embedded a complex array of social problems — will have

throughout the criminal process: from the police officer who is five times more likely to arrest a Black kid than a White kid,[200] to the judge who, considering "whether the minor can be rehabilitated" or is "criminally sophisticated," transfers the same Black kid to adult court,[201] to the prison guard

to be radically transformed), Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 460–61 (2018) (proposing that legal scholarship focus on imagining solutions beyond dominant paradigms, beyond reforms to existing systems); Charlene A. Carruthers, Unapologetic: A Black, Queer, and Feminist Mandate for Radical Movements (2018) (recounting the history of Black radical movements in the U.S., centering the stories of unrecognized figures like movement organizers). The statements of the organizers themselves are arguably more important than the statements of the scholars who bring their words to the academy — though of course there is no clear line between movement organizers and movement scholars. *See*, *e.g.*, *About — What is the PIC? What is Abolition*, Critical Resistance, http://criticalresistance.org/about/not-so-common-language/; California Immigrant Youth Justice Alliance, https://ciyja.org/ ("CIYJA works tirelessly across the state to fight back against policy that attempts to criminalize undocumented youth and families"); *What is Abolition*?, No New SF Jail Coalition, https://nonewsfjail.org/what-is-abolition/ ("As a vision, abolition for No New SF Jails is about: Imprisonment, policing, surveillance & punishment of any kind cause harm, exacerbate oppression, and should not be used . . . ."); *Who We Are*, LA No More Jails, https://lanomorejails.org/about ("Because imprisonment is fundamentally violent, we are working to reduce the number of people locked up in Los Angeles . . . ."); Black & Pink, https://www.blackandpink.org/ ("Black and Pink . . . and is a national prison abolitionist organization dedicated to dismantling the criminal punishment system and the harms caused to LGBTQ+ people and people living with HIV/AIDS . . . ."); Incite! Women of Color against Violence, https://incite-national.org/ (INCITE! is a network of radical feminists of color organizing to end state violence and violence in our homes and communities . . . ."); Assata's Daughters, http://www.assatasdaughters.org/ ("our freedom looks like quality public schools; our freedom looks like universal healthcare; our freedom looks like living without fear of physical or sexual violence; our freedom looks like economic stability; our freedom looks like self-determination; our freedom looks like communities that practice restorative justice and that make police and cages obsolete; our freedom looks like the eradication of anti-Blackness and all forms of oppression.").

[200] *Compare Juvenile Justice in California*, California Attorney General 56 (2018) https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Juvenile%20Justice%20In%20CA%202018%2020190701.pdf (showing, in Table 3, slightly more arrests of Black youth than White youth) *with* Current Population Survey, Census.Gov https://www.census.gov/cps/data/cpstablecreator.html (narrow by "Age:0–17" and "Race") (showing California is home to more than five times the number of White minors than Black minors).

[201] These are some of the findings that Cal. Welf. & Inst. Code § 707 requires before deciding to transfer a juvenile case to adult court. Criminal sophistication is an inherently

who puts him in solitary confinement to prevent an "accidental injury" after his jaw is broken in a fight.[202]

SB 1391 could be one step toward finding less retributive, less costly, and more effective methods of addressing harm. At first glance it may seem like this law change merely tinkers with the edges of juvenile law by constricting adult court jurisdiction over a small class of children.[203] But by reducing sentences and keeping hundreds of people out of prison,[204] it may free up money and energy for communities and movements to work toward effective alternatives to prison and policing. Of course, SB 1391 still allows children to be prosecuted in juvenile court, and without other legislative action, limiting transfer might mean little. However, there are other important signs that the wind is shifting in California.

Another bill passed in 2018 established the minimum age of jurisdiction for the juvenile court at twelve years old.[205] In 2017, "almost all children arrested under the age of 12 were kids of color."[206] The importance of this legislation cannot be overstressed: it means that *no criminal court or penal institution* has jurisdiction over any Californian under the age of twelve. This new rule sets "counsel and release" as the official policy for police encountering kids eleven and younger and represents a major change to the law from 2015, when 687 kids under twelve, including one five-year-old, were prosecuted in juvenile court.[207] Santa Clara County has

racialized term, like "serious delinquent" and "super predator." *See* Geoff K. Ward, The Black Child-Savers: Racial Democracy and Juvenile Justice 258 (2012).

202 *See* Maureen Washburn & Renee Menart, *Unmet Promises: Continued Violence & Neglect in California's Division of Juvenile Justice*, Ctr. on Juvenile and Criminal Justice 54 (Feb. 2019), http://www.cjcj.org/uploads/cjcj/documents/unmet_promises_continued_violence_and_neglect_in_california_division_of_juvenile_justice.pdf.

203 *See* Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives* 4–5 (2017) (unpublished manuscript), https://perma.cc/6A24-H87Y.

204 *See* Cal. Welf. & Inst. Code §§ 601, 602, 1731.7; Penal Code § 1769 (establishing the minimum age of juvenile court jurisdiction at twelve and the maximum at twenty-five).

205 SB 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

206 Taylor Walker, *LA County Supes Seek to Establish A Minimum Age for Juvenile Prosecution*, Witness LA (Nov. 1, 2018) https://witnessla.com/la-county-supes-seek-to-establish-a-minimum-age-for-juvenile-prosecution.

207 *Id.*

already set the minimum age for juvenile court jurisdiction a year higher, at thirteen, and Los Angeles County is considering a similar move — Senator Holly Mitchell has made it clear that she "wholeheartedly embrace[s] expanding the minimum age" for the entire state.[208]

Young people can now stay in the custody of the juvenile court — and therefore in rehabilitation-focused, less crowded, less violent juvenile prisons — until they turn twenty-five.[209] This accords with neurological research often cited by courts showing that people do not reach emotional and neurological maturity until their mid-twenties.[210] Keeping people in juvenile court will fix neither the juvenile nor the adult system. But any public defender will report that juvenile court rehabilitation, however flawed, is preferable to more dangerous and more punitive adult court punishment.[211] These reforms, taken with SB 1391, mean that older kids and young adults will serve shorter, more "rehabilitative" sentences in juvenile facilities, and many more children will not be subject to court jurisdiction at all — what could be the first steps towards a fundamental transformation.

Two other recent events speak to the possibility for structural change in California juvenile law: the abolition of fees in delinquency cases and increasingly successful calls to defund the police. UC Berkeley's Policy Advocacy Clinic, working with local partners around the state, advanced legislation that "repealed county authority to assess all fees [charges aimed at recouping court costs, not at compensating victims or punishing youth] in the juvenile legal system."[212] This project is a good example of abolitionist organizing because it deprives the legal system of funds and leaves money in the pockets of the marginalized people who are most likely to be

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208 *Id.*

209 Washburn & Menart, *supra* note 202 (discussing AB 1812).

210 *See* Brief for Mental Health Experts as Amicus Curiae, 16, 36–37, Miller v. Alabama, 567 U.S. 460 (2012).

211 *See* David P. Farrington, Rolf Loeber, *James C. Howell, Increasing the Minimum Age for Adult Court: Is it Desirable, and What Are the Effects?* 16 Criminology & Pub. Pol'y. 83 (2017) (reviewing the medical and psychological literature to find juvenile court treatment is preferable from a medical and psychological perspective as well as being more likely to reduce recidivism).

212 Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. Rev. 401, 410 (2020).

policed, punished, and thus charged fees.[213] More importantly, it involved a sustained campaign that incorporated local groups and impacted populations, especially youth of color and their families, with an eye toward the future.[214] In explicitly recognizing that "governments and courts may find other ways to tax the same communities," and naming their fee project as one step toward "replac[ing] the juvenile and criminal systems," organizers set their sights on an abolitionist horizon.[215]

The spring and summer of 2020 have marked a renaissance of civil unrest in California in the wake of police killings of Breonna Taylor, George Floyd, Ahmaud Arbery, and many others.[216] In California, the protests have resulted in local governments taking action to reduce policing — the Oakland Unified School Board voted on June 24, 2020 to disband the Oakland Unified School District Police Department.[217] The Black Organizing Project (BOP) made an impassioned case to the Board, noting that Black students make up less than 26 percent of the school district's population

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213 *See* Jessica Feierman et al., *Debtors Prison For Kids? The High Cost of Fines and Fees in the Juvenile System*, Juvenile L. Center 8–9 (2016), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf (discussing racial disparities in fine and fee assessment).

214 *See* Selbin, *supra* note 212 at 414 ("Race-conscious advocacy grounded in impacted communities is less likely to compromise on reforms that bake in such bias").

215 *Id*. at 418.

216 *See generally* Matthias Gafni, John King, & Mallory Moench, *Around the Bay Area, day 5 of protests demanding justice*, San Francisco Chronicle (Jun. 2, 2020), https://www.sfchronicle.com/bayarea/article/In-Bay-Area-a-fifth-straight-day-of-protests-15312298.php (covering the early days of protests in the Bay Area); Aida Chavez, *After Killing of 18-Year-Old Andres Guardado, LA Protestors Struggle Against the Limits of Police Reform*, The Intercept (Jun. 25, 2020, 3:03 PM), https://theintercept.com/2020/06/25/andres-guardado-los-angeles-police/ (discussing the radical potential of current anti-police mobilization in LA); Supriya Yelimeli, *Teenage Black Lives Matter protesters demand that Berkeley Hills residents 'wake up' and take action*, Berkeleyside (Jun. 24, 2020, 4:46 PM), https://www.berkeleyside.com/2020/06/24/teenage-black-lives-matter-protesters-demand-that-berkeley-hills-residents-wake-up-and-take-action (describing a recent action in Berkeley).

217 Brett Simpson, *District police eliminated from Oakland schools: Board votes to abolish agency*, San Francisco Chronicle (Jun. 25, 2020), https://www.sfchronicle.com/bayarea/article/District-police-eliminated-from-Oakland-schools-15364811.php. This success came after years of calls from the Black Organizing Project to defund the OUSDPD. *Id*.

and account for 73 percent of arrests in Oakland schools.[218] Similarly, in response to sustained public pressure, the San Francisco Unified School District ended its contract with local police.[219] The San Francisco School Board imposed restrictions on any on-campus interactions between police and students and promised to reallocate the money it will save to "school health and wellness programs."[220] Jessica Black, BOP's director, said: "Letting go of law enforcement that has oppressed our communities is historic."[221]

It is only organizing like this that will enable us to break the cycle of juvenile transfer. To avoid going back to the punitive transfer policy of the 1990s and 2000s, institutions need to make sure parents have the money to support their kids and provide communities the resources and the knowledge to help families without resorting to the juvenile system. However, these changes have taken place as the juvenile crime rate has been declining for decades[222] — a spike might lead to backlash and a more punitive turn, launching California back into a retributive iteration of the cycle. Real reform can happen only if there is a combination of limited transfer and sustained investment in developing alternatives that can keep kids out of courts altogether.

B. WHAT ONLY COMMUNITIES CAN DO: BUILDING ALTERNATIVES TO THE JUVENILE LEGAL SYSTEM TO RENDER TRANSFER OBSOLETE

Jurisdictional reforms alone will not bring the transformative change needed to break the cycle of juvenile transfer — that work will be done

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218 *Oakland school board abolishes its police force with unanimous vote*, SFGATE (Jun. 24, 2020, 9:56 PM) https://www.sfgate.com/news/bayarea/article/School-Board-Abolishes-Its-Police-Force-With-15364930.php.

219 Jill Tucker, *San Francisco schools sever ties with city police*, SAN FRANCISCO CHRONICLE (Jun. 24, 2020), https://www.sfchronicle.com/education/article/San-Francisco-schools-sever-ties-with-city-police-15363295.php.

220 Annika Hom, *San Francisco School Board votes to cut ties and funds from police*, MISSION LOCAL (Jun. 23, 2020), https://missionlocal.org/2020/06/san-francisco-unified-school-district-votes-to-cut-ties-and-funds-from-police.

221 *See* Simpson, *supra* note 217.

222 *See* Males, *supra* note 194; *see also* Washburn, *supra* note 192 (showing that despite decreasing crime rates, California's spending on the Department of Juvenile Justice has skyrocketed).

outside of the courtroom. Black-letter law, codes, and professional rules can only go so far toward what Michelle Alexander calls "critical political consciousness," a greater cultural shift that forces policy change. More effective and fair interventions in schools and communities could limit the use of juvenile proceedings — including transfer — because schools tend to punish the same young people that courts criminalize.[223] School should be a safe haven for young people, but it is often a site of violence.[224] Summarizing the experiences of female gang members, Meda Chesney-Lind and Randall Shelden write, "School is a road that leads to nowhere, and emancipation and independence are out of reach, given their limited family and community networks . . . avenues of opportunity for urban underclass girls are blocked."[225] Kids are the subject of a carceral state over which they have no control: queer kids, kids of color, and kids with disabilities more than others.[226] If the goal is breaking the cycle of juvenile justice, the process begins with restorative and transformative justice in schools and communities.

