STUDENT WRITING COMPETITION

2022 WRITING COMPETITION VIRTUAL ROUNDTABLE

The California Supreme Court Historical Society met by video conference to congratulate the 2022 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 Dan Kolkey, and Selma Moidel Smith who initiated and conducts the competition.

The following is a lightly edited transcript of the video conference that took place on August 10, 2022.[1] The complete papers appear immediately following in this volume of *California Legal History* (vol. 17, 2022).

DAN KOLKEY: Welcome. I'm Dan Kolkey, president of the California Supreme Court Historical Society and a retired partner at Gibson, Dunn & Crutcher. It's my pleasure to welcome you to this virtual ceremony in honor of you, the winners, of the Selma Moidel Smith Student Writing Competition.

1 The video conference is available on the Society's website at https://www.cschs.org/programs/student-writings or on YouTube at https://www.youtube.com/watch?v=rRfG8aozXrk&t=12s.

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 DANIEL KOLKEY.
BOTTOM, LEFT TO RIGHT: WINNING AUTHORS LEAH HABERMAN, RYAN CARTER, AND SIMON RUHLAND.

Before I introduce our winners here, I'd like to make some introductions of the very distinguished jurists we have here today. I'm going to start with the chief justice of the state of California. Tani Cantil-Sakauye has had an amazing career. Even before she stepped onto the platform of the California Supreme Court, she was a district attorney; she was a deputy legal affairs secretary, and then a legislative secretary for the governor of the state of California, George Deukmejian, and thereafter she had a twenty-year career on the municipal court, superior court, and the Court of Appeal of the state of California, and indeed had some major initiatives in those positions, including — when she was on the Sacramento Superior Court — she instituted the first court solely dedicated to domestic violence issues in Sacramento.

Most people would say that is a sufficient career for anyone. However, in 2010, Governor Arnold Schwarzenegger appointed her as the

twenty-eighth chief justice of the state of California, and, through what was a fairly stormy period — severe budget cuts following the Great Recession, followed quickly by a pandemic — the chief justice steered the courts very successfully and smoothly through all of this without missing a beat. In addition, as chief justice, under the California Constitution she chairs the Judicial Council of California, which is the policymaking body in the state for the courts. As such, she had a number of initiatives, including on bail and on having some traffic violations treated as civil rather than criminal offenses in the name of fairness. She established an initiative and an organization to promote civics education for students, so the chief justice has made her mark not only in major opinions but in all facets of the courts and civics education.

Let me now turn to one of the other jurists we have here, Justice Kay Werdegar. Justice Werdegar retired in 2017, but she served on the California Supreme Court for twenty-three years. Before that, she too had a very distinguished career. If I've got this right, Justice Werdegar, you first served in the Justice Department under Robert Kennedy, and you were a professor and associate dean at the University of San Francisco School of Law, and served on the California Court of Appeal before you took your office at the California Supreme Court, where you were known for your very well-reasoned and very thoughtful judicial opinions. So it is my pleasure to welcome both of our jurists here today.

I'd also like to take a moment and make a virtual introduction of Selma Moidel Smith who is not with us today — we will see a video from her later in the program — but she is certainly worthy of a major introduction. Selma became an attorney in 1943 in California and practiced law for over forty years. She has been honored by the American Bar Association, by the National Association of Women Lawyers, and even by the UCLA School of Music which established a Selma Moidel Smith annual recital which recognizes her over 100 musical compositions. She is really an extreme talent, well beyond the law. Selma first established this writing competition in 2007 and, in 2014, to honor her for her work, and on the occasion of her ninety-fifth birthday, the Society named the competition for her. And I should also note that in 2009 Selma became the editor-in-chief of the Society's journal, *California Legal History*. As such, she doubled its

size and made it into the preeminent journal that it is today and a journal in which each of your pieces will be presented.

Now I'd like to turn this matter over to the chief justice for her introductory remarks.

CHIEF JUSTICE: Thank you, Dan, and what a pleasure it is to be with all of you. I think that it's a pleasure and a privilege for me to be in this Zoom call with you, the bright young minds of the future — judged by very distinguished professors [Lawrence Friedman of Stanford Law School and Rebecca Latham Brown of USC Gould School of Law] — not an easy challenge, but you all rose to it. I also want to point out why this is such a special Zoom, and that is — Dan Kolkey didn't tell you that he was also an appellate justice of the Court of Appeal before he returned to private practice and has been instrumental in helping California become a place of international arbitration through very complicated legislation that allows California to compete on the East Coast as well for international arbitration cases.

Kay Werdegar, my colleague, a beloved justice, a thought leader at the California Supreme Court — to this day, we still quote her *dissents*, because she was *right* in her dissents when the rest of us were merrily moving along on the majority opinion. Kay Werdegar is the kind of person who, when she speaks, everyone listens.

You'll hear from Selma later. The only regret I have is that we don't have Selma in person. Selma, in person, is a force of nature. Even at a hundred, or plus, she is truly, in my mind — of all the people I've met in the law and elsewhere — Selma is genius material, in all candor. She had this idea to bring and to reward smart minds who are thinking about the future. And so, it's a pleasure to be here with all of you, and I look forward to the rest of the remarks and then having an engagement with you about your papers. Thank you, Dan.

KOLKEY: Thank you, and Justice Werdegar, would you like to make any remarks at this point?

WERDEGAR: It's always hard to follow the Chief. Thank you for your comments, Chief. And welcome to our new president of the Society. It is a shame that you winners won't see Selma in person. She *is* a force of nature and an inspiration to all of us. I've been inspired by the essays that I read,

that you all submitted. I think this is a wonderful group of writings to be honored with the Selma Moidel Smith writing award. So I look forward to hearing what you each have to say about yourself, and how you came to this moment, and we will allow you to do that at this time.

KOLKEY: Just before we do that, we're going to post Selma's celebratory comments.

SMITH: Congratulations to our three winning students — Leah, Ryan, and Simon — for their splendid papers. As you know, I have chosen to publish all three in this year's volume of our journal, which is due out at the end of August.

I want to give a special thank-you to my dear "Chief Tani," who has so kindly made herself available for this event in each of her twelve years as chief justice. And thank you to my dear friend Kathryn, who has graciously joined us every year since the competition began in 2007. Many thanks to our Society's new president, Dan, for agreeing to moderate, and I wish him every success as president.

This year, for the third time, this event is being held online instead of in person, thanks to our director of administration, Chris Stockton. With winners from across North America and Europe, it has become a very welcome step forward. Thanks so much to you all.

KOLKEY: All right! And thank you, Selma. Now let's turn to our winners. I'd like to start with Leah Haberman. You are our first-place winner, and I know you're a JD Candidate for the Class of 2024 at Columbia Law School, so congratulations on that. Your paper was, "More than Moratoriums: The Obstacles to Abolishing California's Death Penalty." Leah, why don't you tell us a little bit about yourself, what motivated you to pick this particular topic, and briefly a bit of your conclusions.

HABERMAN: I grew up in San Diego, so I'm from California. I went to school at University of Washington in Seattle, and then I started working on political campaigns. I jumped all around the country, Iowa Caucuses, all of that, before coming back to San Francisco to work for a little while. Now I'm in New York for law school at Columbia. I sort of stumbled upon the writing competition on accident. I'm personally in public-interest work, and as everyone on this call knows, it's financially a lot harder, so I was looking into scholarship opportunities that would help make the

burden of law school a little bit easier and saw this one. A lot of these, they take just a specific legal focus, and I was really excited to see more of the historical focus because, with my political background, it's been exciting to think about law in a more political lens. Right now, where I'm currently sitting, I'm actually an hour away from a candidate whose campaign I'm working on. She's going to be on TV debates tonight, and so I'm still very much involved in the political world and wanted to see how interwoven I could make this legal argument with a political one.

In the summer, I was working at Reprieve, which is an international human rights organization, doing a lot of death penalty work. Coming from California, I was thinking, "I don't know much about the death penalty," thinking we're this progressive bastion of criminal justice, which in a lot of ways we are, so I never really thought about California's death penalty statute until starting this research, and that led me to what is the paper you all read for this — being shocked that California still had a death penalty and how, strategically, it's been used over time, with the different ballot initiatives. It's honestly been a big pivot for me. At the law school, I've reached out to the faculty at Columbia wanting to pursue capital defense work in the future, and it's been really exciting to think about this issue. In particular with our current national Supreme Court, it doesn't seem like much will change on the death penalty front, but I'm thinking about what are other creative, legislative and political opportunities to get rid of the death penalty at a state level and at the federal level. It was really exciting to learn more about California, as my home state and also thinking about applying it — I'm in New York — and seeing a more across-the-country viewpoint.

KOLKEY: I think that your main conclusion was that the only way things are going to change is through public opinion. Is that right?

HABERMAN: That is what I think. In a lot of ways, public opinion is an undertone to a lot of our judicial reasoning. It's clear — we have these jurists with us today — they are just people. All of us exist in the world. I am a queer individual. My right to get married is a legal decision, and in a lot of ways we think about Justice Kennedy's decision, that he moved with the times. We wouldn't have gotten *Obergefell* a decade before, because clearly *Lawrence* was one of all these stepping stones. So I think, when I say "public opinion," we are all members of the public, jurists included.

KOLKEY: Let me ask you a question, since you've done this incredible compendium of the history of the death penalty, particularly as it applies to California. You mentioned at the beginning of your paper the moratorium that the current governor placed on the death penalty. I don't know whether or not you've thought about this, so you're free not to answer the question, but it did occur to me that, under the California Constitution, Article V, Section 1, it provides that the governor shall see that the law is faithfully executed. So, does the governor — given that constitutional duty as chief executive to see that the law is faithfully executed — have the power to declare a moratorium on the application of a particular law, which is separate from the commutation power, which of course the governor has on an individual basis. As the chief justice and Justice Werdegar know, if it's a twice-convicted felon, it's subject to a recommendation from the Supreme Court. But beyond commutation, does the governor have the power, in light of that constitutional obligation, to simply have a moratorium and not apply the death penalty across the board?

HABERMAN: I'll ignore the pun that you implied by "faithfully executing the law" — I didn't look specifically into whether the governor has this power, but when we zoom out about our broader separation of powers in the different branches, I think that's totally what the executive has to do. If the executive was just the functioning arm of the Legislature, it wouldn't be its own branch, and so I think the intuitive gut sense of a rising 2L in law school, it makes intuitive sense for the governor to be able to do that, and I'm sure there have been challenges to moratoriums, and specifically to the way Governor Newsom has structured his, so I think there are ins and outs to that, and California is not unique in its moratorium. Pennsylvania also has one — Oregon, numerous states — Ohio has a pseudo-moratorium happening right now until they conduct more investigation, so California is not unique in this power.

WERDEGAR: Leah, I did enjoy your writing style. I thought your opening paragraph was engaging, about what a wonderful liberal state we are — all the beauties and the natural wonders and the liberal politics — and then, oops, we have the death penalty. And you found that surprising. I also found another comment in your article which, of course, is true, but it came home to me and might to the Chief as well. The California Supreme

Court is *not* the most influential court in the state. Who is? That title, you tell us, belongs to the court of public opinion. And that's the thesis of your paper. Interestingly, this ties in with our third-place winner, Simon Ruhland, who speaks about the ease of amending the California Constitution by way of initiative. A court can issue a constitutional opinion saying the death penalty, under our Constitution, is unconstitutional, and that year by initiative the populace will say, "Oh, no, it's constitutional." They've changed the Constitution, so that touched on some important and rather novel aspects of our government. Did I understand you to say that doing this paper has more or less redirected your aspirations for work after law school? That now you're drawn to defending death penalty cases?

HABERMAN: Definitely. Yes, I think at a more legislative level, too. One of the things that I did this summer at my internship was thinking about the secrecy statutes that many states are passing so that they don't have to disclose how they execute people. So there's a whole realm of legislation that's happening in very conservative states, because it's very hard to get lethal injection drugs right now, and so in a way the death penalty is de facto becoming non-existent. So now, they're trying to get drugs through really shady — for lack of a better word — means, and so I've found that area of legislation and those battles worth fighting. Going into law school, I was much more interested in a national security–human rights–Guantanamo Bay focus.

WERDEGAR: Very interesting.

CHIEF JUSTICE: Leah, my question to you is, I love the whole idea about the court of public opinion, and it can't be ignored, and the court seems to be getting louder and more vocal, depending on what you read and what's on social media. But I wonder what your take is on the fact that in California, in recent history, we had an initiative to abolish the death penalty. It failed. Then, thereafter, we had competing initiatives, one to abolish the death penalty, and one to speed it up — well, ostensibly to speed it up. But yet, the speed-up-the-death-penalty measure again prevailed. What does that tell us about the court of public opinion?

HABERMAN: I think it's a really interesting dichotomy. I think it gets to the way you can use rhetoric to play on people's fears, and that's especially powerful in the area of law. There's a reason that lawyers are really

respected, and for those of us who are in law school that's kind of why we pursue this path. We do see the law as a means of social change. Some people just don't understand the mechanism. They hear the sound bites on TV. They see the local news where crimes are exacerbated. It's really poignant to hear the story of a victim, but it's very rarely where you see the family of — where you see the system at large being talked about in the daily news. So, when you think about these initiatives, you have to think, who's funding them, and who has the power to put out this kind of public messaging, and what are people internalizing? Is it ever as simple as asking someone on the phone, "Do you support the death penalty?" That's not really how these messaging campaigns go. They will often message, "Do you want psychotic murderers who kill everyone they see, walking around on the street with you?" And then that's all of a sudden how people internalize the ballot. I think that is why, so often, these things that can feel so black-and-white get lost in the shades of gray. It's not a skill we are taught in law school, and I notice so many of my peers — we read these judicial opinions and we say, "Okay, here it is, it's very clean," and I just think it's incredibly messy. Coming from politics, I kind of embrace that because it's the only opportunity in a lot of ways. If California is going to continue to vote to hold onto the death penalty and then, in survey polls, say that they don't want the death penalty — figuring out what is that gap — and, often, it's who can resource for the best campaign.

WERDEGAR: Thank you.

KOLKEY: Why don't we turn to our second-place winner, Ryan Carter — Ryan, as I understand it, you have now received a Master of Legal Studies from the UCLA School of Law, is that right?

CARTER: That's right, Judge. Thank you. Yes.

KOLKEY: And you were awarded second place for your paper on "San Fernando Valley Secession: How a Quest to Change the Law Almost Broke L.A. Apart (and Whether It Still Could)." I think your paper really contributed to the legal scholarship in this area of municipal reorganizations because you interviewed a number of people who were involved in enacting these laws. I've got to say that I found your paper very interesting because a number of the personalities that you mention in your paper — Tom McClintock, Bill Lockyer, Bob Hertzberg — were all people that I dealt with

when I was in the Governor's Office, so I really enjoyed reading about some of these people, and I think that I will send Bob Hertzberg a copy of your article because I think he'd really enjoy it. So, why don't you tell us a bit about yourself, how you came to choose this specific topic — which is a very interesting topic, but not one on the tip of the tongue of many people — and then some of your conclusions.

CARTER: Thank you, Judge. And just let me say, it is an absolute honor to be here and to thank you for the platform to present this and share our work. I am a journalist. That's what I do, so the interviews came somewhat — I don't want to say, naturally — but it was an instinct for me to reach out to people and look at fusing these interviews with the scholarship, the research. I was a Master of Legal Studies student, born in Southern California and raised in the San Fernando Valley, and so the San Fernando Valley became sort of a landscape for me to think about studying in a class that I was taking with Professor Kirk Stark, called "Cities in Distress," as part of the Master of Legal Studies program. Initially, going into it, it was not my first topic. I wanted to write about San Bernardino, of all places, and its municipal bankruptcy, because every day in this class we'd be doing postmortems on these cities that had been falling apart — economically — and the politics of these cities, and how they were sort of devolving. But Professor Stark assigned us into teams and had us do work on various cities, and one of them was San Bernardino, so it kind of stole my thunder for the paper. We had to do a project with the team, and I wanted to do a paper on San Bernardino.

So I started thinking about the concepts we were talking about in the class — redistribution of wealth in cities, distribution of services in cities — and it started getting me thinking a little bit about the San Fernando Valley and secession in particular. We were coming up on the twenty-year anniversary of when secession was on the ballot, in which this portion of the San Fernando Valley in L.A. would try to break away. It made sense to see if I could maybe go there. I had no idea really what I was getting into, but I made a call to Richard Close, who, at the time, twenty years ago, was among the leaders of this breakaway movement from the city of L.A. I just had a conversation with him like I would any story as a journalist, just maybe fishing around a little bit for a story, for an angle of some degree. I asked him, "Do you think secession could happen today, twenty years later?" and

here he was saying, "Yeah, I think this is a possibility." I didn't have a real comeback for him, but I began to think about that answer more and more.

I put it in front of my professor, and Professor Stark gave me some flexibility to use some journalism in this paper. That really inspired me to fuse this journalism with the academic research to study whether or not secession could still happen today. That's how this paper came about, and, of course, I never thought I'd end up here, particularly with Simon — we were in a class together at UCLA, and I can remember us vividly talking about our papers with each other, and I remember admiring his topic as we were just bouncing it around. Little did either of us know that some day we'd end up here. That's how this paper came about. That's the rambling version of it anyway.

KOLKEY: You studied a number of the different standards by which you could have a city break away and another municipal reorganization. Having looked at the various models for this, is there a model that you think would be a more effective and fair model for that portion of a city that feels that it's views are not being taken into consideration? Obviously, the purpose of local government is to be closer to the people to address the very local problems that, at the state level, may not seem important. One could understand how various portions of a city that's particularly large might want to break away to have a little bit more control over their local lives. So, is there another model that has not been tried that might be a fairer way, that balances the interests of the larger city, that doesn't want to lose a revenue base, with the interests of the group that feel that they have just been shut out of real democratic participation in the larger municipality's governance?

CARTER: Yes, thank you, Judge. It's a great question and one that definitely has crossed my mind. There is one important thing that came out of the secession movement twenty years ago here in L.A., and of course that was Charter reform here in the city, and while that Charter reform has garnered its own criticism, there is a sense here locally that it has brought government closer to the people. There are Neighborhood Councils that now are placed throughout the city, and the secession movement was directly responsible for that reform in the Charter. But it still is a criticized measure. Even Paula Boland, the leader of one of the initial secession movements,

just thinks it's kind of a joke and that it hasn't really worked. Richard Close felt the same way, so you still have that strain of criticism happening in the city. But there is a sense that it has brought government closer, and people are activated to participate in Neighborhood Councils locally.

The other thing that still comes up quite frequently are rumblings of secession during redistricting debates. For instance, in the recent round of redistricting in Los Angeles County, at the county level, you can still sense these rumblings of the need for the San Fernando Valley — in this vast, huge city of Los Angeles — to have its own representation, to get its own fair share. As it relates to redistricting, there's been a whole push toward creating a form of representation that better represents the San Fernando Valley on the county Board of Supervisors, at City Hall, so redistricting has become an outlet and a way for government getting closer to a more remote suburb of the city. Bob Hertzberg himself, ironically, is running for the Board of Supervisors, and he's from the San Fernando Valley, so twenty years later, he might argue that it's actually working. And it's because of redistricting that this is actually possible. I don't know if that directly answers your question.

KOLKEY: I think it's an interesting observation because redistricting is another way to bring government closer to the people, depending upon the districts. And then the question would arise, is there a reform to the redistricting within Los Angeles County, or within the City of Los Angeles itself, that would improve the feeling of representation by the people, because redistricting is a very political endeavor, which I know because I was the lead lawyer when Governor Wilson had his redistricting litigation before the California Supreme Court in 1991 and 1992. And I was involved in the actual drafting of Proposition 20 on the redistricting of congressional districts in California. So that may be a sequel to your piece, in terms of how redistricting could do something that secession is unable to do.