Restorative justice (RJ) can contribute to transformation by creating spaces for communities, outside the juvenile or criminal legal systems, to respond to harm caused by kids. RJ focuses on the harm, but also on the needs of the people harmed, their families, and the people who did harm

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223 *See*, *e.g.*, Michael Krezmien et al., *Marginalized Students*, *School Exclusion*, *and the School-to-Prison-Pipeline*, *in* Juvenile Justice Sourcebook 267, 269 (Wesley T. Church et al., eds., 2d ed. 2018) (showing that Black students, Hispanic students, and students with disabilities are suspended from school at disproportionate rates).

224 *See* Erica Meiners, For the Children? 109–10 (2016).

225 Meda Chesney-Lind & Randall Shelden, Girls, Delinquency and Juvenile Justice 64 (4th ed. 2014).

226 Shannon D. Snapp & Stephen T. Russell, *Discipline Disparities for LGBTQ Youth: Challenges that Perpetuate Disparities and Strategies to Overcome Them*, *in* Inequality in School Discipline 207–23 (Russell J. Skiba, Kavitha Mediratta, & M. Karenga Rausch, eds., 2016); Jennifer F. Chmielewski et al., *Intersectional Inquiries with LGBTQ and Gender Nonconforming Youth of Color: Participatory Research on Discipline Disparities at the Race/Sexuality/Gender Nexus*, *in* Inequality in School Discipline 171–88 (Russell J. Skiba, Kavitha Mediratta, M. & Karenga Rausch, eds., 2016); Jemimah L. Young, jamaal R. Young, & Bettie Ray Butler, *A Student Saved is NOT a Dollar Earned: A Meta-Analysis of School Disparities in Discipline Practice Toward Black Children*, 17 J. of Culture and Education 95 (2018); *see also* Alexander, *supra* note 111 at 199 ("Because black youth are viewed as criminals, they . . . are . . . 'pushed out' of schools through racially biased school discipline policies.").

themselves.[227] It seeks to fulfill the obligations of young people to their communities, and the obligations of communities to their young people, using inclusive, collaborative processes that also correct individual wrongs.[228] Contrary to the proposal that we "trust in government and experts,"[229] restorative justice urges communities to trust themselves. Even twenty years ago, the National Institute of Justice reported to Congress that restorative justice was the best tool to address the needs of young people and their communities, and RJ has only developed since.[230] One undisputed benefit is that RJ is cheap.[231] More numerous and more effective restorative justice programs affiliated with the juvenile court — or better yet independent of the court system entirely — can both help communities and convince judges that transferring cases to adult court is unnecessary.

However, some criticize programs that "rehabilitate" rather than shake the foundations of prisons and the carceral system. Some restorative justice programs fit that bill.[232] Juvenile courts around the country

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227 Restorative programming also generally produces lower recidivism rates than juvenile court. *See* Bouffard et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15 Youth Violence and Youth Justice 465, 495 (analyzing by race and controlling for prior criminal convictions). A 2006 study of an RJ program called direct victim-offender mediation (VOM) found that kids who participated in VOM were 34 percent less likely to recidivate than those formally charged in juvenile court. See William Bradshaw et al. *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A meta-analysis*, 24 Conflict Resolution 1 (2006); *see also* Bouffard, *supra*, at 467–68.

228 Howard Zehr, Changing Lenses 270 (3d ed. 2005); *see also* Mark Umbreit, *Multicultural Implications of Restorative Justice* 63 Fed. Probation 44 (1999); Meiners, supra note 224 at 108 (explaining the origins of RJ in Native American cultures).

229 *See* Zimring, Choosing the Future, *supra* note 95 at 231.

230 *See* Thomas Simon et al. *Changing Course: Preventing Gang Membership*. National Institute of Justice (2013).

231 J. C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice into Chicago's Juvenile System*, 104 J. Crim. L. & Criminology 635, 643 (2014).

232 *See* Dean Spade (Facebook.com, Apr. 7 2012) https://www.facebook.com/notes/dean-spade/seattle-youth-jail-rehabilitation-project-thoughts-on-thursdays-public-forum/405286129483770; *see also* Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's Masculinity as Prison*, The Circuit 4 (2012) (critiquing a program that provided funding and training to jail guards who interact with LGBTQ inmates); Critical Resistance, *What is the PIC? What is Abolition?* CriticalResistance.org, http://criticalresistance.org/about/

have adopted the so-called Missouri Model of intensive therapeutic and allegedly restorative interventions in juvenile prisons. The Missouri Model has inspired glowing reviews from staff, politicians, and even former juvenile inmates.[233] But Erica Meiners, an organizer with the abolitionist group Critical Resistance and a former California educator, argues that RJ, especially when conducted in juvenile prisons as in Missouri, can incorporate to an unacceptable degree the structures of the prisons it should dismantle.[234] "While the goal of RJ, for some, is to disentangle young people from relationships with prisons and policing, the location of RJ programs in schools already inherently wedded to the carceral state poses significant challenges."[235] These are challenges that ongoing efforts to build out RJ will have to contend with, but it still has "the potential to negotiate some forms of conflict in schools and communities, and to reduce the roles that the police and courts play in the lives of young people."[236]

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not-so-common-language/ ("Abolition isn't just about getting rid of buildings full of cages. It's also about undoing the society we live in because the [prison industrial complex] both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people"); *see also* Kathy Evans, *Restorative Justice in Education — Possibilities, but also Concerns*, Zehr Institute for Restorative Justice (Jun. 26, 2014), https://zehr-institute.org/resources/restorative-justice-in-education-possibilities-but-also-concerns.html (warning against restorative programs that are actually punitive or have otherwise "been completely co-opted").

233 *See* Bernstein, *supra* note 12 at 284–89.

234 Meiners, *supra* note 224 at 113–14.

235 *Id*. at 114; *see also* Samuel Y. Song & Susan M. Swearer, *The Cart Before the Horse: The Challenge and Promise of Restorative Justice Consultation in Schools*, 26 J. of Educational and Psychological Consultation 313, 322–24 (outlining the extensive training teachers and school staff will need to support effective RJ in schools); Paul J. Hirschfield, *The Role of Schools in Sustaining Juvenile Justice System Inequality*, 28 The Future of Children 11, 13–15 (2018) (describing disproportionately negative outcomes for Black students in school RJ programs); Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 26 J. of Educational and Psychological Consultation 325, 350–52 (covering many of the same challenges to productive use of RJ in schools but outlining how to use the practice of RJ to transform relationships and systems that support the school to prison pipeline).

236 Meiners, *supra* note 224; *see also* Jeanie Austin, *Restorative Justice as a Tool to Address the Role of Policing and Incarceration in the Lives of Youth in the United States*,

Meiners instead advocates for what she calls transformative justice (TJ). Some organizations conceive of TJ as distinct from RJ because rather than restoring some former status quo, it attempts instead to change the conditions that allow harm to occur.[237] For example, California teacher and transformative justice practitioner Mimi Kim suggests using general terms like "person who caused harm" (rather than perpetrator, offender, batterer, or thief), or first names to "allow the possibility of change, without assuming it is inevitable."[238] Kim founded and led an organization called Creative Interventions (CI), which exemplifies the promise and difficulty of transformative justice, important tenets of which are anti-institutionalism and impermanence.[239] CI produced a toolkit based on Kim and others' years practicing TJ and then closed up shop.[240] Similarly, Meiners notes that many TJ initiatives are suspicious of being catalogued or transposed into new places and recognize the difficulty of reproducing the personal, local spaces required for success.[241] That makes it hard to develop a clear roadmap for TJ (although CI's Toolkit is an excellent start).

However, organizations — especially youth- and people-of-color-led abolitionist organizations[242] — are increasingly organizing for transformative justice, whether they so name it or not.[243] Youth Organize (YO!)

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1 J. Librarianship and Info. Sci. 15 (2018) (discussing the implementation of restorative justice in a completely different context: San Francisco public libraries).

237 *See* Meiners, *supra* note 224 at 121; Esteban Lance Kelly, *Philly Stands Up: Inside the Politics and Poetics of Transformative Justice and Community*, 37 Social Justice 44 (2012) (discussing transformative justice as practiced by a Philadelphia abolitionist organization).

238 Mimi Kim, *Moving beyond critique: Creative Interventions and reconstructions of community accountability*, 37 Social Justice 14 (2012).

239 Creative Interventions, http://www.creative-interventions.org.

240 *See Creative Interventions Toolkit: A Practical Guide to Stop Interpersonal Violence*, Creative Interventions 3 (2012), https://www.creative-interventions.org/tools/toolkit.

241 Meiners, *supra* note 224 at 123–24.

242 *See* Eric Braxton, *Youth leadership for social justice: Past and present*, in Contemporary Youth Activism: Advancing Social Justice in the United States 25 (2016) (arguing that youth social justice organizing tends to center young people of color).

243 *See About Us*, YouthBuild, https://www.youthbuildcharter.org/about-us/ (describing the youth-led projects YouthBuild supports, including explicitly abolitionist campaigns around Los Angeles County jails — YouthBuild works with kids who

California calls for justice with "no prisons, criminalization, deportation, mass incarceration, state-sanctioned violence, or racial profiling in communities of color. Instead, young people and community members are embraced by a true community of healing and transformation."[244] YO! has been involved in recent successful campaigns to overhaul school discipline and defund police departments.[245] With the political energy of the moment,[246] expertise developed over years of restorative and transformative justice practice,[247] and money that cities and counties have pledged to redirect from police contracts,[248] TJ can become a cornerstone of a larger transformative project.

Bernard and Kurlycheck argue that restorative justice programs will not break the cycle of juvenile justice because they cannot change systemic causes of violence and wrongdoing.[249] But more transformative programs, like those outlined in Mimi Kim's Creative Interventions toolkit, seem tailor-made to respond to such a criticism.[250] Rather than inserting restorative programs into institutions like schools and jails, restorative practice can be a part of larger social and political

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have been expelled or otherwise removed from public schools and explicitly recognizes the negative impact of neoliberal charter school programs on public education in Los Angeles).

244 *Young People's Agenda*, *supra* note 16.

245 *See Welcoming & Safe Schools for All*, Advancement Project, https://www.advancementprojectca.org/what-we-do/educational-equity/k-12-education-policy/welcoming-safe-schools-for-all (describing the successful 2017 YO! California campaign for abolitionist school safety programs); *see also Fresno Announces Commission on Police Reform*, KMJNow (Jun. 19, 2020), https://www.kmjnow.com/2020/06/19/video-fresno-announces-commission-on-police-reform/ (listing Yo! members as participants in a commission that will make recommendations about the future of Fresno's police department).

246 *See*, *e.g.*, *Angela Davis on Abolition*, *Calls to Defund Police*, *Toppled Racist Statues & Voting in 2020 Election*, Democracy Now! (Jun. 12, 2020) https://www.democracynow.org/2020/6/12/angela_davis_on_abolition_calls_to (reflecting on the unique energy of the moment and the challenge of turning that energy into sustained momentum for change).

247 *See*, *e.g.*, *Creative Interventions Toolkit*, *supra* note 240.

248 *See* Simpson, *supra* note 217 (discussing the redirection of $2.5 million from Oakland's school police department to student services).

249 Bernard & Kurlycheck, *supra* note 12, at 200.

250 *See Creative Interventions Toolkit*, *supra* note 240.

transformation. RJ — perhaps TJ, too — has already decreased referrals to juvenile court.[251] Many teachers, schools, communities, and organizers, especially those run by and for Black people and people of color, have been working on this transformation for years.[252] And now California's families, schools, and communities seem to be ready.[253] School districts are pledging to stop calling the police to campus, cities are

[251] *See*, *e.g.*, Fania Davis, *Discipline with Dignity: Oakland Classrooms Try Healing Instead of Punishment*, 23 RECLAIMING CHILDREN AND YOUTH 38 (2014); David Washburn & Daniel J. Willis, *The Rise of Restorative Justice Programs in Schools Brings Promise, Controversy*, EDSOURCE (May 13, 2018), https://edsource.org/2018/the-rise-of-restorative-justice-in-california-schools-brings-promise-controversy/597393.