CARTER: Yes, it's interesting that we have citizens commissions now that are redrawing boundaries across the state and in Los Angeles County. It was the Citizens Redistricting Commission that created this last round of maps for supervisorial districts, and some would say that it was actually a fresh exercise, taken away from politicians and actually given to the people. And in some sense, people are gratified here that it was given to them.

Don't get me wrong, the citizens commissions garnered a lot of criticism, but it's a fresh look at representation and drawing boundaries.

KOLKEY: Chief, Justice Werdegar, do you have any questions for Ryan?

WERDEGAR: I'll let the Chief speak last because she speaks best. I found this article fascinating. This is an area of law that you don't really get in law school, and going back to Leah's comment on the intersection of law and politics, certainly this area speaks to that. I really was so interested in all of it — about secession and what goes into it. I also marveled, and I'm sure you were gratified, that you were able to interview these individuals, one of whom has passed — that would be Mr. Close — and Paula Boland, who've been engaged in this for almost half a century. Was it difficult to access them?

CARTER: No, actually it was surprisingly easy. Coming from the San Fernando Valley, I knew the names of some of these leaders. Also being a journalist — my company and my newspaper, we cover these parts of the region — so I knew these names. I think I even had Richard Close's number in my contacts list. When the idea came up, I'm thinking, "Okay, that number's going to come in handy for me," and so I reached out. Paula Boland was a little more difficult. I had to go through some local chambers of commerce to get to her. It's been a while since she's been engaged fully in public life.

WERDEGAR: She must be of an age — she must be elderly.

CARTER: Yes, and yet just as indignant as ever about what happened. She felt like she was right on the cusp of getting a key Senate vote on the first go at secession, and still vividly recalls the politics that went into — at the time, for her — stopping her movement. And it really reminded me that, in one of the broader themes that I thought came out of some of the reporting and the research on this, it was not only how close they came to secession, and the ability to actually change the law — there was a sense of alienation that was going on, this idea of "getting our fair share," a sense of alienation happening in this part of a large, giant city, that we don't always hear about. And yet, that sense is still there among many who led this movement, certainly with Richard Close at the time I talked to him — he

passed away early this year. You could still sense that, and these are themes of alienation that still resonate today.

WERDEGAR: L.A. is massively large. I'm from San Francisco. We used to be a small town; we're not so small now. But to grasp how large Los Angeles is, that's amazing, and your article brought that forth. I have a question. Were you going to write this paper as part of your master's or, when did you come upon the competition opportunity?

CARTER: The paper was written in the fall of 2021, and then I saw something in an email the following year, and I thought, as Leah noted, just the idea of legal history, there was a lot of history in my piece and it just seemed like it might make a good fit, and so I thought I'd give it a try.

WERDEGAR: We're very glad you did.

CARTER: Thank you, Justice. Thank you so much.

CHIEF JUSTICE: Thank you, Ryan. When you were talking with Dan and also Kay, and talking about redistricting, whenever the census happens — and even the census in and of itself is controversial, or certainly was this year, and it affected the Redistricting Commission, of course, and there were a lot of delays and requests in getting the draft maps to the citizen commissions — but no matter, as you point out, there's so much litigation about the citizen commissions or threat of it, and thinking about, as litigious a society as we are becoming, it wouldn't surprise me if there is even yet more talk about secession. We live in Northern California, and we see the "state of Jefferson," and I'm not quite sure what that is about exactly, but I wondered if you — it's a twofold question, and I wondered maybe if, after talking to the folks here with the San Fernando Valley secession, you could drill down to the nub of what feeling alienated, or not having a representative voice — could you drill down to what that was exactly? How did it manifest that it caused such strong feelings and a movement, and then, do you think there are alternative ways to try to address and mitigate and be able to actually be a functioning government?

CARTER: Thank you, Chief Justice. That is — wow. One of the things, and perhaps it's more of an emotion that I came across quite a bit, particularly in talking to people like Paula Boland and Richard Close, was this idea of the way things used to be, this idea of nostalgia, and that there was a San

Fernando Valley as part of Los Angeles that was something almost romanticized in a way, the way that it was back in the thirties, and the forties, and the fifties. That was a theme that was very pronounced in the people I spoke to. That, along with a vision of development that saw well-kept shopping centers that were very easy to get to, in neighborhoods that were very well kept and maintained — city services, and again I come back to this idea of fair share.

These themes were very pronounced, and so, when you combine that with the fervor at the time — we're talking the late 1990s, early 2000s, when Proposition 187 was very much a part of the social and political and legal milieu of the time (1994), a very anti-immigrant feeling was happening, and the concern about crime that was happening in the 1990s, this all combined and fueled this movement, and so that made the movement powerful. People like Boland, people like Richard Close, people like Jeff Brain who was his associate in leading the most recent incarnation of the secession movement, bring this up a lot. And that's still, as I say, a theme even as you talk to them today.

CHIEF JUSTICE: Thank you, Ryan. It's fascinating.

KOLKEY: We are going to turn to our third-place winner, Simon Ruhland. I believe now you've gotten your LLM from the UCLA School of Law, is that right?

RUHLAND: Yes.

KOLKEY: Excellent, and you have been awarded for your paper on "Wind of (Constitutional) Change: Amendment Clauses in the Federal and State Constitutions." I thought this was a very nicely done comparative analysis of the amendment clauses in both the federal and then various state constitutions. This was a very interesting subject. So why don't you tell us a little bit about yourself and then what motivated you to write this particular paper and then a little bit about your conclusions.

RUHLAND: It's great to see all of you, and in the case of Ryan, to see you again. Ryan and I, as Ryan mentioned, went to law school together and met there in a seminar. That seminar was part of what sparked my interest here. Coming from Germany, which is also a federal state, it's almost hard to not compare and to not do comparative law. I arrived in the U.S., and I

was marveling at all those constitutional similarities, and then when you look in the details, how different those actually are. The legal details are obviously different. We amend very differently our [German] Basic Law, but that has very political implications. I talked to my friends [in the U.S.], and almost all of them felt more or less unrepresented by the Constitution. So I decided to drill a little bit deeper on that, especially because, while the paper was written, the leak in *Dobbs* came out.

There was quite a bit of waves through national news, through legal commentary, so I started looking into how the [U.S.] Constitution came to be so rigid. I started off thinking that it seems to be a design flaw. And going through the protocols of the Convention in Philadelphia, it turns out it wasn't. It was very intentionally set up to be very hard to amend, and if it is amended this amendment power should be placed with the states. I was only half satisfied at that point, first of all, because at this point it was only an observation. I had a hunch, and I didn't like it, but I couldn't quite put my finger on it. So I turned to Bruce Ackerman, who came up with this idea of "constitutional moments," those big moments in a nation's history where supermajorities of people get together and change the course of how the constitution goes. He named a number of them. Those began with the Founding, and over time, more and more constitutional moments happened where nothing changed in the Constitution, or very little changed in the Constitution — to today, where the last constitutional amendment was passed before I was born. So that was not very satisfying.

And then I looked to the polar opposite, which is the state constitutions. A lot of things change there. California, for example, changes its Constitution on average four times a year, or passes four amendments per year, Alabama roughly eight amendments per year. That seemed to be a lot, and the results are very, very long constitutions. Alabama's Constitution is around 400,000 words long, that are just as unreflective of popular opinion, popular will. If anything can be in the constitution, how much does it still matter? I came to find one constitution that does it a little bit better, which is Delaware's, where the people don't have the power to amend the Constitution through a ballot vote [but only the state legislature], and that has tamed the Constitution of Delaware quite a bit. It has aligned it with international averages when it comes to constitutional amendments. It has also caused the [Delaware] Constitution to be relatively stable and to be

relatively short, at roughly 28,000 words, about a quarter of California's, so that's my conclusion. My conclusion is, if ever there is a constitutional convention again for the states, maybe look to Delaware. It seems to be working quite well for them.

KOLKEY: That's interesting. You're certainly right that when you've got a power of initiative to create a constitutional amendment, then you do lend yourself to a large number of amendments because it's simply a matter of finding someone who is willing to finance that ballot initiative, combined with the fact that the Attorney General's Office does a title and summary which can, in and of itself, really affect how the voters view that particular amendment. It does generate a lot of changes to the Constitution. You said in your paper that the Delaware Constitution has — I think the statistic was 1.2 amendments a year. Do you think that even 1.2 amendments a year is a little too much for a document that is meant to be the constitutional framework pursuant to which government operates? Isn't 1.2 still quite a few amendments, which suggests that you are getting the political passions of the time enacting what ought to be a greater framework that constrains what the Legislature can do, because the purpose of a constitution is really to provide some protections against the founders' concern about the tyranny of the majority. And that majority can change in any legislature, and that means that you need a framework that can constrain those passions, which can be very great at any particular time.

RUHLAND: Yes, that's definitely a huge issue. I think part of it is my own biases. Coming from Germany, we have had a relatively stable constitution over the last three-quarters of a century, and that constitution has a rate of change of about 0.9, which is not too far off from Delaware's. So I do feel that a constitution can be stable, can be protective of rights and can be restrictive of the government, while still reflecting popular opinion — the opposite effect that we have from the federal Constitution, where people feel unrepresented because certain political movements just have no chance of ever ending up making constitutional law.

That being said, I think this is where this quantitative analysis, that I did relatively early — political scientists would tell me — breaks down, because those 1.2 amendments don't tell us what parts of the Constitution are amended. Certainly, a catalog of civil rights is hardly ever subject to

change, especially not subject to taking away protections. It's more likely that protections are added — marriage equality, example. Once we get to that part of the analysis, I believe we have to look a little bit closer: what is actually amended, are core features of the constitution that restrain the executive or the legislative branch amended, or — turning to the worst — are civil rights amended, or is the constitution just updated? I believe there is quite a difference there. And obviously there are the most harmless amendments, little technical fixes, updates to current language, etc. But I do believe that once we look into the details here and to this tiered constitutional design, that we do see that those 1.2 amendments per year are still creating stability, rather than instability through an overwhelmingly long constitution.