[252] *See*, *e.g.*, kihana miraya ross, Black girls speak: struggling, reimagining, and becoming in schools, 45–47, 83–83 (2016) (unpublished Ph.D. dissertation, on file with the University of California, Berkeley) (describing the risk, power, and opportunity of a pilot program of all-Black-women high school classrooms in the Bay Area); Chrissy Anderson-Zavala et al., *Fierce Urgency of Now: Building Movements to End the Prison Industrial Complex in Our Schools*, 19 MULTICULTURAL PERSPECTIVES 151 (2017) (drawing on a forum in Oakland: "Without Walls: Abolition & Rethinking Education" to discuss strategies to dismantle the "school-prison nexus"); Roam Romagnoli, Decarcerating California: A Critical Trans-politics Approach to Expanding Incarcerated Students' Access to Upper-Division Coursework (2018) (unpublished Ph.D. dissertation, on file with San Francisco State University) (asking a series of questions to judge the value of partnerships between schools and prisons: "is this tactic/reform/approach recuperating systems and institutions we want to dismantle? . . . Does it leave out an especially marginalized part of the affected group (e.g., people with records, people without immigration status)? Does it legitimate or expand a system we are trying to dismantle?").

[253] For example, the Black Organizing Project had called for dismantling the Oakland Unified School District Police Department for ten years before the school board suddenly, unanimously, agreed in June 2020. Sarah Ruiz-Grossman, *Oakland School Board Votes to Eliminate its Police Department*, HUFFINGTON POST (Jun. 24, 2020, 11:02 PM), https://www.huffpost.com/entry/oakland-schools-vote-eliminate-police_n_5ef3e6c0c5b643f5b22ee844?guccounter=1&guce_referrer=aHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAABY2FHrP1K3IsPL8e3ChMZgBRf5OzjgWfWq-1SCaUii49hBYXAHK2UJ53w0SJFwRQNEugxWTH9AOTtC0JbwgwZa_4jQMQJV-Pd3RORMum9FsZr1pF7mcFAANrNUbMWBG7mTYv6TS_ZyJU12XUPwFHq53tpH_XNO8F7IcRPtBjFpm. The superintendent of Oakland Unified School District said, "As an educator, I know that students and staff must be safe physically and emotionally. In reflecting over the past few weeks, it has become clear to me that we must answer this call and this moment in a way that fundamentally transforms how we operate." Chris Walker, *Oakland School Board Unanimously Votes to Disband its Own Police Force*, TRUTHOUT (Jun. 25, 2020), https://truthout.org/articles/oakland-school-board-unanimously-votes-to-disband-its-own-police-force.

defunding police departments, and Californians seem to be looking for alternative ways of living without resorting to policing, prisons — or juvenile transfer.

CONCLUSION

Juvenile transfer presents interesting legal questions about jurisdictional lines, but dark realities about prosecution and incarceration of young people. Despite the reforms of the last twenty years, Frankie Guzman and his friend might have the same experience if they were charged today. The few-month difference in their birthdays would make Guzman ineligible for transfer to adult court under SB 1391, while prosecutors could still ask the court to transfer his friend. And prosecutors are attempting to reinvigorate the juvenile court's worst punishment — their constitutional challenges to SB 1391 are the backlash to lenient treatment and show the formidable opposition facing anti-police and anti-carceral movements in California.

State and national history inform transfer rules, but the people set them and decide whether we need transfer at all. Perhaps community-based programming can engender a "fundamental shift in public consciousness" and end the transfer of kids to adult court.[254] Perhaps, even as we restrict the jurisdiction of adult courts over the oldest children, we can also limit juvenile court jurisdiction over our youngest children, until more and more young people are treated, held responsible, and made whole outside of any legal system. To avoid a more punitive turn in the cycle of juvenile transfer, and perhaps to end the cycle altogether, California should continue to explore the horizons of transformative change.

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[254] Alexander, *supra* note 111 at 222.

STOP! TURN THE CAR AROUND RIGHT NOW FOR FEDERALISM'S SAKE!

The One National Program Rule and How Courts Can Stop Its Impact

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This paper was awarded third place in the California Supreme Court Historical Society's 2020 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

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I. INTRODUCTION

It is late July — the dead heat of summer — of 1943.[1] Allied forces have just bombed Rome; Benito Mussolini has been arrested; and Italy is under martial law.[2] Across the world, Los Angeles residents believe they are being attacked by Japanese forces.[3] They can see no farther than three blocks as a thick fog envelops the city, stinging their eyes and making their noses run.[4] They think it is chemical warfare. But the culprit is not a wartime enemy — it is the first incidence of smog in California.[5] A local factory is shut down as Angelenos try to discern the source, and the mayor confidently predicts "an entire elimination" of the issue within four months.[6] This prediction did not come to pass.[7]

In fact, it did not become clear until the next decade that the "hellish cloud" in the city was smog, created primarily by automobile exhaust.[8] In 1960, to combat the impact of the smog and some of the "worst air quality in the country," California established a Motor Vehicle Pollution Control

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[1] Jess McNally, *July 26, 1943: L.A. Gets First Big Smog*, WIRED (July 26, 2018, 12:00 AM), https://www.wired.com/2010/07/0726la-first-big-smog (The first smog occurred on July 26).

[2] PBS, *Timeline of World War II*, PBS (Sept. 2007), https://www.pbs.org/thewar/at_war_timeline_1943.htm.

[3] McNally, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Kat Eschner, *This 1943 "Hellish Cloud" was the Most Vivid Warning of LA's Smog Problems to Come*, SMITHSONIAN.COM (July 26, 2017), https://www.smithsonianmag.com/smart-news/1943-hellish-cloud-was-most-vivid-warning-las-smog-problems-come-180964119. In 1948, Arie Jan Haagen-Smit, a researcher at the California Institute of Technology, discovered the source of the chemicals in the smog, which "were created when hydrocarbons produced by oil refineries and automobiles interacted with compounds in the atmosphere." Nat'l Sci. & Tech. Medal Found., *Arie Jan Haagen-Smit*, NAT'L SCI. & TECH. MEDAL FOUND. (last accessed Dec. 10, 2019), https://www.nationalmedals.org/laureates/arie-jan-haagen-smit; This particular smog is called photochemical smog, though it is also known as "Los Angeles smog," which is most common in urban areas with a large number of automobiles. The Editors of Encyc. Britannica, *Smog*, ENCYC. BRITANNICA (last updated Mar. 19, 2019), https://www.britannica.com/science/smog. Unlike the Angelenos' original assumption, it "requires neither smoke nor fog." *Id.*

Board.[9] In 1966, California enacted the first tailpipe emissions standards in the country.[10] A year later in an amended version of the Clean Air Act (CAA), the federal government preempted all states — except for California — from adopting emissions control standards.[11] The government has consistently reaffirmed California's emissions control standards for over fifty years.[12] Until now.[13]

The Trump administration wants to revoke California's ability to innovate and set its own automobile tailpipe emissions standards for greenhouse gas emissions, as well as its zero emissions vehicle regulations.[14] The Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) jointly proposed the revocation of the 2013 CAA waiver as a part of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule.[15] After the comment period ended and California made it clear they did not plan to comply with future Trump administration automobile emissions standards, the administration issued a final rule on the waiver and preemption

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9 The Editors of Encyc. Britannica, *supra* note 8. Los Angeles smog results in many detrimental effects: "a light brownish coloration of the atmosphere, reduced visibility, plant damage, irritation of the eyes, and respiratory distress." *Id.* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. Rev. 1097, 1109 (2009).

10 Carlson, *supra* note 9, at 1109.

11 *Id.*

12 California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013) [hereinafter 2013 CAA Waiver].

13 David Shepardson, *Trump Administration Bars California from Requiring Cleaner Cars*, Reuters (Sept. 19, 2019, 6:10 AM), https://www.reuters.com/article/us-autos-emissions-trump/trump-administration-bars-california-from-requiring-cleaner-cars-idUSKBN1W4157. There was one denial, but the waiver was eventually granted. See discussion *infra* at text associated with nn. 111–13.

14 The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020) [hereinafter SAFE Vehicles Rule]. Shepardson, *supra* note 13.

15 SAFE Vehicles Rule, 83 Fed. Reg. 42,986, 42,986 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86) [hereinafter "Proposed SAFE Rule"].

issues, called the One National Program Rule.[16] One National Program withdraws California's 2013 CAA waiver and explicitly preempts the state's greenhouse gas emissions control program.[17] NHTSA also rolled back the Corporate Average Fuel Economy (CAFE) standards, which would put California's desired standards at odds with the new CAFE standards, the impetus for One National Program.[18]

The Trump administration's actions contravene the most basic principles of federalism: innovation, competition, state sovereignty, and fostering creative partnerships. Notions of federalism, the question of the proper division of authority between local and national governments, existed in the United States long before the Founding.[19] From the early seventeenth century and naissance of states, to a modern era of fifty states totaling 330 million people, the American tradition of federalism remains alive and well.[20] Spurning this long history, One National Program will impact the innovative and dynamic version of federalism that exists today — possibly impacting it indefinitely.[21] California's CAA waiver is an example of iterative federalism, which results in "regulations [that] are the results of repeated, sustained, and dynamic lawmaking efforts involving both levels of government."[22] California's existing standards, which focus on controlling greenhouse gas emissions, are a part of one of the most significant climate-related iterative federalism schemes in existence.[23]

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16 The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533) [hereinafter One National Program].

17 *Id.*

18 SAFE Vehicles Rule, 85 Fed. Reg. at 24,174. *See generally* One National Program, 84 Fed. Reg. at 51,310. U.S. Envtl. Prot. Agency, *Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards*, U.S. Envtl. Prot. Agency (Sept. 19, 2019), https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel.

19 James E. Hickey, Jr., *Localism, History, and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, 9 Ius Gentium 5, 6, 8 (2003).

20 *Id.* U.S. Census Bureau, *U.S. and World Population Clock*, U.S. Census Bureau (last accessed May 11, 2020), https://www.census.gov/popclock.

21 SAFE Vehicles Rule, 85 Fed. Reg. at 24,174.

22 Carlson, *supra* note 9, at 1099–1100.

23 *Id.*

This paper is a comment on the negative impacts the One National Program Rule and the SAFE Vehicles Rule will have on federalism. Part II examines the deeply embedded aspects of federalism in the origin of California's CAA waiver scheme. Part III discusses how the rules will harm federalism, with a focus on the new wave of liberal federalism. Part IV discusses the reasoning behind the rules. Part V proposes a framework that emphasizes the central role federalism should play in the analysis of an eventual court's decision on the rules. It concludes that the continued existence of California's waiver scheme is essential to the vitality of modern-day federalism.

II. THE ORIGIN OF CALIFORNIA'S WAIVER SCHEME & WHY IT IS ESSENTIAL TO FEDERALISM

Federalism is embedded in California's environmental protection scheme. California is the leader in air quality and emissions standards because of the troubles major urban areas like Los Angeles faced in the 1940s.[24] In 1947, California created the Los Angeles County Air Pollution Control District, the first in the nation.[25] But counties could not combat the problem of motor vehicle pollution at large, so in 1959, California created a Motor Vehicle Pollution Control Board to test vehicle emissions and certify any emission control devices.[26] California's approach prompted the adoption of the CAA of 1963, and the Motor Vehicle Air Pollution Control Act

[24] S. Coast Air Quality Mgmt. Dist., *The Southland's War on Smog: Fifty Years of Progress Toward Clean Air (Through May 1997)*, S. Coast Air Quality Mgmt. Dist. (last accessed Dec. 10. 2019), https://www.aqmd.gov/home/research/publications/50-years-of-progress.

[25] *Id*. The bill had fierce opposition from business interests, like oil companies and the chamber of commerce, which "opposed the repeal of a state law giving manufacturers the right to 'necessary' discharge of smoke and fumes, and the creation of an air pollution permit system." *Id*. However, after the creation of the first district, districts spread all over the state. *Id*.

[26] *Id*. Automobile makers at the time had to agree to make separate additions to car models made for California, like smog control systems (which are an emissions control device). *Smog-Control Unit Set for California in '66-Model Cars*, N.Y. Times (Aug. 13, 1964), https://www.nytimes.com/1964/08/13/archives/smogcontrol-unit-set-for-california-in66model-cars.html.

of 1965.[27] The federal Health, Education and Welfare Agency even issued emissions standards identical to California's standards for model year 1968 passenger cars.[28]

The CAA of 1967 included California's first waiver.[29] The act states: "No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this title," but also adds that "[t]he Secretary shall, after notice and opportunity for public hearing, waive application of this section to any state which has adopted standards . . . prior to March, 30, 1966."[30] The waiver exclusively impacted California, because of the state's pioneering emissions regulations.[31] The 1977 amendments to the CAA authorized other states to follow either the federal standard or their own standards if and only if they were identical to California's.[32] Congress granted this option with the "hope and expectation that California would pioneer air pollution control standards and technologies that could serve as models for the United States as a whole."[33] This is a classic example of incentivizing a state to serve as a laboratory of democracy, one of the main objectives of federalism.[34] Since 1967, under Democratic and Republican administrations, the EPA has almost summarily approved California's waiver requests.[35] These waivers enable

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27 Carlson, *supra* note 9, at 1110.

28 *Id*.

29 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013).

30 Clean Air Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 501, 501 (1967). This waiver does not apply if the state does not require higher standards than federal ones "to meet compelling and extraordinary conditions," or if the state's standards and enforcement of those standards are not consistent with Section 202(a) of the CAA. *Id.*

31 Cal. Air Res. Bd., *History*, Cal. Envtl. Prot. Agency (last accessed Dec. 10, 2019), https://ww2.arb.ca.gov/about/history.

32 2013 CAA Waiver, 78 Fed. Reg. at 2,113.

33 Richard M. Frank, The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management, *Hearing Before the Calif. S. Comm. on Environmental Quality* 4 (Feb. 22, 2017).

34 *See generally* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See *infra* text associated with note 60.

35 Frank, *supra* note 33, at 6 (Over 100 separate waiver determinations from the United States Environmental Protection Agency have been granted since 1967).

California's innovations in emissions control regulation.[36] Currently, the California Air Resources Board is responsible for the state's emissions regulation and innovation.[37]

This long and comprehensive history of emissions control and air quality regulation reveals the vitality and importance of this federalism model — in fact, the federal government continues to model many of its own emissions standards on California's.[38] A 1971 report on environmental quality recognized the importance of state and local governments, which are on the front lines of "essential planning, management, and enforcement."[39] It noted California as a harbinger for federal emissions laws, a laboratory for solutions, and a catalyst for federal action.[40]

As a part of one of the "most significant climate change initiatives to come from the state," California's iterative scheme has been the source of one of the "most innovative state responses to climate change."[41] Ann E. Carlson, the originator of the term "iterative federalism," posits that this innovation stems from the "repeated, sustained, and dynamic lawmaking

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[36] *Id*. These innovations include: a "[f]irst in the nation tailpipe emission standard for hydrocarbons, carbon monoxide, oxides of nitrogen and [] particulate matter emissions from diesel-fueled vehicles," catalytic converters, "check engine" light systems, the "nation's first greenhouse gas emission standards for passenger vehicles," and requiring manufacturers "to consider the combined effects of engines, transmissions, tire resistance, etc., on both conventional ('criteria') and greenhouse gas pollutant emissions." *Id*. at 6–7.

[37] Cal. Air Res. Bd., *supra* note 31. The California Air Resources Board consists of sixteen members, twelve of whom are appointed by the governor and confirmed by the State Senate. Cal. Air. Res. Bd., *About*, Cal. Air. Res. Bd. (last accessed Feb. 8, 2020), https://ww2.arb.ca.gov/about. The remaining four slots consist of two members who represent environmental justice communities, and two nonvoting members who conduct legislative oversight — these four are also selected by the California Senate and Assembly (two by each). *Id*. Altogether, the California Air Resources Board includes experts in the air quality field, leaders in local air districts, and concerned members of the public. *Id*. The staff of the California Air Resources Board includes a "professional staff of scientists, engineers, economists, lawyers and policy makers." *Id*.

[38] Frank, *supra* note 33, at 7.

[39] Council on Envtl. Quality, *Environmental Quality, the Second Annual Report of the Council on Environmental Quality* 37 (Aug. 1971), https://files.eric.ed.gov/fulltext/ED055922.pdf.

[40] *Id*. at 37–38.

[41] Carlson, *supra* note 9, at 1099–1100.

efforts involving both levels of government."[42] The CAA waiver enables California to act more freely to limit greenhouse gas emissions.[43] The ability of the states and the federal government to push back and forth over different iterations of automobile emission standards has strengthened laws and the lawmaking process in ways that the federal government alone could not achieve.[44]

Critics of this form of federalism, which uses iterations to strengthen environmental law, suggest that limiting California's waiver is not a federalism issue at all. Instead, they suggest that the waiver process is a coercive power grab by California.[45] This argument ignores the obvious. California is not the only state that follows its standards. The 1977 amendments to the CAA allow any state to adopt vehicle emissions standards that are identical to California's, as long as a waiver has been granted for the model year, and the standards are adopted two years ahead of time.[46] States *have* chosen to take this option, forgoing the federal standard in favor of California's. Almost 120 million people reside in states that follow California's vehicle emissions standards.[47] The combined population of all other states

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[42] *Id.* at 1099. Carlson describes this dynamic as one in which the federal government has "quasi-deputized" California to act, while also continuing to promulgate federal regulations. *Id.* at 1100. Then the back and forth begins, in which "one level of government — either the singled-out state actor or the national government — moves to regulate a particular environmental policy area. The initial policymaking then triggers a series of iterations adopted in turn by the higher or lower level of government. The process then extends back to the policy originator, and so forth." *Id.*

[43] *Id.*

[44] Carlson, *supra* note 9, at 1108–9 (Even California, the leader in these vehicle emissions regulations, has dragged its feet at times — and the federal law was what pushed the state to do more).

[45] Kenny Stein, *Limiting California's Waiver Authority is Not a Federalism Issue,* Inst. for Energy Research (Mar. 27, 2018), https://www.instituteforenergyresearch.org/regulation/limiting-californias-waiver-authority-not-federalism-issue.

[46] Clean Air Act of 1977, Pub. L. No. 95-95, § 177, 91 Stat. 750, 750 (1977). "Waivers do not expire; they are sometimes superseded by a new waiver approving more stringent standard." Stanley Young, *California & the Waiver: The Facts*, Calif. Air Resources Bd. (Sept. 17, 2019), https://ww2.arb.ca.gov/resources/fact-sheets/california-waiver-facts.

[47] U.S. Census Bureau, *State Population Totals and Components of Change: 2010–2019,* U.S. Census Bureau (last updated Dec. 30, 2019), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html. Maryland Dep't of the Env't, *States Adopting California's Clean Cars Standards*, Md. Dep't of the Env't (Last visited May 11, 2020), https://mde.maryland.gov/programs/air/mobilesources/pages/states.aspx (The

is around 209 million.[48] Therefore, the population of the states following California's standards is over one-third of the United States population. Moreover, California still impacts states beyond those following its standards. Any car dealerships in states bordering those following California's standards can sell cars compliant with the adopted standards.[49]

These states are the subject of "spillovers," which some scholars take issue with, because it means citizens of one state are living under another state's laws.[50] But, spillovers are where federalism blossoms — spillovers "give [people] the chance to see how other people live, to live under someone else's law, [and] try someone else's policy on for size."[51] Spillovers push issues into the national sphere, forcing governments to act.[52] This is exactly what California's emissions regulations do. Because states adopt California's regulations, and car dealers within these states sell cars compliant with California's regulations to noncompliant states, the framework goes far beyond just California.[53]

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entire group of jurisdictions following California's standards is as follows: California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia).

48 U.S. Census Bureau, *supra* note 47.

49 Robinson Meyer, *The Coming Clean-Air War Between Trump and California*, The Atlantic (Mar. 6, 2017), https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver-climate-change/518649/ (They *can* do so, but it is not a must — it is an optional economic choice for the businesses to make). Currently 12 states border the states following California's standards, bringing the total number of states (and D.C.) that may be affected by California's emissions regulations to 27. Maryland Dep't of the Env't, *supra* note 47.

50 Heather K. Gerken & James T. Dawson, *Living Under Someone Else's Law*, 36 Democracy, A J. of Ideas (2015), https://democracyjournal.org/magazine/36/living-under-someone-elses-law.

51 *Id*. Gerken and Dawson state that "[a] well-functioning democracy doesn't require rigid uniformity; it requires us to deliberate about which departures from national policy are consistent with our norms and which are outside the bounds." *Id*.

52 *Id*.

53 Meyer, *supra* note 49. Because CAFE standards regulate new cars and trucks, car dealers are only affected if they are required to follow California's rules as per their state's adoption of them, and if they sell new cars. Benjamin Leard, *The Effect of Fuel Economy Standards on New Vehicle Sales*, Resources Mag. (Feb. 11, 2019), https://www.resources-mag.org/common-resources/effect-fuel-economy-standards-new-vehicle-sales. The concerns about the negative economic impact of more expensive fuel/emission efficient

California's scheme is essential to federalism. It is vital that states have control over how they choose to implement federal standards as well as the ability to exceed those standards should they choose to, especially in the environmental sphere. For example, the Obama administration gave states a great deal of leeway in their Clean Power Plan to determine climate policies.[54] This kind of allocation of authority is essential, because "[c]limate change is an area where a deep state of gridlock has settled in at the national level, and new ideas for political coalitions and alignments are desperately needed."[55] With this marketplace of ideas stripped away, innovations through iterative federalism's push and pull will be lost, and a productive area of federalism will be walled off forever by the federal government. Losing California's CAA waiver scheme doesn't just affect California — it has created an iterative scheme that flows through the federal government, and the governments of other states.

III. HOW THESE RULES WILL HARM FEDERALISM

Federalism is older than the Founding.[56] It stems from long-held preferences for local authority and a strong distrust of concentrated federal power.[57] This division of power between the federal government and state governments is most noticeable in the Tenth Amendment to the Constitution, which gives the states any powers not expressly delegated to the government.[58] Because any power not reserved by the federal government

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cars on spillovers states, as well as the states that have adopted California's standards, does not come to bear. *Id.* A study of new vehicle buyers found that 92 percent of those buyers would opt for a different new vehicle, if their first choice was unobtainable (perhaps due to price concerns). *Id.* So higher CAFE standards would only have a "modest effect" on the sale of new vehicles. *Id.*

54 Denise A. Grab & Michael A. Livermore, *Environmental Federalism in a Dark Time*, 79 Ohio St. L.J. 667, 672 (2018).

55 *Id.*

56 Hickey, *supra* note 19, at 8.

57 *Id.* at 8–9 (citation omitted). The distance between England and the colonies made it necessary for people in colonial America to make their own decisions and laws, establishing a pattern of local rule in town and county governments. *Id.* at 9.

58 *Id.* at 16.

goes to the state, states have a lot of power to regulate different areas of the lives of their people.[59]

One of the longest lasting statements on federalism comes from a 1932 Supreme Court case in which Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[60] California and its CAA waiver experiment is a laboratory of democracy, as the continued existence of the waiver is vital to the health of federalism in the twenty-first century. Federalism has gone through many iterations. This note will now examine the intersection between new blue federalism and iterative federalism, as well as the path forward from imagining states as the laboratories to a new era of modern federalism.[61] Analysis will demonstrate the importance of California's continued ability to have a waiver, and how this ability is a federalism issue through and through.

A. NEW BLUE FEDERALISM

Federal and state governments have clashed since the founding.[62] In *McCulloch v. Maryland*, Justice John Marshall wrote, "[T]he question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist."[63] Federalism has not always been tied to liberal ideas like the expansion of environmental protections led by state governments rather than the federal

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59 U.S. Const. amend. X. *See also id.* at amend. XI.

60 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). However, some scholars criticize the laboratory view of federalism as a relic of the last century, specifically the pre–New Deal conceptualization of it, saying that it is a threat to federalism itself. *See* Heather K. Gerken, *Federalism 3.0*, 105 Calif. L. Rev. 1695, 1696–97 (2017), and Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 Harv. L. & Pol'y Rev. 33, 35–36 (2009). Federalism must be "reconceptualized" to "maintain its progressive potential. Schapiro, *supra* note 60, at 35. "Society and social ills have become more complex. Further, the civil rights era demonstrated the dangerous potential of unchecked local power, and this threat must not be ignored." *Id.*

61 Schapiro, *supra* note 60, at 34–35. ("Blue state" federalism is federalism that pushes for distinctly liberal policies, including in the areas of student loans, climate change, and same-sex marriage).

62 Hickey Jr., *supra* note 19, at 6–7.

63 McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

government.[64] Now, in a time when the federal government is "unable or unwilling" to take on climate change, liberal or "blue" states have stepped in to fill the gaps.[65]

This brand of federalism is often called "blue state" or "new" federalism.[66] In fact, federalism comes in many forms, and it's used to meet many different ends.[67] The concept of new blue federalism echoes Progressive Era reforms, before federalism became synonymous with conservative "states' rights" goals.[68] One scholar argues that in this new progressive era of federalism, the idea itself must be reconceptualized, keeping in mind past abuses carried out under the banner of federalism.[69] As a solution to the threat of unchecked local power, he argues for a creative partnership between states and the federal government.[70] While states can press forward with issues the federal government is not yet acting on, the federal government's help is still important to combating the challenges the nation faces.[71] This ensures that states are still able to problem-solve, without sealing themselves off completely from the federal government.[72]

B. NEW BLUE FEDERALISM AND ITERATIVE FEDERALISM INTERTWINED

The way new blue federalism and iterative federalism intertwine shows how different conceptualizations of federalism build off one another. The

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64 Schapiro, *supra* note 60, at 33. The "states' rights" movements of the last century are often tied to opposition to civil rights, a point of view that progressives are unlikely to want associate with their own principles. *Id.*

65 *Id.*

66 *Id.* at 34. Gerken, *supra* note 60, at 1696.