KOLKEY: Chief, do you want to ask any questions of Simon?

CHIEF JUSTICE: Simon, I find that to be a fascinating subject because, if we look at the United States Constitution and the ten Bill of Rights amendments, it was seventy-two years later until we saw another amendment. And it took a civil war, brother against brother, for even the trigger of those amendments, the Reconstruction amendments. I really just have an observation, and I think you are absolutely right. We are grappling in our courts now — Kay will be familiar with this — with which article controlled. I won't say which articles, since that would give away the case. We have dueling provisions that were added by different initiatives, and now we wonder if the latest enacted one repealed the former one, or can we harmonize it? And then we also ask ourselves, because the last amendment enacted in this particular area had a competing ballot measure, and so we ended up choosing which ones had the most votes — right now, we have remanded something like that to the lower courts, to percolate and think about the idea before the California Supreme Court takes it on.

But because the Constitution is so large and so varied in California, for example, we engage in this legal construct that, when the voters pass an amendment to our California Constitution, we presume they know the law and the Constitution when they enacted it. So we assume they meant to harmonize, or we assume knowledge for purposes of moving forward with an interpretation of the latest amendment. It is quite unwieldy, I would say. The California Supreme Court is the final word on initiatives, at least when

they are voted upon by the people. Sometimes we look like the bad guy, for interpreting an initiative in a way that might be contrary to what the people thought they were voting for. I think that history is fascinating, and I think the comparison is worth studying — and thinking about restraint in the future. Thank you.

RUHLAND: Thank you for those observations.

WERDEGAR: These papers are sort of related. Our first-place winner is speaking about the voice of the people as really the fourth court, and, as the Chief referenced, in California we have this incredibly easy way of amending the Constitution, so they are related. I was wondering, Simon, if you and your friend Ryan had known each other, and here it turns out you did. You are both our prizewinners, and we're very glad. Also, a question to you, are you established now in the United States or are you taking all this wisdom and education back to Germany?

RUHLAND: No, I'm back in Germany right now. I'm in Berlin. I'm clerking here for the higher regional court.

WERDEGAR: Oh, my!

RUHLAND: That's going to keep me busy for the next two years, and then I will, hopefully, head back to grad school and do a Ph.D.

WERDEGAR: In California?

RUHLAND: I don't know yet, wherever it will take me.

WERDEGAR: Wherever it will take you! I'm sure you'll have no problem. I found your paper very interesting, and some of the observations you made, such as that constitutional moments are not reflected in the amendments. That's absolutely true, but to phrase it that way really brings it home. The Constitution is one thing, and the changes — as we see with the recent term of our United States Supreme Court — are not happening by way of constitutional amendments. So, that's by way of saying I enjoyed your paper; I found it very informative. I found all of these papers sort of interrelated in a way, the coming together of law and politics — they're never separate — but also touching on one relates to the other. So I want to thank you for your paper, congratulate you on your degree, and wish you the best of luck.

RUHLAND: Thank you very much.

KOLKEY: I want to turn to the Chief for any final remarks before we close this ceremony.

CHIEF JUSTICE: Thank you, Dan. Well, it's been a pleasure to spend time with you and having this engagement and see and hear and read your minds at work. For all that's happening in this fluid and dynamic world, I know all of us are heartened by knowing that you're thinking about it, and you're writing and you're putting your thoughts out for everyone to share, and so by publication in our journal, rest assured that you will meet like minds, that your ideas will resonate and inspire. And in the name of our founder for this essay contest, Selma Moidel Smith, we couldn't be more honored. There are more geniuses in the making. Thank you for your work.

KOLKEY: Let me conclude by thanking the Chief for your time today, your leadership, and your wisdom throughout your career, and the same to Justice Werdegar. Thank you for being here today and, again, for all your contributions and jurisprudence that you have provided to the state of California. I want to thank Leah, and Ryan, and Simon for your contributions to California's legal scholarship, which I think are tremendous, and let me just conclude with some words of advice from Abraham Lincoln, who of course was himself a lawyer. Lincoln said that the leading role for the lawyer is diligence, and he also said, "Discourage litigation. Persuade your neighbor to compromise whenever you can." And I think both pieces of advice would serve any attorney as he or she begins his or her career to follow, because I think it's very sound advice. So, thank you, and congratulations as our award winners. We're adjourned.

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MORE THAN MORATORIUMS?

The Obstacles to Abolishing California's Death Penalty

LEAH HABERMAN*

INTRODUCTION

When someone speaks of California, they conjure images of the state's beautiful coastline, Hollywood's movie stars, Silicon Valley's innovation, and Sacramento's progressive policies. California maintains its reputation as a liberal bastion and progressive leader on climate, minimum wage, and a whole range of issues. None of this matters to the more than six hundred people in California sentenced to death. California's tide of progressive idealism stops at death row's shores.

Due to both judicial rulings and political movements, the death penalty remains the law of the land. This means the state has the constitutional power to execute people sentenced to death by a jury of their peers. This is not to say California executes people right and left. California has not executed anyone since 2006,[1] and current Governor Gavin Newsom issued

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[1] *History of Capital Punishment in California*, Cal. Dept. of Corr. and Rehabilitation, at https://www.cdcr.ca.gov/capital-punishment/history.

a moratorium on the death penalty just months after taking office.[2] In February of this year, Governor Newsom announced that he'd dismantle the state's death row and move all the inmates to other prison units.[3] Dismantling death row sounds perfectly in line with California's progressive policies, but this executive action does nothing to stop prosecutors from seeking the death penalty in capital murder cases. The governor cannot abolish the death penalty on his own.[4] Abolition must come from either a proposition passed by the majority of Californians, the California Supreme Court ruling the death penalty statute unconstitutional, or a new law passed by the Legislature and signed by the governor. Until then, the death penalty remains in the California Constitution. This leaves the men and women with capital punishment sentences in a precarious position with their lives tied to how long the governor's moratorium lasts.

Elections feel like life or death for many people, but it is literally true for those with capital sentences in California. Governors are term-limited, and following Governor Newsom there is no guarantee that the moratorium on the death penalty will continue. This is why anti–death penalty advocates are calling for abolition. The call has not been answered. Ballot initiatives, progressive legislation, and judicial decisions have all failed to eradicate this blight on California's progressive reputation.[5] The obstacles that have squelched abolition efforts in the past remain just as poignant in the present, which does not bode well for the future. Because of the power of public opinion and continued support for the death penalty from the majority of Californians, *California's death penalty is not going anywhere anytime soon*.

In this paper, I will analyze the history and trends of California's death penalty to extrapolate how neither legislative nor judicial abolition

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[2] *Governor Gavin Newsom Orders a Halt to the Death Penalty in California*, Office of California Governor Gavin Newsom (Mar. 13, 2019), *at* https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california.

[3] *California Governor Gavin Newsom Orders Dismantling of State's Death Row*, Death Penalty Information Center (Feb. 1, 2022), *at* https://deathpenaltyinfo.org/news/california-governor-gavin-newsom-orders-dismantling-of-californias-death-row.

[4] *Id*.

[5] *Death Penalty Report*, Committee on Revision of the Penal Code (Nov. 2021), http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf.

is feasible in the current environment. First, by outlining the decades-long back-and-forth between the different branches of government, I'll show how the current law has been crafted to be almost fully immune from an Eighth Amendment challenge to its constitutionality. By exhausting the legal arguments, I'll show how both legislative and judicial action is limited by the power of public opinion, and how public opinion still favors the continuation of the death penalty. Finally, I'll end by acknowledging that despite these very real challenges to abolition, there are opportunities to change public opinion and to bring legal challenges under the Sixth Amendment.

I. A TRIUMPH OF REVISION: WHY THE CURRENT CALIFORNIA DEATH PENALTY STATUTE IS ALL BUT IMMUNE TO AN EIGHTH AMENDMENT CHALLENGE

California exports ingenuity around the world. Silicon Valley's startup community comes up with new ideas on a daily basis, but not all of them are successes from the start. Sometimes, even the most brilliant ideas fall short when faced with reality, and that's when it's time to go back to the drawing board until the feedback loop of revision comes up with a better outcome. Taking a page out of Silicon Valley's book, the feedback loop between the different branches of government has fine-tuned and perfected a death penalty statute that is likely beyond judicial reproach on Eighth Amendment grounds.

Because of California's ballot initiative process, there are four branches of government that shape California's laws: the executive, the legislature, the courts, and the people. The branches are constantly in conversation with each other, the California Supreme Court striking down laws passed by the Legislature, the people passing laws to bypass the Court's rulings, and so on and so forth. The tale of California's death penalty is a dance between the different branches, but now the feedback loop has reached its pinnacle. The people of California refused to abolish the death penalty through referendum in 2016.[6] Despite a Democratic trifecta in the state

[6] *Id.*

legislature, no abolition bill has passed.[7] And in 2021, the California Supreme Court re-affirmed the constitutionality of the state's death penalty scheme.[8] All the branches with the power to change the status quo are speaking in one voice: this version of the death penalty is here to stay.

The goal of this section is to articulate the timeline and trajectory of different challenges to California's death penalty, in order to show that the trend in the tea leaves is that California's modern death penalty law is likely to sustain any Eighth Amendment challenge. This section will first outline the feedback loop between the courts, the Legislature, and the people that culminated in Proposition 7, passed in 1978, and remains California's death penalty scheme. Then this section will examine the ways in which abolitionists challenged the death penalty in light of the passing of Prop. 7. Once it became clear that the death penalty itself was not inherently unconstitutional, abolitionists turned their attention to attacking the way the death penalty was carried out. After challenges to the mechanisms of execution were no longer feasible, most challenges in California moved away from direct Eighth Amendment challenges and tried to get at it through the Sixth Amendment. This too failed, in *People v. McDaniel*, the 2021 decision that reaffirmed the constitutionality of California's death penalty.

A. Getting to Briggs*: The Feedback Loop to California's Current Death Penalty Statute*

California's current death penalty statute emerged out of the 1970s tug-of-war between legislatures and courts. Its existence emerged from an obstacle course of changing judicial precedent and legislative maneuvering. Prior to the mid-1900s, the death penalty existed in California without much fanfare, similar to the rest of the country.[9] Public hangings dated back to the start of the nation,[10] and the country continued to operate under the

[7] Alexei Koseff, *Is this another way to end California's death penalty?*, Cal Matters (Feb. 9, 2022), *at* https://calmatters.org/politics/2022/02/california-death-penalty-end.

[8] Don Thompson, *California Supreme Court upholds death penalty rules*, Associated Press (Aug. 26, 2021), *at* https://apnews.com/article/courts-california-race-and-ethnicity-c9f9b3d6bcd04f3a8ac6d69d56b59a47.

[9] Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.

[10] *Early History of the Death Penalty*, Death Penalty Information Center, *at* https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty.

presumption that some crimes are so heinous that they warrant the death penalty. Most Americans accepted, and still accept, capital punishment as just another feature of their legal system.[11]

Early death penalty abolitionists viewed the Eighth Amendment as their best chance to eradicate the death penalty from the American criminal justice system. The Eighth Amendment protects individuals from cruel and unusual punishment by the government. Abolitionists argued that the death penalty is state-sanctioned murder, and is no different in practice than the murders these individuals are convicted of.[12] Their argument contended originally that all murder constitutes "cruel and unusual punishment" and is therefore a violation of the U.S. Constitution's Eighth Amendment.[13] The United States Supreme Court cited the longstanding history of capital punishment in the United States as a means to legitimize its future use.[14] However, the Court did not allow the past to retain a stranglehold on contemporary practices of punishment. In *Trop v. Dulles*, the Supreme Court altered the trajectory of Eighth Amendment jurisprudence by stating the analysis should be based on "evolving standards of decency that mark the progress of a maturing society" and not just how things have always been done.[15] The 1958 holding in *Trop* reinvigorated abolitionists, bringing a new wave of suits that would force judges to decide if the death penalty comported with evolving standard of decency despite its long history in this country.[16]

Capital punishment continued to survive federal challenges, with the Court reluctant to find that the death penalty violated the Eighth Amendment.[17] However, in a victory for true textualism, the California Supreme Court changed the structure of its analysis and found California's death

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[11] *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, Pew Research Center (June 2, 2021), *at* https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration.

[12] *The Case Against the Death Penalty*, ACLU (2012), *at* https://www.aclu.org/other/case-against-death-penalty.

[13] *Id*.

[14] Gregg v. Georgia, 428 U.S. 153, 168 (1976).

[15] Trop v. Dulles, 356 U.S. 86, 87 (1958).

[16] Robert M. Bohm, DeathQuest: An Introduction to the Theory and Practice of Capital Punishment in the United States (5th ed., 2015).

[17] Laura E. Randa, Society's Final Solution: A History and Discussion of the Death Penalty (1997).

penalty unconstitutional in *People v. Anderson*. In this 1972 decision, the California Supreme Court looked at the specific diction of the California Constitution and distinguished its language in Article 1, section 6 of "cruel or unusual" from the Eighth Amendment's language, "cruel and unusual."[18] One small conjunction opened the door to the Court's holding that the death penalty violated the California Constitution.

In *Anderson*, the Court used *Trop*'s "evolving standards of decency" approach to reason that, despite the history of executions in California, the death penalty was now barbaric to modern sensibilities of punishment and so infrequently used that it was both cruel and unusual.[19] The Court articulated every point that abolitionists had been making: citing the psychological harm of prolonged appeals, the lack of evidence of any additional deterrence effect, and the inherent cruelty in the ability of the state to take a life. The Court went further in its role as the sole arbiter of constitutionality by stating, "public acceptance of capital punishment is a relevant but not a controlling factor," pushing aside the evidence provided by the state of popular support for the death penalty.[20] However, public opinion ultimately won out against the Court's decision in *Anderson*. The people of California would not allow *Anderson* to have the last say.

Just a few months later, the people of California passed Prop. 17, a ballot initiative bringing the death penalty back to life.[21] Prop. 17 passed with 67 percent of the vote and, just like that, *Anderson* was a thing of the past.[22] However, the ping ponging continued because, just before Prop 17 could be enacted, the U.S. Supreme Court found in *Furman v. Georgia* that all death penalty statutes that were applied in an arbitrary manner were unconstitutional.[23] Not deterred, pro–death penalty leaders went back to the drawing board. In order to avoid any conflict with *Furman*, the California Legislature enacted a mandatory death penalty scheme for certain crimes.[24]

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[18] People v. Anderson, 6 Cal. 3d 628 (1972).

[19] *Id*. at 648.

[20] *Id*. at 633.

[21] *California Proposition 17, Death Penalty in California's Constitution (1972)*, Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972).

[22] *Id*.

[23] *Death Penalty Report*, *supra* note 5, at 13.

[24] *Id*.

This took the sentencing power out of the hands of juries and placed it with the Legislature. The Legislature designated certain crimes as the most heinous and deserving of the death penalty regardless of the individual's circumstances. These individual circumstances, such as an abusive childhood or mental distress at the time of the crime, are called mitigating circumstances. A mandatory sentencing structure ignores the existence and the importance of mitigating circumstances.

The Court again acted as a check on legislative power when, in *Rockwell v. Superior Court*, they found the mandatory death penalty and the inability of mitigating circumstances to be factored into sentencing a violation of the Eighth Amendment.[25] Their reasoning followed the 1976 Supreme Court decision in *Gregg v. Georgia*.[26] The reasoning in *Rockwell* reflected the value the Court places on sentencing discretion for both judge and jury. They concluded that the intention of the framers with regard to the Eighth Amendment centered on the human dignity of every person, and that to dole out the highest form of punishment without any chance for the jury to weigh individualized circumstances and history denies the very humanity the amendment seeks to protect.[27] The dance between branches continued.

Intent on preserving the death penalty despite judicial rebuttals, Californians passed Prop. 7 in 1978. Prop 7, referred to as the Briggs Initiative after its sponsor State Senator John Briggs, crafted a death penalty statute that raised the maximum sentence for an increased number of crimes to include capital punishment.[28] It also expanded the list of aggravating circumstances that would trigger the possibility of capital punishment. The campaign supporting the proposition framed it as the most inclusive capital punishment scheme in the nation, seeking to punish every kind of murder.[29] Prop. 7 passed with 71 percent of the vote,[30] a clear statement of

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25 Rockwell v. Superior Court, 18 Cal. 2d 420 (1976).

26 *Id*.

27 *Id*. at 428.

28 *Death Penalty Report*, *supra* note 5, at 13–14.

29 *Id*.

30 *California Proposition 7, Expand Death Penalty and Life Imprisonment for Murderers Initiative (1978)*, Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_7,_Expand_Death_Penalty_and_Life_Imprisonment_for_Murders_Initiative_(1978).

widespread public support for a harsh death penalty. The death penalty scheme created under Prop. 7 is still the law of the land.

The statute created by Prop. 7 calls for a three-part analysis by the jury.[31] First, it calls for the jury to find that the defendant committed a qualifying crime, most often first-degree murder, beyond a reasonable doubt.[32] Next, the jury must find an aggravating factor that warrants the death penalty such as its being committed in conjunction with another felony like rape or robbery.[33] Finally, the jury must then conduct a balancing test, weighing the mitigating circumstances against the aggravating factors, in order to determine if the mitigating circumstances are such that the jury finds the death penalty would be an inappropriate sentence.[34] The three-part construction of the law results from the back-and-forth between the branches of government. Mindful of the California Supreme Court's decisions in *Anderson* and *Rockwell* as well as the Supreme Court's recent holdings, the drafters of Prop. 7 created a law that allows enough discretion, without being too arbitrary, to survive judicial scrutiny to this day.

B. Fine Tuning the "Machinery of Death"

The passage of Prop. 7 with such a wide margin of victory sent a clear message. The people of California were okay giving their government the power to execute people. Once it became clear that a challenge to the state's ability to execute individuals would be unsuccessful, abolitionists changed their tactics from attacking the death penalty itself to challenging the ways it was carried out.[35] The next wave of challenges used the logic that if the manner in which the state kills people is unconstitutional, then it would have to cease killing people — the same result as if the law itself was found unconstitutional.

Through the 1990s, California executed people using cyanide gas in a gas chamber.[36] Starting in the early '90s, the state allowed those sentenced to die to choose between lethal gas and lethal injection.[37] Then, in *Fierro v.*

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31 *Death Penalty Report*, *supra* note 5, at 14.

32 *Id.*

33 *Id.*

34 *Id.*

35 Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.