67 Gerken, *supra* note 60, at 1696. Paul D. Moreno, *"So Long as Our System Shall Exist": Myth, History, and the New Federalism*, 14 Wm. & Mary Bill Rts. J. 711, 715 (2005). California's fight with the Trump administration is only the most recent battle for a liberal end, and it shows why the need for support behind new blue federalism is more pronounced than ever. *See* Schapiro, *supra* note 60, at 34–35 (discussing other liberal-leaning federalism battles).

68 Schapiro, *supra* note 60, at 34.

69 *Id.* at 35. ("The civil rights era demonstrated the dangerous potential of unchecked local power, and this threat must not be ignored.")

70 *Id.*

71 *Id.*

72 *Id.*

mix of new blue federalism and iterative federalism is especially prevalent in the environmental realm. The federal government under the Trump administration has rolled back many Obama-era policies related to combating climate change.[73] While this is the complete opposite of the inaction that once spurred states onward to fill the climate change policy void, the existence and idea of iterative federalism's helpful push and pull still stands. It ties into the idea of new blue federalism in the way that new blue federalism pushes the federal government further.[74] Critics of new blue federalism and its iterations say limiting California's waiver is not a federalism issue.[75] One critic stated, "The California legislature and its Air Resources Board set these national standards without the opportunity for the governments and populations of other states to weigh in."[76] He believes Congress and the Trump administration should be the ones deciding national issues to create a coherency among the states.[77] The blame is aimed at the Obama administration's past decisions to increase the federal standards, and California is accused of engaging in coercive, rather than cooperative, federalism.[78]

Federalism is not always cooperative.[79] Taking power from the federal government to regulate differently than it does is an inherently

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[73] See Cinnamon P. Carlarne, *Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 Am. U. L. Rev. 387 (2019) for a discussion of the state of climate change law in the Trump era. Michael Greshko, Laura Parker, Brian Clark Howard, Daniel Stone, Alejandra Borunda, & Sarah Gibbens, *A Running List of How President Trump is Changing Environmental Policy*, Nat'l Geographic (May 3, 2019), https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment.

[74] Carlson, *supra* note 9, at 1097–99.

[75] Stein, *supra* note 45. The Obama administration matched California's standards, and then went further to raise CAFE standards, which this critic says hurt the automotive industry. *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id. But see* Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799, 817 (2008) (discussing how the CAA was also the first modern environmental statute that used a "cooperative federalism framework" (referring to the waiver scheme and emissions control standards)).

[79] *See* Ilya Somin, *No More Fair-Weather Federalism*, Nat'l Rev. (Aug. 18, 2017, 8:00 AM), https://www.nationalreview.com/2017/08/limit-federal-power-left-right-can-agree/ (discussing federalism that takes more power away from the national government).

coercive act, as it pushes the federal government to concede the power or follow along. In iterative federalism, that push and pull forces a dialogue between states and the federal government and makes federalism stronger — not weaker. California has this power because it acted first in the 1940s, and, when the federal government acted, they limited their own power to recognize California's already-existing state powers[80] — a delegation of power given willingly and expanded to allow other states to follow.[81] Federalism does not cease to exist because the Trump administration does not agree with the direction it is going, and what happens to California may reshape federalism's direction entirely.[82] The intertwining of iterative federalism and new blue federalism has only made the country stronger.

C. FEDERALISM IN THE MODERN AGE, AND CALIFORNIA'S ROLE IN IT

One reconceptualization of federalism is what Heather Gerken calls "Federalism 3.0."[83] Gerken's reconceptualization is based on the idea that the legacies of two different federalism debates frame federalism in an outdated way.[84] In one camp are what she calls the "nationalists," who pride themselves on "solicitude for . . . dissenters," and put the most emphasis on the power the states have as agents of the government.[85] The other camp is full of federalism "stalwarts," who believe strongly that states matter the most,

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[80] 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013).

[81] *Id.*

[82] This point of view might also stem from the fact that, to an extent, modern federalism has also moved into what scholars call "executive federalism," away from cooperative federalism, because of polarization and the rise of the executive branch and the administrative state. Michael S. Greve, *Bloc Party Federalism*, 42 Harv. J.L. & Pub. Pol'y 279, 280 (2019).

[83] Gerken, *supra* note 60, at 1718.

[84] *Id.* at 1696, 1718 (The two frames come from "the mistaken assumptions of the New Deal (that state and national power should be conceived of in sovereignty-like terms) and the civil rights movement (that decentralization is properly cast in opposition to the interests of dissenters and racial minorities).")

[85] *Id.* at 1696–97. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L.J., 1889, 1893 (2014). Solicitude for minorities and dissenters has echoes of new blue federalism contained within.

but rely on what Gerken calls an "archaic conception of state power."[86] Gerken moves beyond those characterizations. In this era of Federalism 3.0, there are no longer laboratories of democracy, but a system of iterative federalism, with "helpful redundancy" and "healthy competition," coming from states and the federal government working together.[87] By encouraging the devolution of power to the states, which are already embedded in the federal regime, the federal government benefits.[88]

In Federalism 3.0, the government still has plenty of power to tame the states, but states can push back and shape federal law — both cooperatively and uncooperatively.[89] The decades of iterative federalism in California fit right in line with Gerken's view of the future of federalism. This federalism is not the idealized laboratory, completely cut off from the federal government, but the sometimes-cooperative and sometimes-uncooperative partner of a federal government strengthened by its partnership with the states. California's CAA waiver scheme is a prime example of a blue state scheme that has grown and been strengthened by the integration of federal and state goals, culminating in the allowance given to other states to follow its plan.[90] To say California is practicing a harmful version of federalism is to misunderstand the workings of modern federalism itself[91] — a modern federalism that continues to build on different versions of the concept, continuing the ever-lasting and ever-changing ideal of federalism this country was founded on.

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[86] Gerken, *supra* note 60, at 1697. New blue federalism can also lie within this concept.

[87] *Id.* at 1720.

[88] *Id.* at 1720–21. A devolution promoted by both liberals and conservatives. *See generally* Somin, *supra* note 79.

[89] *Id.* at 1721.

[90] *Id.* at 1720.

[91] *See* Stein, *supra* note 45. And the principles of federalism themselves weigh against what the Trump administration is trying to do to California. Denise A. Grab, Jayni Hein, Jack Lienke, & Richard L. Revesz, *No Turning Back: An Analysis of EPA's Authority to Withdraw California's Preemption Waiver Under Section 209 of the Clean Air Act*, N.Y.U. Inst. for Pol'y Integrity 11–12 (Oct. 2018), https://policyintegrity.org/files/publications/No_Turning_Back.pdf (discussing the finding of revocation authority related to the waiver).

IV. A CLOSER LOOK AT THE ONE NATIONAL PROGRAM RULE & THE *SAFE* VEHICLES RULE

While federalism does require a healthy push and pull between states and the federal government, these rules are not a healthy push and pull — they are an inartful power grab by the executive branch. These rules break the mold of iterative federalism and cut off innovation completely. An examination of the One National Program Rule is necessary to determine why the Trump administration decided to release this rule before completing the rest of SAFE. And understanding why the administration revoked the CAA waiver helps us understand the administration's federalism motivations.

A. ONE NATIONAL PROGRAM

The One National Program Rule was issued in September of 2019, as a step toward finalizing the SAFE Vehicles Rule.[92] One National Program "enabl[es] the federal government to provide nationwide uniform fuel economy and greenhouse gas emission standards for automobiles and light duty trucks."[93] In a press release, the EPA called on California to continue to enforce its programs but stated that the enforcement must be in line with the new federal mandate, due to the revocation of the 2013 CAA emissions waiver.[94]

When the SAFE Vehicles Rule was first proposed, having one national standard for fuel economy and tailpipe CO_2 emission created an efficient regulatory framework for the entire nation.[95] One National

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92 U.S. Envtl. Prot. Agency, *supra* note 18.

93 *Id.* The EPA called One National Program (and the SAFE Vehicles Rule as a whole) one of President Trump's top priorities. *Id.*

94 *Id.* Secretary of Transportation Elaine L. Chao echoed critics of California's waiver program, stating that One National Program will ensure "that no State has the authority to opt out of the Nation's rules, and no State has the right to impose its policies on the rest of the country." *Id.*

95 Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,999 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86). Of course, fuel economy standards were within an efficient regulatory framework before, when the Obama administration harmonized its standards with California's and decided to push further. *See infra* note 102. The Trump administration just believes those targets are too high. *See generally* Proposed SAFE Rule, 83 Fed. Reg. at 42,986. Fuel economy is defined

Program was released before the rest of the rule, in part, because of actions California took after the publication of the SAFE Vehicles Rule.[96] The EPA and NHTSA took issue with two specific actions in the rule.[97] First, California amended its compliance provision for manufacturers, stating that their greenhouse gas standards would only be satisfied by complying with Obama administration–era EPA standards.[98] Second, California announced a "voluntary framework" with four automakers "to allow those automakers to meet reduced standards on a national basis if they promised not to challenge California's authority to establish greenhouse gas standards or the zero emissions vehicle mandate."[99]

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as "use of less fuel." Merriam-Webster, *Fuel Economy*, Merriam-Webster (last accessed Dec. 11, 2019), https://www.merriam-webster.com/dictionary/fuel%20economy. The most useful fuel economy metric, the Combined Miles Per Gallon (MPG) value is the "weighted average of City and Highway MPG values that [are] calculated by weighting the City value by 55% and the Highway value by 45%." U.S. Dep't of Energy & Envtl. Prot. Agency, *Gasoline Vehicles: Learn More About the Label*, U.S. Dep't of Energy & Envtl. Prot. Agency (last accessed Dec. 11, 2019), https://www.fueleconomy.gov/feg/label/learn-more-gasoline-label.shtml. Non-gasoline vehicles are weighted slightly differently, but the fuel economy factor is a measure used on all vehicles. *Id.* Tailpipe emissions come from "fuel combustion in a vehicle's engine." U.S. Dep't of Energy, *Ethanol Vehicle Emissions*, U.S. Dep't of Energy (last accessed Dec. 11, 2019), https://afdc.energy.gov/vehicles/flexible_fuel_emissions.html. CO_2 is the most prevalent greenhouse gas in tailpipe emissions, constituting 99 percent of the tailpipe emission. Envtl. Prot. Agency, *Greenhouse Gas Rating*, Envtl. Prot. Agency (last updated Apr. 1, 2019), https://www.epa.gov/greenvehicles/greenhouse-gas-rating.

96 One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

97 *Id.*

98 *Id.* The Obama administration's fuel standards were projected to cut greenhouse gas emissions in half by 2025. Press Release, White House, Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards, (Aug. 28, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard. These standards raised fuel economy to 54.5 MPG for cars and light-duty trucks. *Id.* The last fuel economy increase prior to the 2012 increase was to 35 MPG in 2007, which was the first increase since the origin of these standards in the 1970s. Union of Concerned Scientists, *A Brief History of US Fuel Efficiency Standards*, Union of Concerned Scientists (last updated Dec. 6, 2017), https://www.ucsusa.org/resources/brief-history-us-fuel-efficiency.

99 *Id.* Four big automakers, Ford, Honda, Volkswagen, and BMW of North America struck a deal with The California Air Resources Board after secret negotiations in which they agreed to produce a more fuel-efficient fleet to obtain regulatory

Widespread deregulation is another big goal of the administration, so the One National Program Rule fits right in.[100]

The impetus for One National Program, in part, comes from the belief that the Energy Policy and Conservation Act (EPCA) preempts California's greenhouse gas emissions regulations.[101] The EPCA "broadly preempts"

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certainty. Juliet Eilperin & Brady Dennis, *Major Automakers Strike Climate Deal with California, Rebuffing Trump on Proposed Mileage Freeze*, Wash. Post (July 25, 2019), https://www.washingtonpost.com/climate-environment/2019/07/25/major-automakers-strike-climate-deal-with-california-rebuffing-trump-proposed-mileage-freeze/?utm_term=.6694edcc0b4d. The California Air Resources Board hoped that it would bring the Trump administration back to the table, but the administration quickly rejected the deal as a "PR stunt." *Id.* They said at the time that they would settle for nothing less than a single national standard. *Id.* This eventually comes to light through One National Program. *See* One National Program, 84 Fed. Reg. at 51,310. The Department of Justice (DOJ) launched an antitrust probe into the deal California made with automakers, which some called an abuse of departmental power. Michael Wayland, *DOJ Launches Antitrust Probe over California Emissions Deal with Automakers*, CNBC (last updated Sept. 6, 2019, 4:26 PM), https://www.cnbc.com/2019/09/06/doj-launches-antitrust-probe-over-auto-emissions-deal-with-california-wsj-reports.html, and Mark A. Lemley & David McGowan, *Trump's Justice Department's Antitrust 'Investigation' of California Deal with Car Makers is an Abuse of Power*, Stanford L. Sch. Blogs (Oct. 21, 2019), https://law.stanford.edu/2019/10/21/trumps-justice-departments-antitrust-investigation-of-californias-deal-with-car-makers-is-an-abuse-of-power. Again, deals like this are not new, and can be considered part of the innovative process. *See* N.Y. Times, *supra* note 26 (describing the deal automakers made with the state on installing smog control devices). DOJ eventually chose to drop the probe. Jessie Byrnes, *DOJ Dropping Antitrust Probe of Four Major Automakers*, The Hill (Feb. 7, 2020, 7:21 PM), https://thehill.com/homenews/administration/482114-doj-dropping-antitrust-probe-of-four-major-automakers.

100 *See generally* Office of Mgmt. & Budget, the 2018 Regulatory Reform Report: Cutting the Red Tape, Unleashing Economic Freedom (2018), https://www.whitehouse.gov/wp-content/uploads/2018/10/2018-Unified-Agenda-Cutting-the-Red-Tape.pdf. Nicole Goodkind, *New EPA Director is Working with Trump to End Auto Fuel Economy Standards,* Newsweek (Aug. 2, 2018, 4:36 PM), https://www.newsweek.com/epa-wheeler-emissions-deregulation-cars-trump-elaine-chao-1055135.

101 *See* One National Program, 84 Fed. Reg. at 51,312. The rule points to specific language from the EPCA: "Furthermore, EPCA states: 'When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.' 49 U.S.C. 32919(a). As a limited exception, a State or local government 'may prescribe requirements for fuel economy for automobiles obtained for its own use.' 49 U.S.C. 32919(c)." *Id.*

any state or local laws " 'related to' fuel economy standards or average fuel economy standards" — which both agencies say contain emissions regulation standards.[102] NHTSA and the EPA have also determined that the CAA waiver would not waive EPCA preemption anyway.[103] They state that "avoiding preemption under one federal law has no necessary bearing on another federal law's preemptive effect."[104] According to the Trump administration, this rule, and having a nationwide standard, achieves the goal of providing regulatory certainty.[105]

The rule also withdraws California's 2013 CAA waiver preempting federal standards for California's Advanced Clean Car Program.[106] There are several reasons why the waiver was withdrawn — first, the aforementioned EPCA preemption rendered the 2013 waiver "invalid, null, and void."[107] Second, the EPA reconsidered the grant of the waiver and withdrew it because California no longer needs the standards "to meet compelling and extraordinary conditions," one of the three scenarios in Section 209(b) where the waiver must not be granted.[108] The EPA states that it has the authority to withdraw the waiver in circumstances like this because

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[102] *Id.* at 51, 312–313. The phrase "related to" is essential to the administration's argument. In a fact sheet on EPCA preemption, NHTSA and the EPA state: "The tailpipe carbon dioxide (CO2) limits and zero emission vehicle (ZEV) mandate imposed by California and other States "relate to" fuel economy standards because CO2 is the primary byproduct of gasoline fuel combustion and compliance with the California rules and the Federal CAFE standards is assessed on the same basis: by measuring carbon emissions." U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency, *Fact Sheet: EPCA Preemption*, U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency (Aug. 2, 2018), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fact_sheet_-_epca_preemption_final_clean_080218_v1-tag.pdf.

[103] *See* One National Program, 84 Fed. Reg. at 51,314.

[104] *Id.*

[105] *Id.* at 51,317.

[106] *Id.* at 51,328.

[107] *Id.*

[108] *Id.* According to the EPA, the concentrations of greenhouse gases over California and the rest of the United States is similar to the global average, and California's vehicle fleet size is not significant, so the fleet does not bear any greater weight on the amount of greenhouse gases over California than any other source of greenhouse gases. One National Program, 84 Fed. Reg. 51,310, 51,328 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

agencies generally have the inherent authority to reconsider their actions.[109] Because the waiver is not unlimited, and Congress has not expressly carved out a preemption for California that does not rely on an EPA affirmation, withdrawal of the waiver is within the EPA's rights.[110]

Important to the administration's argument is the fact that the greenhouse gas waiver was denied once.[111] In 2008, the EPA determined that Section 209(b) "was not appropriate for [greenhouse gas] standards," because the standards are not designed to address conditions specific to California — they were intended for global pollution problems.[112] The denial was reversed in 2009, and then the newest waiver was granted in 2013.[113] One National Program, therefore, is only the second time in history a waiver has been denied and the first time a granted waiver has been reversed, and serves to forever alter the statutory waiver scheme.

B. THE *SAFE* VEHICLES RULE

The SAFE Vehicles Rule was only recently finalized, after over half a year of delay.[114] The main feature of the SAFE Vehicles Rule are amended CAFE standards for passenger cars and light duty vehicles from model year 2021 to 2026.[115] In the rule, NHTSA and the EPA rolled back the previous CAFE

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[109] *Id.* at 51,331. They also say that there is "no cognizable reliance interest" to stop them from revoking the waiver. *Id.*

[110] *Id.*

[111] *Id.* at 51,330.

[112] *Id.*

[113] One National Program, 84 Fed. Reg. 51,310, 51,330 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533). *See* 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,112 (Jan. 9, 2013).

[114] The rule was supposed to be revised and finalized by the end of 2019, but the agencies were contemplating a new emissions reduction figure and had some issues with data analysis not backing up their claimed benefits. Samantha Oller, *Trump Administration Rethinks Emissions Freeze*, CSP Magazine (Nov. 1, 2019), https://www.cspdailynews.com/fuels/trump-administration-rethinks-emissions-freeze.

[115] SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020). *See* One National Program, 84 Fed. Reg. at 51,310. The model year of a vehicle is defined as "the manufacturer's annual production period . . . which includes January 1 of such calendar year, provided, that if the manufacturer has no annual production period, the term 'model year' shall mean the calendar year." 40 C.F.R. § 85.2302.

standards.[116] Meanwhile, California raised its fuel economy standards, leaving automakers at a compliance impasse.[117]

Therefore, CAFE standards intertwine with the CAA waiver California receives. The only way the country can have uniform CAFE standards is through One National Program's revocation of the 2013 grant of the waiver.[118] Over the years, the CAFE standards have been increased gradually, with the previous administration setting the standards to 54.5 MPG for cars and light duty trucks by model year 2025.[119] This increase was the largest for fuel economy regulations in the last thirty years, and they are the standards California wants to continue to follow.[120] The Trump administration decided to roll back the CAFE standards because "they are no longer maximum feasible standards," and because NHTSA's 2012 standards could not be final as NHTSA is prohibited from finalizing CAFE standards beyond five model years in one rulemaking.[121] The EPA & NHTSA state

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116 SAFE Vehicles Rule, 85 Fed. Reg. at 24,175. The CAFE and CO_2 standards will now increase in stringency "at 1.5 percent per year," which is significantly lower than the 5 percent per year set forth by the Obama administration. *Id*. *See also* Dan Goldbeck & Dan Bosch, *EPA, DOT Finalize SAFE Vehicles Rule*, Am. Action F. (Apr. 1, 2020), https://www.americanactionforum.org/insight/epa-dot-finalize-safe-vehicles-rule.

117 Megan Geuss, *17 Automakers Tell Trump That Fuel Economy Rollback Needs to Include California*, ARS Technica (June 7, 2019, 4:08 PM), https://arstechnica.com/cars/2019/06/17-automakers-ask-trump-to-hold-off-on-fuel-economy-rollback.

118 Green Car Congress, *US EPA and DOT Propose Freezing Light-Duty Fuel Economy GHG Standards at 2020 Level for MY 2021–2026 Vehicles; 43.7 MPG for Cars; 50-State Solution*, Green Car Congress (Aug. 2, 2018), https://www.greencarcongress.com/2018/08/20180802-epadot.html. The CAFE standards originated in the 1970s, when oil shortages created an energy crisis in America. PEW Trusts, *Driving to 54.5 MPG: The History of Fuel Economy*, PEW (Apr. 20, 2011), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2011/04/20/driving-to-545-mpg-the-history-of-fuel-economy. Brian C. Black, *How an Energy Crisis Pushed the Government into Creating National Fuel Efficiency Standards*, Pac. Standard (Aug. 10, 2018), https://psmag.com/environment/the-origin-of-fuel-efficiency-standards.

119 Press Release, *supra* note 98.

120 Umair Irfan, *Trump's EPA is fighting California over a Fuel Economy Rule the Auto Industry Doesn't Even Want*, Vox (Apr. 6, 2019, 8:30 AM), https://www.vox.com/2019/4/6/18295544/epa-california-fuel-economy-mpg. Geuss, *supra* note 117.

121 Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,986–988 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86. The standards stretched all the way to 2025, though standards for model years 2012–2016 were already in place. Press Release, *supra* note 98.

that the SAFE Vehicles Rule, which went into effect on June 29, 2020, strikes a "reasonable balance" between market impacts and climate change.[122]

V. ADHERING TO PRECEDENT & DEFERENCE ARE KEY TO THE FUTURE OF FEDERALISM

One National Program is now embroiled in litigation that could take years to come to a conclusion.[123] All the while, California continues to make its own decisions related to how they want to conduct their own business, despite the EPA and NHTSA prohibiting these actions in One National Program.[124] This section will propose a framework for a future decision in this case — one founded on a bedrock of precedent and deference, focused on honoring the vital relationship between states and the federal government that forms the heart of modern federalism.

A. THE CURRENT STATUS OF THE LITIGATION

One National Program was immediately challenged in court by the attorney general of California, and the attorneys general of twenty-three other states, as well as the cities of Los Angeles and New York.[125] California

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122 SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,174–76 (Apr. 30, 2020).

123 Matthew DeBord & Reuters, *California and 22 Other States are Suing the Trump Administration over Auto-Emissions Rules*, Bus. Insider (Sept. 20, 2019, 1:06 PM), https://www.businessinsider.com/california-other-states-sue-trump-administration-over-auto-emissions-rules-2019-9. SAFE is most likely next, with states and environmental groups stating they are planning on filing suit. Jennifer Hijazi, *Several States, Environmental Groups Vow to Sue Over Car Pollution Rollback*, Sci. Am. (Apr. 1, 2020), https://www.scientificamerican.com/article/several-states-environmental-groups-vow-to-sue-over-car-pollution-rollback.

124 One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533). Chris Isidore & Peter Valdes-Dapena, *California Won't Buy Cars from GM, Chrysler or Toyota Because They Sided with Trump Over Emissions*, CNN Bus. (last updated Nov. 19, 2019, 2:32 PM), https://www.cnn.com/2019/11/19/business/california-limits-purchase-automakers-emissions-rules/index.html. (California has declared it will only buy vehicles from automakers who recognize the California Air Resources Board's tougher greenhouse gas emissions standards, as well as pledged to only work with automakers who are "committed to stringent emissions reduction goals.")

125 Press Release, Office of the Attorney General, Attorney General Becerra Files Lawsuit Challenging Trump Administration's Attempt to Trample California's Authority to Maintain Longstanding Clean Car Standards, (Sept. 20, 2019). The group includes

argues preemption must be declared unlawful for several reasons: "it exceeds NHTSA's authority, contravenes Congressional intent, it is arbitrary and capricious, and NHTSA failed to conduct the analysis required under the National Environmental Policy Act ("NEPA")."[126] Their arguments rest heavily on the fact that Congress has frequently amended the law (like adding new EPCA and CAFÉ standards), leaving California's waiver untouched each time.[127] California's complaint includes a plea for the court to respect the vital role its innovation has played in our federalist system.[128] It states that NHTSA did not consult with the plaintiffs on One National Program, violating Executive Order 13132, "which imposes requirements on agencies that promulgate regulations with federalism implications."[129] This executive order requires agencies to consult with states "early in the process" of developing proposed preemption regulations.[130] NHTSA did

"Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia." *Id*. *See generally* Complaint for Declaratory and Injunctive Relief, California v. Chao, 1:19-cv-02826 (D.D.C. Sept. 20, 2019). This case is currently stayed, pending resolution of related litigation in the D.C. Circuit. Minute Order, California v. Chao, 1:19-cv-02826 (D.D.C. Feb. 11, 2020).

126 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 4.

127 *Id*. at 17–25. Except for, of course, the denial in 2008, which was reversed after reconsideration in 2009. *Id*. at 25–26. The complaint also emphasizes the importance of California's greenhouse gas and zero emissions vehicles standards, which they claim are fundamental to protect the public health and welfare. *Id*. at 29. *See generally* EELP Staff, *CAFE Standards and the California Preemption Plan*, Harv. L. Sch. Envtl. & Energy L. Program (Aug. 24, 2018), https://eelp.law.harvard.edu/2018/08/cafe-standards-and-the-california-preemption-plan/ (discussing the relationship between the EPCA and CAFE standards).