36 *Id.*

37 *Id.*

Gomez, the Ninth Circuit upheld a California district court decision that the use of cyanide gas in executions violated the Eighth Amendment.[38] The District Court's decision focused on factual findings that those killed with cyanide gas suffered incredible amounts of pain for what could be several minutes.[39] The testimony of expert witnesses refuted the state's claims that lethal gas was painless for the inmate, "like falling asleep." Instead the facts showed that unconsciousness was not immediate, and the person would feel like they were suffocating from the lack of oxygen, and then would feel the full effects of the poison on their cells as they drift in and out of awareness.[40] Based on these findings, the Ninth Circuit found California's lethal gas mechanism unconstitutional under the Eighth Amendment.[41] However, California statute provided that if lethal gas became constitutionally unavailable then lethal injection would be the default mechanism.[42]

Once lethal injection became the default, the abolitionists focused on challenging lethal injection as an Eighth Amendment violation. In 2006, the District Court of Northern California turned abolitionists' dreams into reality in *Morales v. Tilton*. They found that California's lethal injection procedure violated the Eighth Amendment because the drug cocktail was administered in such a way that unconsciousness was not guaranteed, and it is an accepted fact that injecting a conscious person would constitute cruel and unusual punishment.[43] The District Court cited failures in the execution team's credentials and training along with other administrative issues.[44] The Governor's Office issued an order to the Department of Corrections and Rehabilitation to address the following issues: inconsistent and unreliable screening of execution team members; a lack of meaningful training, supervision, and oversight of the execution team; inconsistent and unreliable recordkeeping; improper mixing, preparation, and administration of sodium thiopental by the execution team; and inadequate lighting, overcrowded conditions, and poorly designed facilities in which

38 *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).
39 *Id.*
40 *Id.*
41 *Id.*
42 Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.
43 *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006).
44 *Id.*

the execution team must work.[45] The CDCR submitted proposed revisions to its execution procedure addressing each of the points above.[46]

Although there continued to be challenges about how effective the CDCR's revisions were in actually changing California's execution procedures, lethal injection challenges, nationwide, were dealt a heavy blow by the 2015 Supreme Court decision in *Glossip v. Gross*. In a challenge to Oklahoma's lethal injection procedure, the Supreme Court squelched abolitionists' hopes that through attacking the means, lethal injection, they could attack the end, the death penalty. The case ruled that as long as the death penalty was constitutional then there needed to be constitutionally valid ways to carry it out.[47] Justice Alito insulated further lethal injection challenges by stating that, unless there was a proven better way of carrying out the execution, the Court would give deference to the mechanism of execution chosen by the state.[48] *Glossip* crushed the last glimmer of hope for abolitionists to find relief in the judicial system. Most states use lethal injection, firing squad, or lethal gas, or offer options of the above mechanisms. Eighth Amendment challenges to the death penalty itself and to the mechanisms of execution now face the monumental hurdle of fine-tuned laws backed by Supreme Court precedent. The Supreme Court shows no signs of changing its position on the death penalty or on lethal injection, and without a national jurisprudence shift, the California Supreme Court's options remain limited. It is Sisyphus at the bottom of the mountain once again.

C. A Change in Tactics: A Surrender of Sorts

In 2021, the California Supreme Court affirmed the constitutionality of the state's death penalty law. The Court in *People v. McDaniel* was neither looking to see if the death penalty itself nor lethal injection constituted "cruel and unusual" punishment. Instead the defendant's claim was that the three-part structure of capital sentencing in California as articulated earlier in this section violated his Sixth Amendment rights.[49] *McDaniel*

45 *History of Capital Punishment in California*, *supra* note 42.
46 *Id*.
47 *Glossip v. Gross*, 576 U.S. 863 (2015).
48 *Id*.
49 *People v. McDaniel*, 12 Cal. 5th 97 (2021).

argued that each part of the proceeding — the determination of guilt, the aggravating factor analysis, and the mitigating factors balancing test — were all questions of fact for the jury and thus all needed to meet the burden of "beyond a reasonable doubt."[50] The court did not agree, stating that such a standard was for the first part of the test alone.[51] If this sounds to you like a vast divergence from the jurisprudence cited earlier in this section, you'd be right. Abolitionists are now trying to eliminate the death penalty through other amendments because the Eighth Amendment arguments have reached a dead end. The arguments presented in *McDaniel* will be explained later in this paper, but the change that *McDaniel* represents in the legal arguments used by abolitionists marks a clear end to this chapter of Eighth Amendment jurisprudence.

In conclusion, any successful challenge to California's death penalty will have to come from somewhere besides the Eighth Amendment. It is still open for debate if any other types of legal challenges will prove to be fruitful in the future.

II. THE POWER OF PUBLIC OPINION: A FICKLE POWER

The California Supreme Court is not the most influential court in the state. That title belongs to the court of public opinion. By virtue of being a democracy, we are a nation beholden to the whim of opinion rather than facts. Those who hold the power of persuasion hold the ultimate power. The tug-of-war between death penalty abolitionists and retentionists is really a war to control the narrative. Both sides know that neither the California Legislature nor the California Supreme Court will abolish the death penalty until Californians clearly decide they no longer want the death penalty.

California's recent history weighs against abolitionists. In 2012, California voters decided to keep the death penalty when Prop. 34 was on the ballot.[52] Fifty-one percent of Californians voted to keep the death penalty

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[50] *Id.*

[51] *Id.*

[52] *California Proposition 34, Abolition of the Death Penalty Initiative (2012)*, Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012).

that year, the same year that President Obama was on the ballot. However, even liberal President Obama never came out against the death penalty during either of his campaigns.[53] The failure of Prop. 34, which would have ended the death penalty, shocked many because even State Senator Briggs, the sponsor and the face of Prop. 7, supported abolishing the death penalty. He wrote in an editorial that he no longer supported the death penalty in California because no one was being executed, yet the cost of capital appeals continued to burden taxpayers.[54] Popular support or disdain for the death penalty was largely abstract and unrelated to the executions themselves.

Keep in mind, no one had been executed in the state since 2006. In 2016, the death penalty was once again on the ballot in Prop. 62, and once again Californians voted to keep it.[55] This time, 53 percent of Californians voted to keep the death penalty, contradicting the narrative that California was becoming more progressive and that more people opposed the death penalty than ever before. Ballot initiatives are an expensive battleground for the messaging war. Anti–death penalty advocates spent $10 million on Prop. 62.[56] Pro–death penalty advocates spent $12 million.[57] Ultimately that is $22 million spent on a proposition about a punishment that hadn't been carried out in the state in over a decade.

Unless something drastically changes to shift the tide of public opinion, abolitionists will be wary of spending millions on another failed proposition. However, without a proposition to abolish the death penalty, the death penalty will remain on the books in California. Every avenue for abolition is subject to the power of public opinion. Legislators do not want to get ahead of voters on any issue. It is reminiscent of the often-quoted observation attributed to Alexandre Auguste Ledru-Rollin during the French

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53 Josh Gerstein, *Death Penalty Decisions Loom*, Politico (June 21, 2009), *at* https://www.politico.com/story/2009/06/death-penalty-decisions-loom-023974.

54 Ron Briggs, California's death penalty law: It simply does not work, Los Angeles Times (Feb. 12, 2012), https://www.latimes.com/archives/la-xpm-2012-feb-12-la-oe-briggs-death-penalty-20120212-story.html.

55 *California Proposition 62, Repeal of the Death Penalty (2016),* Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016).

56 *Id.*

57 *Id.*

Revolution of 1830: "There go my people. I must find out where they are going so I may lead them."

Unfortunately, this is not just true of the legislative branch. The judicial branch, the safe haven of minority opinion, the least political branch, is still a victim of public opinion. In California, judges maintain their seats on the bench through retention elections. It's a lethal combination. Public opinion failed to abolish the death penalty with Propositions 34 and 62, and both the legislative and judicial branch will take their cues from such failures. Again, it is the feedback loop between the different branches of government. However instead of ping-ponging legislation back and forth, public opinion acts like a domino force, getting all branches to fall in line. The subsequent sections will explore in depth the hurdles that public opinion creates for both legislative and judicial abolition.

A. Legislative Abolition: Tougher on Crime

Every politician, no matter their political affiliation, fears being smeared with the "soft on crime" brush. For decades, politicians have bolstered their election credentials by touting how "tough on crime" they are. It's an easy appeal to make to voters: "I want to keep you safe. I want to put the bad guys away," and it's all too easy to distort criminal justice reform as dangerous: "If criminals aren't in prison, they are on the streets." Republican strategists used that exact messaging during the 2022 primary elections.[58] Both Democrats and Republicans are trying to seem tough on crime ahead of the 2022 elections.[59]

Republicans are optimistic that 2022 could be the backlash to California's trend toward progressive criminal justice reform.[60] Over the past few years, California passed legislation decriminalizing drug use and shortening sentences, and it joined the national progressive call for less prosecutorial and police discretion.[61] This should have given death penalty

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[58] Phil Willon & Hannah Wiley, *Why Crime is at the Center of California Elections this Year*, Los Angeles Times (Mar. 2, 2022), https://www.latimes.com/california/story/2022-03-02/crime-debate-center-california-election-season.

[59] Dan Walters, *California politicos now talking tough on crime*, Cal. Matters (Jan. 19, 2022), *at* https://calmatters.org/commentary/2022/01/california-politicos-now-talking-tough-on-crime.

[60] Willon & Wiley, *supra* note 58.

[61] *Id.*

abolitionists the momentum they needed to think the time was ripe for another proposition. However, it likely had the opposite effect.

Nationally, 2020 saw a 30 percent rise in homicide rates. California's Republicans were ready to make 2022 the referendum on liberal criminal justice policies. Republicans' messaging blames the recent increases in homicide and property crime on the criminal justice reforms passed in 2014 and 2018. Republican candidate for governor Brian Dahle campaigns with the message that liberal policies are costing people their lives and taxpayers their dollars.[62] Public opinion polling shows that Californians are more concerned about crime than in recent years.[63] It's a risky time to be seen as soft on crime as a Democrat. The political risk is too high. To strongly advocate for death penalty abolition in a political climate where people are now considering overturning other forms of sentencing reform is political suicide.

B. Politicized Prosecution

California elects its prosecutors. California has fifty-eight elected district attorneys, one for each county.[64] Elected prosecutors are not unique to California, but they present additional challenges to abolitionists. Prosecutors play an important role in shaping the political narrative around crime in their communities.[65] They can point to victims' families and paint themselves as white knights riding in to ensure justice is brought. Because of these narratives, people tend to believe what prosecutors tell them about the criminal justice system.

Prosecutors use their credibility as a messaging tool. They point to the "practical" considerations and challenges of doing their job. Conservative prosecutors have said they need the flexibility that the death penalty provides.[66] They've stated that with the death penalty on the table, they

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62 *Id.*

63 Mark DiCamillo, *Voters offer a wide range of issues they'd like the state to address* (Institute of Governmental Studies, UC Berkeley, Release #2022-08, Apr. 14, 2022), https://escholarship.org/uc/item/7sn293xs.

64 *Meet Your DA Campaign*, ACLU Foundations of California (2018), *at* https://meetyourda.org.