128 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 32.

129 *Id*. In Executive Order 13132, agencies are required to follow certain "fundamental federalism principles." Exec. Order No. 13132, 64 Fed. Reg. 43,255, 43,255 (Aug. 10, 1999). These principles acknowledge that issues that are not national in their scope/significance are best left to the government "closest to the people," reiterates the promise of the Tenth Amendment's reserved powers to the states, recognizes states as laboratories of democracy, states that the national government should defer to the states when it comes to actions that "affect[] the policymaking discretion of the States," and directs the government to act with "the greatest caution" in areas where there is uncertainty related to the authority of the national government. *Id*. at 43,255–56.

130 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 32

not do so, claiming that notice-and-comment was enough to satisfy this requirement.[131] California believes it does not.[132]

The claim California makes under the National Environmental Policy Act is that NHTSA was required to undergo an environmental assessment or prepare an environmental impact statement before undertaking this action — NHTSA did not.[133] The purpose of the act is to make sure that the environmental impacts of an undertaking are known to the public before the action takes place, as while as during the action, so the utmost care is taken in regard to the environment.[134] Because NHTSA evaded the requirement to prepare an environmental impact statement for any rulemaking and regulatory action that is "likely to be controversial on environmental grounds" and for "proposed action[s] which ha[ve] unclear but potentially significant environmental consequences," they acted improperly.[135] Overall, California asks the reviewing court for a litany of relief based on these facts, and asks that One National Program be held unlawful and set aside, or that the court grant a permanent injunction so the rule cannot be implemented or relied upon.[136]

As the case has been stayed, the administration has not yet filed their response.[137] It is almost certain that their reasoning will be grounded in the language of the One National Program Rule. In One National Program, the EPA states that they have the authority to withdraw a waiver

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131 *Id.* at 32–33. NHTSA did not consult with California officials, or any other state that follows California's standards. *Id.* at 33.

132 *Id.*

133 *Id.* at 35–36. There would have been several avenues that would have forced NHTSA to conduct a National Environmental Policy Act analysis: first, finding that this was a major federal action that impacted the environment, and second, finding that this action is "likely to be controversial on environmental grounds," or "has unclear but potentially significant environmental consequences." *Id.* At the least, there needed to be an environmental assessment considering the problem and making no finding of significant impact, or that the impact would be at a minimum if the project were undertaken. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 36.

134 *Id.* at 35 (internal citation omitted).

135 *Id.* at 36 (internal citation omitted).

136 *Id.* at 44.

137 *See* Minute Order, *supra* note 125.

like the one given to California, under "appropriate circumstances."[138] The EPA points to legislative history to support the claim that the waiver is revocable.[139] A 1967 Senate report states, "Implicit in this provision in the right of the [Administrator] to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver."[140] The EPA also makes several alternative arguments as to why the waiver cannot be given: because under Section 209(b)(1)(B) California no longer has compelling and extraordinary circumstances, and because the EPCA preempts California's fuel emissions regulations.[141]

Several arguments are made beyond the legal sphere to explain why the rule is so important: the administration wants to "give consumers greater access to safer, more affordable vehicles, while continuing to protect the environment."[142] NHTSA and the EPA claim the rollback will reduce technology costs by $86 to $126 billion dollars, and consumer costs will be around $977 to $1,083 less per vehicle.[143] In the proposed rulemaking, they highlighted the fact that consumers are less likely to purchase cars based on fuel economy standards, and are more enticed by safety technology, infotainment systems, or a better powertrain.[144] NHTSA used a safety analy-

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138 *See* One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

139 *Id.* at 51,328.

140 *Id.* at 51,312, 51,328.

141 *Id.* at 51,312.

142 Elaine L. Chao & Andrew Wheeler, *Make Cars Great Again*, Wall Street J. (Aug 1, 2018, 8:40 PM), https://www.wsj.com/articles/make-cars-great-again-1533170415.

143 SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,176 (Apr. 30, 2020).

144 Thus, the lower price of the vehicle caused by less extensive fuel economy related technology would entice more consumers to buy cars. Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,993 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86). *See generally* Consumer Reports, *Cars with Advanced Safety Systems*, Consumer Reports (Feb. 22, 2019), https://www.consumerreports.org/car-safety/cars-with-advanced-safety-systems/ (Forward-collision warning, automatic emergency braking, pedestrian detection, etc.). *See generally,* Keith Barry, *Choose an Infotainment System You'll Love*, Consumer Reports (May 1, 2019), https://www.consumerreports.org/automotive-technology/choose-an-infotainment-system-you-will-love/ (Infotainment is a bundle of features containing audio, navigation telephone, and texting, usually contained on a dashboard screen). *See generally,* Autobytel, *What is a Powertrain Warranty?*, Autobytel (last accessed Dec. 15, 2019), https://www.autobytel.

sis to show the danger of older cars on the road and determined that, if cars cost less because of a reduced focus on costly fuel economy standards, people would be able to buy new cars more frequently and take older, more dangerous vehicles off the road.[145]

Some stakeholders of the automotive industry back the administration on these claims and support what the EPA and NHTSA are attempting to do with One National Program and SAFE. In a suit against NHTSA by the Environmental Defense Fund, a group called the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc. joined as an intervenor on behalf of the Trump administration.[146] They state that the One National Program framework will reduce the industry's compliance burden due to "overlapping and inconsistent regulations," and will ensure consumers have "a wide selection of vehicles" to choose from.[147]

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com/car-buying-tips/warranty-information/what-is-a-powertrain-warranty-100466/ (Powertrain consists of "the components that get the engine's power to the wheels and down to the ground," the engine, transmission, and drivetrain).

145 Proposed SAFE Rule, 83 Fed. Reg. at 42,995 (Which lead to a 12,400 lives saved figure that the EPA and NHTSA claimed the SAFE Vehicles Rule would bring). They stand by their claim of reduced fatalities in the final rule, though they do not put a number to it. SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,216 n. 80 (Apr. 30, 2020).

146 Environmental Defense Fund v. National Highway Traffic Safety Administration, No. 19-1200 (D.C. Cir. 2019). This is the case for which *California v. Chao* is stayed. *See* Minute Order, *supra* note 125. The Automakers within the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc include: General Motors Company, Toyota Motor Corporation, Fiat Chrysler Automobiles N.V., Hyundai Motor Corporation, Mazda, Nissan Motor Corporation, and the Kia Motor Corporation. David Shepardson, *Several Automakers Back Trump in Two Other California Vehicle Emissions Suits*, Reuters (Oct. 31, 2019, 11:15 PM), https://www.reuters.com/article/us-autos-emissions-california/several-automakers-back-trump-in-two-other-california-vehicle-emissions-suits-idUSKBN1XB33K. However, not all automakers have joined — Ford Motor Company, Honda Motor Company, BMW AG, and Volkswagen AG are not a part of the suit, because they made a deal with California in July of 2019. *Id.* Honda is the only member of the Association of Global Automakers that has not intervened on behalf of the administration, and Ford and VW are a part of the Alliance of Automobile Manufacturers that will not intervene. *Id.* This split occurs as the trade associations "have been in merger talks for months." *Id.*

147 Motion for Leave to Intervene by the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc., Environmental Defense Fund v. National Highway Traffic Safety Administration, No. 19-1200 i, 1 (D.C. Cir. 2019). Global Automakers' membership accounted for "40 percent of all U.S. production

Another supporter of the administration's SAFE Vehicles Rule states that critics must "move past their distrust of the Trump administration and automobile manufacturers" because sometimes a push for stricter standards will harm both consumers and the environment.[148] The balance between safety and affordability is a top priority for proponents of the rules, whether they be in the automotive community, part of the administration, or members of the public.[149]

The court should rule in California's favor for three reasons. *First*, the precedent for granting waivers favors California strongly. *Second*, ruling against the plaintiffs in this case would contravene deference based on federalism concerns and put almost any state regulatory scheme at risk of

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and 45 percent of all U.S. sales of passenger vehicles and light trucks," and states that this issue is of "central importance" to the intervenors. *Id.* at 3–4.

148 Jason Hayes, *Unreasonable Demands Stifle Real Environmental Progress*, Mackinac Ctr. for Pub. Policy (Sept. 25, 2018), https://www.mackinac.org/unreasonable-demands-stifle-real-environmental-progress.

149 *Id.* This focus on safety (personal and environmental) as well as affordability does not play out. Within the EPA, an internal email from the director of assessments and standards division stated that the proposed CAFE standards "are detrimental to safety, rather than beneficial," and would likely increase the number of highway deaths by seventeen annually. Ellen Knickmeyer, *EPA Challenged Safety of Administration Mileage Freeze*, Associated Press (Aug. 14, 2018), https://apnews.com/1a7551fca3294ec49029b93e994cd7f9. The SAFE Vehicles Rule will also substantially increase vehicle greenhouse gas emissions — which can pose a substantial threat to public health. Romany Webb, *Five Important Points About the EPA's "SAFE Vehicle Rule*, Columbia Univ. Earth Inst. (Aug. 7, 2018), https://blogs.ei.columbia.edu/2018/08/07/five-points-epa-safe-vehicle-rule. The rule, as it currently stands, would increase carbon dioxide emissions by 713 million metric tons, which is equivalent to nearly 40 percent of 2016 carbon dioxide emissions from the entire U.S. *Id.* High levels of greenhouse gases lead to planetary temperature increases, which contribute to "rising sea levels, population displacement, disruption to the food supply, flooding, and an increase in infectious diseases. Karen Feldscher, *Greenhouse Gases Pose Threat to Public Health*, Harvard T.H. Chan Sch. of Pub. Health (Nov. 1, 2011), https://www.hsph.harvard.edu/news/features/bernstein-greenhouse-gases-health-threat. The EPA and NHTSA have determined that there would be a $2,340 reduction in overall average ownership costs for new vehicles. U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency, *MY's 2021-2026 CAFE Proposal – By the Numbers*, U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency (Aug. 2, 2018), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V26H.pdf; Jessica McDonald, *Trump's False Auto Industry Tweets*, FactCheck.org (Aug. 27, 2019), https://www.factcheck.org/2019/08/trumps-false-auto-industry-tweets. The cost savings would only end up being around $390, a far cry from the supposed $2,340 reduction. *Id.*

being overtaken by the federal government. *Finally*, a ruling for the Trump administration would violate the principles of federalism that have been so vital to this nation, forever impacting the way federalism works. In order to protect the innovations brought on by federalism, a court should strongly consider this framework of factors in its final decision.

B. THE FRAMEWORK

1. *The Amount of Precedent Is Overwhelming*

Ruling against the Trump administration is the correct course of action for any court confronted by the issue.[150] The waiver has been in place for over half a century.[151] There is existing precedent for the continued grant of the waiver.[152] Agencies must "provide 'good reasons' for departing from prior policies and precedents that have 'engendered serious reliance interests that must be taken into account.'"[153] Reliance interests exist because the waiver has *never* been revoked — it is unlikely that anyone who looked at the midterm review of the standards had an understanding that review equals revocation.[154] The reliance interest does not only encompass the waiver for model year 2021–2025 greenhouse gas and zero emissions vehicle standards.[155] Serious federal reliance interests are also in existence here — "for the last decade, the federal government has harmonized its own greenhouse

150 "*No waiver* has ever been revoked and the one previous denial *was quickly reversed*." Young, *supra* note 46 (emphasis added).

151 Carlson, supra note 9, at 1109 (As of 2020, it has been in place for 53 years).

152 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 34. Not only is "further justification demanded," but "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by prior policy." Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (2017).

153 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 34.

154 Young, *supra* note 46. For the government's argument against reliance, see One National Program, 84 Fed. Reg. 51,310, 51,334 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

155 One National Program, 84 Fed. Reg. at 51,334. The EPA and NHTSA unfairly limit the reliance interest in this way. *Id.* The reliance interest does not just attach to one waiver, even though the revocation is attached to one waiver — because the One National Program Rule pushes the waiver permanently out of existence. If a court buys into the arguments that the EPA and NHTSA make in the rule, then the CAA waiver will no longer be allowed to exist, because the argument that the EPA and NHTSA make is that the CAA waiver should not exist because of the EPCA and lack of compelling

gas emissions standards and its fuel economy standards with the California standards."[156] Precedent *can* be overturned, but the EPA and NHTSA would need to make a stronger showing to prove One National Program is more beneficial than the current scheme.[157] They do not.