65 *Id.*

66 Elizabeth Renter, *The Death Penalty and The Ugly Power of Prosecutors*, The Crime Report (Mar. 25, 2011), *at* https://thecrimereport.org/2011/03/25/2011-03-the-death-penalty-and-the-ugly-power-of-prosecutors-2.

are better able to negotiate plea bargains.[67] Just days ago, at the time of this writing, the San Francisco district attorney was recalled (the process in which voters revoke their support and remove an elected official from office).[68] His recall was branded as a rebuttal to "lenient prosecution."[69] People saw him as too soft on crime, even people in one of the most liberal cities in the country. This is emblematic of the risks prosecutors take in this hyper-partisan debate on criminal justice by supporting progressive policies. Given this current environment where politicians are walking the tightrope between the recent "defund the police" narrative and the continued "tough on crime" narrative, the winds of change on the death penalty might blow anti–death penalty leaders right off the rope.

C. Checks Without Balances

The founding fathers feared mob rule. They feared the tyranny of the majority. They decided that one branch of government, the judicial branch, would be the check on the more political branches. However, the myth of an independent judiciary crumbled when judges started being on the ballot. In California, the governor appoints members of the state Supreme Court, but to retain their seats, they must be elected in what's called a "retention election." This means that every time a justice of the California Supreme Court is penning a decision, they know that their opinion could be used against them the next time they are on the ballot.

Rose Bird, California's first female chief justice and one of the most progressive people to sit on that bench, was not retained by California voters in 1987.[70] She was a strong advocate against the death penalty.[71] She reviewed sixty-five capital cases, and voted to overturn the death penalty each time.[72] She found legal technicalities to couch her decisions in, and

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[67] *Id*.

[68] Jeremy B. White, *San Francisco district attorney ousted in recall election*, Politico (June 8, 2022), *at* https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002.

[69] *Id*.

[70] *The Campaign Against Rose Bird*, Death Penalty Focus (Nov. 4, 2016), *at* https://deathpenalty.org/the-campaign-against-rose-bird.

[71] *Id*.

[72] *Rose Bird ProCon.org: The Death Penalty*, Britannica ProCon.org (accessed June 30, 2022), *at* http://www.rosebirdprocon.org/pop/DeathPenalty.htm.

was never the sole dissenting voice on a death penalty case.[73] Conservatives painted her as hyper-partisan and failing to fulfill her duty as judge, rather than as a policymaker.[74] The people of California wanted a death penalty, and they did not want a chief justice who was unwilling to support it. She served as an example to future judges that in California even the courts are subject to public opinion. A Reuters report found that elected judges reverse death penalty sentences at less than half the rate of appointed judges.[75] The same analysis found that judges who are first appointed and then must keep their seats through retention elections reverse 15 percent less than appointed judges.[76] Despite the idea of checks and balances, it is clear that when judges face elections they make decisions informed more by politics than by legal reasoning.

Changing public opinion on the death penalty remains the North Star for abolition movements. By changing public opinion even by a small margin, the outcome of the next death penalty ballot initiative could be wildly different. By changing public opinion, legislators who support abolition in private will be willing to sponsor bills and declare their support publicly. By changing public opinion, California Supreme Court justices who have already expressed their dissatisfaction with California's death penalty can strike down the laws without fear of being ousted. By changing public opinion, everything in California death penalty politics could change.

III. GLIMMERS OF HOPE

A. The Battle over Narrative

If public opinion is the crux of the problem, then it is also the opportunity. Abolitionists across the country continue to employ a variety of strategies

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[73] *Id.*

[74] Cynthia Gorney, *Rose Bird and the Court of Conflict*, The Washington Post (Apr. 8, 1986), https://www.washingtonpost.com/archive/lifestyle/1986/04/08/rose-bird-and-the-court-of-conflict/d391da7f-33dd-4fa5-87b2-a7c79e62e048.

[75] Dan Levine & Kristina Cooke, *In states with elected high court judges, a harder line on capital punishment,* Reuters Investigates (Sept. 22, 2015), *at* https://www.reuters.com/investigates/special-report/usa-deathpenalty-judges.

[76] *Id.*

to change the public perception of the death penalty. They focus on the emotional, fiscal, and logistical arguments.

From 1989 to the early 2000s, two hundred people had been wrongfully convicted of a serious crime in California.[77] This means that among those wrongfully convicted were people sentenced to death but later exonerated through Section 1983 innocence claims. Although the California Supreme Court now affirms most death penalty sentences, these are often overturned in federal court. Abolitionists make the argument that it tarnishes the credibility of California's legal system to punish innocent people and to be contradicted by federal courts.[78]

One of the original arguments for the use of the death penalty focused on the deterrence factor. However, studies continue to refute the argument that the death penalty serves as a greater deterrence to crime than a life sentence.[79] There's no conclusive evidence that the risk of a death sentence factors into a person's decision to commit a crime.[80]

Opinion pieces continue to be penned citing data point after data point that the death penalty is a costly and inefficient use of taxpayer dollars. The cost argument fueled Prop. 66 which passed in 2016. Prop. 66 shortened the appeals process for death sentences, attempting to "streamline" the process.[81] People lamented that the lengthy appeals process drove up the cost unnecessarily, and now because of Prop. 66 there's a directive to resolve capital cases in five years or less. Even current California Supreme Court justices have cited the high cost and dysfunctional nature of the system.[82] The cost argument stretches beyond the cost of appeals. The cost to acquire lethal injection drugs also plays into the conversation.

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77 *Fact Sheet on Wrongful Convictions in CA*, ACLU Northern California (Dec. 1, 2006), *at* https://www.aclunc.org/publications/fact-sheet-wrongful-convictions-ca.

78 *Death Penalty Report*, *supra* note 5, at 15.

79 *Studies on Deterrence, Debunked*, Death Penalty Information Center (accessed June 30, 2022), *at* https://deathpenaltyinfo.org/policy-issues/deterrence/discussion-of-recent-deterrence-studies.

80 *Id*.

81 *Death Penalty Report*, *supra* note 5, at 31–33.

82 Steve Gorman, *Two California Supreme Court justices decry death penalty as 'dysfunctional,'* Reuters (Mar. 28, 2019), *at* https://www.reuters.com/article/us-usa-california-death-penaty/two-california-supreme-court-justices-decry-death-penalty-as-dysfunctional-idUSKCN1RA05Z.

The cost arguments have been the most effective in bringing conservatives to the table. In Utah, the libertarian think tank, the Libertas Institute, is one of the loudest anti–death penalty voices in the state. They advocate for a small government that carefully uses taxpayer dollars, not a government so big it has the power to kill people while costing taxpayers millions.[83]

In California, specifically, there's the argument of living up to the values of the state. Abolitionists press the point: can California really call itself progressive if it still has a death row? This is especially poignant for the racial justice argument used in California and around the country. The death penalty is disproportionately handed down to Black and Brown defendants for the same kinds of crimes committed by Whites.[84] President Obama qualified his support for capital punishment with his concerns of its racist application.[85] The racism in the death penalty's application has been an effective tool in engaging progressive elected officials.

There's hope that Governor Newsom's 2022 Executive Order to move all death row inmates to lower security units that allow them more freedom and opportunities will slowly change public opinion.[86] Since California does not actively execute people, death row exists as a symbol and as a threat. Once the threat no longer looms like the grim reaper in California's prisons, abolitionists hope that people will realize it did not do much to begin with.[87] It's easier to abolish something that you have no emotional connection to, and abolitionists believe that this executive order will dissolve whatever emotional connection is left to the death penalty.

Each of the approaches articulated above has slowly moved the needle on public opinion, but there's a long way to go. In a public opinion poll conducted in April 2022, crime was listed as one of Californians' top concerns. As long as there are fears to play on, pro–death penalty advocates will play to those fears. Fear of crime plays to our most irrational selves, and so rational arguments about cost, innocence, and racial justice go out the window.

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83 *A Case Against the Death Penalty*, The Libertas Institute (May 17, 2022), *at* https://libertas.org/justice-and-due-process/a-case-against-the-death-penalty.

84 *Death Penalty Report*, *supra* note 5, at 20.

85 *President Obama Calls Death Penalty "Deeply Troubling,"* Death Penalty Information Center (Oct. 26, 2015), *at* https://deathpenaltyinfo.org/news/president-obama-calls-death-penalty-deeply-troubling.

86 Koseff, *supra* note 7.

87 *Id.*

B. The Sixth Amendment Window

Justice Liu's concurrence in *People v. McDaniel* opened the door to future challenges to the death penalty on Sixth Amendment grounds. As discussed earlier in this paper, Eighth Amendment challenges have become futile because the current death penalty statute is too well insulated, after years of back-and-forth between the Legislature, the people, and the courts. The law's staying power is further bolstered by the power public opinion holds over each branch of government with the power of abolition. However, in his concurrence, Justice Liu pointed out future opportunities, although he refused to explore them with regard to the case at bar.[88]

The holding in *People v. McDaniel* validated the current death penalty scheme where jury members are allowed to determine aggravating factors without the "beyond a reasonable doubt" standard.[89] This means different jury members can all have different reasons for issuing a death sentence. The majority opinion in *McDaniel* attributed the constitutionality of such variability to the bifurcation of capital cases.[90] The initial factfinding trial that decides guilt is subject to the Sixth Amendment protection that the jury must find guilt beyond a reasonable doubt.

However, the court refused to extend those same protections to the sentencing part of the trial. Justice Liu points abolitionists toward challenging that bifurcation and making the claim that the Sixth Amendment applies to both the fact finding and sentencing components of a capital trial, and that both demand the jury to rely on facts proven beyond a reasonable doubt. Liu wrote in his concurrence: "The constitutionality of our death penalty scheme in light of two decades of evolving Sixth Amendment jurisprudence deserves careful and thorough reconsideration."[91] The Supreme Court has expanded the Sixth Amendment rights of criminal defendants over the years, and therefore the Sixth Amendment might be the window of opportunity that abolitionists have been looking for.[92]

It is a small window, but a window nonetheless.

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88 People v. McDaniel, 12 Cal. 5th 97 (2021) (Liu, J., concurring).

89 *Id.*

90 *Id.*

91 *Id.* at 160.