Their concern over automakers' being placed in an "untenable situation of having to expend resources to comply not only with Federal standards, but also meet separate State requirements," is also weak, when precedent is considered.[158] In 1966, a year before the CAA waiver was set in place, California's Motor Vehicle Pollution Control Board approved smog-control devices.[159] Did the federal government stop this action on behalf of the automakers? No. Did the federal government try to control the market and the industry? No. Like California and automakers of the modern era, several manufacturers agreed to put the smog-control systems on their cars made to be sold within California.[160] California's cooperation with automakers is nothing new and is certainly not novel enough to be the target of a politically motivated investigation by the Department of Justice.[161] Just like there is precedent for the continued grant of the waiver, there is precedent for cooperation between California and automakers.[162]

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circumstances. *See generally id.* It would be impossible, or nearly impossible, to obtain a waiver ever again.

156 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 6. And the federal government has chosen time after time to use California's emissions standards to model their own. *The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management: Hearing Before the Calif. S. Comm. on Environmental Quality*, *supra* note 33, at 7.

157 For a discussion of the principles of *stare decisis*, see Gamble v. U.S., 139 S.Ct. 1960, 1969 (2019).

158 The EPA and NHTSA are concerned that requiring automakers to develop and implement technologies to follow these standards is imbalanced. One National Program, 84 Fed. Reg. at 51,312.

159 N.Y. Times, *supra* note 26. This triggered a 1959 law, requiring installation of smog-control devices on 1966 car models bound for the state. *Id. See generally* Eilperin & Dennis, *supra* note 99.

160 *Id.*

161 Lemley & McGowan, *supra* note 99.

162 The automakers intervening on behalf of the administration support the One National Program Rule because they believe they will suffer a concrete injury if California continues to be allowed to have their own fuel economy standards — there would be no "regulatory simplicity and certainty." Motion for Leave to Intervene by the Coalition

2. *Deference is Crucial in This Case*

Precedent is not the only factor at play here. The concept of federal deference to state agency interpretations in cooperative federalism schemes is "unresolved," but one scholar proposed a framework to deal with questions of when a court should defer to the state, or to the federal government.[163] His solution is that courts should consider whether Congress, when passing the scheme in question, delegates authority to a state agency for "federalism" or "decentralization" purposes.[164] The level of deference due to that state agency's interpretation then varies depending on Congress' choice.[165] Federalism is for when Congress specifically wanted an actual cooperative federalism scheme.[166] Decentralization (also called managerial decentralization) encompasses the benefits that Congress receives from the delegation of administration to state and local entities.[167] Deference goes to Congress if the choice was related

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for Sustainable Automotive Regulation and the Association of Global Automakers, Inc., Envtl. Defense Fund v. Nat'l Highway Traffic Safety Admin., No. 19-1200, 1, 17 (D.C. Cir. Sept. 28, 2019).

[163] It tends to be unresolved because most of the action is occurring in lower courts, and the Supreme Court has not yet weighed in. *See* Ben Raker, *Decentralization and Deference: How Different Conceptions of Federalism Matter for Deference and Why that Matters for Renewable Energy*, 47 Envtl. L. Rep. News & Analysis 10963, 10963 (2017). *Id.* (citing Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 391, 394 (5th Cir. 2014), where, "[i]n response to a challenge by a wind power developer, the court granted deference to a Texas state agency's interpretation of a federal regulation, even though the federal agency tasked with implementing the act, the Federal Energy Regulatory Commission (FERC), disagreed with that interpretation."; citing Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278 (Idaho 2013) "[A]n Idaho state agency had correctly ruled on a matter involving a different wind power developer. The majority opinion failed to mention a decision by FERC that had held to the contrary."; citing Grouse Creek Wind Park, 142 FERC ¶ 61187 (Mar. 15, 2013) "[S]olar energy developers in Montana found themselves on the losing end of a decision by a Montana state agency. FERC later held that decision to be improper under federal law, but the state agency has not changed course." *See also* Emily Stabile, *Federal Deference to State Agency Implementation of Federal Law*, 103 Ky. L.J. 237 (2015).

[164] Raker, *supra* note 163, at 10963.

[165] *Id.* Reliance on congressional intent, according to Raker, puts the deference decision back in "its proper place" – which is in Congress. *Id.* at 10975.

[166] Raker, *supra* note 163, at 10975–76.

[167] *Id.* at 10974. Raker states that the usual suspects to justify federalism are competition, experimentation, political participation, and separation of powers, and that

to managerial decentralization, and deference goes to the state agency when Congress was looking to experiment with a cooperative federalism scheme.[168]

Considering California's waiver scheme in this framework shows that Congress intended to create a cooperative relationship to govern these emissions standards, acting according to principles of federalism. Because of this, California's agency interpretation should receive deference. The federal government's hope for the cooperative federalism scheme was that California would become a leader.[169] They were not given the ability to waive out of federal standards for a managerial decentralization role — it was, and has been the fundamental purpose of the CAA that California have a waiver ability, and that that waiver ability cover any state that wishes to follow it.[170] Any court looking at this issue should take into account this decentralization/federalism framework and determine that California's interpretations, made by the California Air Resources Board and its other related agencies, should prevail over the federal government's One National Program Rule and the SAFE Vehicles Rule.[171]

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these justifications are benefits of decentralization, rather than any federalism specific benefit. *Id.*

168 *Id.*

169 *The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management: Hearing Before the Calif. S. Comm. on Environmental Quality*, *supra* note 33, at 4.

170 *See generally* 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013). This is unlike the statute Raker discusses in his article, the Public Utility Regulatory Act (PURPA) of 1978, because "the enacting Congress simply chose to delegate administrative tasks to local organizations, not allow those organizations to alter the fundamental purpose of the statute." Raker, *supra* note 163, at 10963, 10979. The fundamental purpose of the CAA waiver in 1967 (and from that point onward) was to allow California to experiment and do their own work within the framework provided by the CAA — not to help Congress out administratively, but innovatively.

171 Currently, there is no agreed-upon deference standard in cooperative federalism schemes — some states and their courts do it differently than other states and their courts, leaving a patchwork of confusion. *See generally* Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 Yale L.J. 1280 (2013). Adopting a test that makes Congress's decision central to the court's decision would ensure that they are following the original legislative intent.

3. Principles of Federalism

The importance of federalism is clear from the statutory scheme — it is interwoven though the scheme's history and the concepts of precedent and deference. And the singular innovative principle of federalism itself is important beyond those reasons. Federalism is widely debated but is continually reaffirmed as an important principle by our courts of law.[172] These rules would take away state power in favor of a national rule, defaulting to the new executive conception of federalism, becoming more common due to the expansive reach of the executive branch and the administrative state.[173] California's standards incorporate more than just California — over one-third of the United States population is covered by California's fuel emissions standards.[174] Federalism is not just an ephemeral idea that agencies should *try* to follow. Executive Order 13132 dispels any notion that agencies are not constrained by federalism concerns in these kinds of preemption actions.[175] Federalism is and should be a concern of any agency taking part in regulatory change that involves federalism implications.

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[172] Hickey, *supra* note 19 at 7–8. Hickey quotes Justice O'Connor, who stated, "The constitutional question (in this case) is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States." *Id.* at 7.

[173] *See generally* Greve, *supra* note 82.

[174] *See supra*, p. 10–11. And when one looks at the number of states that joined onto the multistate lawsuit led by California, the number of people who now have a vested interest in states' retaining their power is over 179 million, which shows that the federalism concern touches almost half of the states in the union, and well over half of its population. *See supra*, p. 10–11. This is not a battle between so-called "liberal" states like California and their so-called "conservative" counterparts; it is a movement for a better environment and standard of living that is brought on by clean air through California's waiver scheme and cooperative federalism.

[175] *See generally* Exec. Order No. 13132, 64 Fed. Reg. 43,255, 43,255 (Aug. 10, 1999). The Executive Order does not create an enforceable right or benefit, but it *does* require agencies to meet certain conditions before the promulgation of rules with "federalism implications." *See* One National Program, 84 Fed. Reg. 51,310, 51,327 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533); Envtl. Prot. Agency, *Summary of Executive Order 13132 – Federalism*, Envtl. Prot. Agency (last updated Oct. 17, 2016), https://www.epa.gov/laws-regulations/summary-executive-order-13132-federalism#:~:text=Executive%20Order%20(E.O.),issued%20by%20President%20William%20J.&text=The%20E.O.'s%20objective%20is,the%20Unfunded%20Mandates%20Reform%20Act. In One National Program, the agencies try to say that they comply with the Executive Order's mandates when it comes to preemption (in Section 4 of the Order), just because they satisfied notice requirements in relation to the

Accepting these rules sets an untenable precedent, essentially eradicating cooperative federalism schemes.[176] If the executive branch can reclaim power Congress has given away, why would the executive continue to allow states to do what it is now enabled to do?[177] If a court decides that Congress wanted to let the executive branch and its agencies step all over the cooperative federalism scheme it has set up, as the Trump administration would like it to do, that court further contributes to the imbalance of power between the two branches.[178] The benefits of the state's retaining its ability to set emissions standards through the waiver framework disappear, as does the choice Congress made to step aside and let the states continue to push and pull it with iterations that spur innovations.[179]

If a future court rules in favor of the administration, it will stem the exciting flow toward Gerken's modern federalism, Federalism 3.0.[180] The iterative federalism of Federalism 3.0, with its helpful redundancies and healthy competition will be gone, perhaps first in the waiver scheme, but perhaps disappearing from other places as well as time passes.[181] California will no longer be there to push the federal government to go further in its own fuel emissions standards and fuel economy regulation. In turn, California will no longer have the federal government pushing it back, either to think bolder, or to scale back a certain regulation. There will not even be a hint of Justice Brandeis's laboratories, so derided as outmoded

possibility of a conflict. One National Program, 84 Fed. Reg. at 51,327. But that does not invalidate the mandate of Sec. 4(a), which requires "clear evidence Congress intended preemption of State law." Exec. Order No. 13132, 64 Fed. Reg. at 43,257.

176 For discussions of cooperative federalism see generally Doremus & Hanemann, *supra* note 78. *See also* Frank, *supra* note 38.

177 *See* Benjamin Ginsberg, *The Growth of Presidential Power*, Yale Univ. Press Blog (May 17, 2016), http://blog.yalebooks.com/2016/05/17/growth-presidential-power/ (discussing the expanding presidential power, usually at the expense of Congress and its own power structures).

178 *Id*.

179 *See generally* Carlson, *supra* note 9 (discussing iterative federalism).

180 *See* Gerken, *supra* note 60, at 1718.

181 *Id*. at 1720. There are other cooperative federalism schemes in the environmental sphere that could next face the litigative gauntlet if a court decides cooperative federalism in one area is no longer valid. *See* Carlson, *supra* note 9, at 1100 (discussing another example of iterative/cooperative federalism, the Ozone Transport Commission).

by current scholarship.[182] This will not only hurt California. It will not just hurt the states that follow California's standards, or the ones defending them. It will hurt the federal government itself. And the push for one national standard by the Trump administration for regulatory ease and for the automotive industry will end up hurting the federal system in the long run.[183] The court that rules on this case cannot just look at the arguments presented and rule on those at face value — they must look at the long-lasting implications of a ruling against a scheme like this. Otherwise, the healthy growth and change of federalism may, at best, be set back and, at worst, closed off forever.

VI. CONCLUSION

The waiver that California receives through the CAA is essential to the continued existence of iterative and cooperative federalism schemes in the United States. The entire impetus of the waiver was to acknowledge how exceptional California was at recognizing, diagnosing, and addressing the problems that the early stages of climate change caused in the state. California has been able to drive the automotive emissions conversation for over half a century now, pushing the federal government to go further with its own regulations. And the federal government has been able to push back in its own ways — but never to the extent of demolishing the waiver for good — instead, pushing back in iterations to strengthen the bond between the state and federal government. Ripping away that ability will forever shape federalism and cooperative federalism in the environmental sphere as the concentration of power in the federal government and the executive branch grows. State power will shrink. The desire to innovate will also shrink, and the drive of states to go further and do more will dissipate.

The Trump administration has buckled to pressure from the automotive industry to make changes that are in the interest of industry rather than in the interest of the people of this country. The administration will irreparably damage a pillar of federalism if they succeed, and states and

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182 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). For criticism see Gerken, *supra* note 60, at 1696–97, and Schapiro, *supra* note 60, at 35–36.

183 *See generally* One National Program, 84 Fed. Reg. 51,310, 51,310 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533)

their people will not be able to innovate to make life and the environment better in their communities. Emissions standards have far-reaching impacts. It is now up to the judicial branch to protect federalism and the people of the United States, as the federal government will not take care to do so. The fate of federalism is in the hands of the courts — whether one ascribes to the laboratory conception, or Federalism 3.0 — and America's roots will be put to the test. For the sake of the United States, a return to federalism's roots and an adherence to its ideas is the best chance for federalism's survival.

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