92 *Id.*

IV. MORE THAN MORATORIUMS? IN CONCLUSION . . . NOT YET

California does not carry out its death penalty, yet Californians are reluctant to let go of it. The tough on crime narrative continues to persist even in a state where criminal justice reform succeeded in both 2018 and 2020. However, it might be those very successes combined with an uptick in people's concern over crime rates that will make it even harder for death penalty abolitionists.

It might be troubling to read a paper about life-and-death issues and have it all come back to narrative. Yet narrative remains the greatest obstacle to abolition. We've constructed this idea of law as an entity devoid of passion, devoid of opinion, devoid of politics. We call it "black-letter" law because we want to believe the law is black and white, good or bad. This is not the case. Not in California. Not anywhere.

Narrative fueled the progressive court decision in *People v. Anderson* where the court cited psychological harm, innocence, and other abolition talking points. The justices' thinking in *Anderson* was as much a product of narrative and political spin as was the reaction to *Anderson*, the passage of Prop. 17. Narrative fueled the ouster of Chief Justice Rose Bird, and Republicans are hoping that narrative will fuel their victories in the November 2022 election. Every branch of government is made of people, and as people we are shaped by the narrative around us. The abolition movement might consist of lawyers, but their best tool and biggest obstacle is not the law. It is public opinion.

The legal history of the death penalty in California is the story of our beliefs around the death penalty — beliefs about its effectiveness, about its power, about what it does for victims' justice, for prosecutors' flexibility, for communities' safety. The longevity of the death penalty is intertwined with a narrative that Californians believe. Until that narrative changes, it is doubtful that California will see more than moratoriums when it comes to the death penalty.

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SAN FERNANDO VALLEY SECESSION:

How A Quest to Change the Law Almost Broke L.A. Apart (and Whether it Still Could)

RYAN CARTER*

INTRODUCTION: SO CLOSE, BUT SO FAR . . .

A quarter of a century ago, then California Assemblywoman Paula Boland, a Granada Hills Republican, was oh so close to realizing what for decades indignant San Fernando Valley homeowners and business leaders had only dreamed of, tried, and failed: A new state law that would have eased the path for the San Fernando Valley — from Sunland and Tujunga on the east to West Hills — all 254 square miles of it, to legally secede from the city of Los Angeles.[1]

The moment — August 22, 1996, in the state Senate — was decades in the making, forged by northwest Valley business leaders, who with Boland found a true believer in the halls of the state Capitol. They finally had a

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[1] "Map of Proposed San Fernando Valley Secession from City of Los Angeles, 2002," *Los Angeles Almanac*, accessed Dec. 5, 2021, http://www.laalmanac.com/geography/ge30secession.php.

A Memorial Day Parade float sponsored by Valley VOTE rallies in support of Valley secession in the San Fernando Valley's Woodland Hills neighborhood, May 27, 2002.

Photo: Gary Leonard, Los Angeles Neighborhoods Collection / Los Angeles Public Library.

shot to lock in a legislative mechanism that would enable the Valley to get its "fair share" of services. If the state legislature passed her AB 2043, no longer would the L.A. City Council have veto power over applications to leave the city of 3.5 million. The Valley would have a clear path to creating its own city of more than 1.5 million people.[2]

Boland herself was part of the movement that years earlier had spurred the legal barrier in the first place. Sensing passage of an epic piece of legislation in her grasp, Boland had momentum — until she didn't. She needed 21 votes for it to pass. She got 19.[3] Twenty-five years later, Boland is still

[2] Nancy Hill-Holtzman, "Valley Secession Measure Clears Assembly Panel," *Los Angeles Times*, Apr. 18, 1996, https://www.latimes.com/archives/la-xpm-1996-04-18-mn-59934-story.html.

[3] Nancy Hill-Holtzman, "Boland's Valley Secession Bill Fails by 2 Votes in State Senate," *Los Angeles Times*, Aug. 23, 1996, https://www.latimes.com/archives/la-xpm-1996-08-23-mn-36935-story.html.

indignant over what she says may have been the Valley's last and best chance to break away from L.A.

"It would have been a done deal, right now," said Boland of a new Valley city, reflecting on what might have been: local control over land-use, a suburban ideal.[4]

In the rubble of Boland's bill, a battle royale to break away from L.A. would ensue. It would lose.[5] By then, the legal and political barriers to seceding and incorporating were immense, bolstered by nearly thirty years of state law that discouraged the kind of explosion of municipal incorporations seen in the 1950s. But the movement to secede would ultimately bring major legal change to how cities are born and break away in California, amplifying tensions between public choice and collective goods theory, and would prompt reform in local government in L.A. This paper examines the history and path of Boland's bill and the impact its fate had on future attempts to secede from the city of L.A. It then explores the likelihood of the San Fernando Valley ever seceding. This examination draws on my interviews with sources who led the movement for and against secession and on scholars who both studied the effort and who were involved in the city reform that responded to it. It concludes that current law, transformative demographic change in the Valley, city reforms prompted by secession, and still lingering distrust of potential secession leaders, make such a breakaway unlikely twenty years later.

PART I: DECADES OF NO "FAIR SHARE"

Boland's generation of Valley secessionists built on the success of west San Fernando Valley business leaders who in the early 1960s found traction informally agitating for a breakup from the city.[6] Fueled by complaints

[4] Interview with Paula Boland, Nov. 17, 2021.

[5] A secession effort in Hollywood, Measure H, also was defeated. It was motivated by similar reasons. Noah Grand, "Valley, Hollywood secession measures fail," *Daily Bruin*, Nov. 5, 2002, https://dailybruin.com/2002/11/05/valley-hollywood-secession-mea. The L.A. Harbor area's three-year effort to break away failed after a commission found it could not be on the ballot in 2002.

[6] Tom Hogen-Esch and Martin Saiz, "An Anatomy of Defeat: Why San Fernando Valley Failed to Secede From Los Angeles," *California Policy Issues* (Nov. 2001): 49, https://www.csun.edu/sites/default/files/Anatomy_of_Defeat.pdf.

of lackluster city service, a lack of adequate political representation and the need for control over land development, members of the Valleywide Better Government Committee (VBGC) were among early agitators. They failed to bring in their east Valley counterparts. But the inequities they complained of caught the eye of then L.A. Mayor Sam Yorty, himself a resident of Studio City in the southeast Valley.[7] Yorty's rise to power in the 1960s was fueled by northwest Valley residents like Boland — conservative, White homeowners with a united zeal for having more control over land-use policy and who longed for a suburban ideal.[8] By the time Yorty came around, residents had long transformed the Valley from an agricultural hub. But as the population grew, they were determined to maintain a small-town community vibe within the great metropolis.[9]

By 1975, Boland, along with fellow west Valley business people — future L.A. City Councilmen Hal Bernson and Greig Smith — would pick up the secession mantle under the name of Committee Investigating Valley Independent City/County (CIVICC).

"We were working on the breakup in the middle 1970s," Boland reflected. "We had meetings constantly. It was just a community of people trying to strategize about how we could maybe break up the Valley. With a million and half people we certainly were not getting our fair share."[10]

But in contrast to their 1960s progenitors — even the right-leaning Yorty — Boland's group had major political momentum on its side.

The Prop. 13 Connection

The same sense of anger and alienation that fueled the Valley's middle-class property tax revolt in 1978, and ultimately pushed Proposition 13 to

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7 Ibid.

8 The first organized secession movement in the Valley dates back to the 1920s, but efforts picked up steam in the post–World War II boom. It galvanized over complaints about zoning, parking, traffic and services. Tom Hogen-Esch, "Urban Secession and the Politics of Growth: The Case of Los Angeles," *Urban Affairs Review* 36, no. 6 (July 2001): 788–89, https://www.csun.edu/sites/default/files/Valley_Secession.pdf.

9 Raphael J. Sonenshein, *The City at Stake* (Princeton University Press, 2004), 73–74.

10 Interview with Boland, Nov. 17, 2021.

Los Angeles Mayor James Hahn leads an L.A. United demonstration against Valley secession in the San Fernando Valley's Lake Balboa neighborhood, October 26, 2002. The opposition, as represented by the "Valley Cityhood" signs, attempted to disrupt the march.

Photo: Gary Leonard, Los Angeles Neighborhoods Collection / Los Angeles Public Library.

victory, was still lingering.[11] The movement for Prop. 13 had its start in the Valley — leaning on its homeowner groups for fundraising and political support. Its earliest backers included Boland. Bernson himself, the San Fernando Valley Republican allied with Boland on secession, was elected to the L.A. City Council at the height of the anti-tax fervor.[12] Like secession, that fervor was rooted in mistrust of government and a sense that the

[11] Statewide voters approved Proposition 13 in 1978. It amended the California Constitution to cap property taxes at 1 percent of a property's assessed value, and it effectively decreased taxes by fixing a property's assessed value to its original price, adjusted for inflation at a maximum annual rate of 2 percent. *Cal. Const.*, art. XIIIA, §§ 1–7 (Tax Limitation), https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&article=XIII+A.

[12] Staff report, "Former L.A. City Councilman Hal Bernson dies at 89," *L.A. Daily News*, July 21, 2020, https://www.dailynews.com/2020/07/21/former-l-a-city-councilman-hal-bernson-dies-at-89.

region was not getting its fair share.[13] A similar fervor was fueling campaigns against public school busing.[14]

Boland, a Granada Hills real estate broker, herself was a Prop. 13 activist in the west Valley. She even opened up her real estate office for anti-busing phone campaigns.[15] It was here where the political lines that would persist throughout the secession battle of the late '90s and early 2000s were clearly drawn.

Both movements, anti-busing and anti-tax, were direct challenges to the political establishment at the time. It was an establishment led by then L.A. Mayor Tom Bradley, an African-American mayor whose rise to power was fueled by a coalition of African Americans, liberal Jews, and still relatively nascent but growing Latino and Asian populations. Bradley's liberal administration would form powerful alliances with unions and also around downtown redevelopment. But it was happening as conservative agitators, fighting a court-ordered school integration busing plan for the Valley and lobbying for Prop. 13, were also fighting Bradley's agenda — from civilian police oversight to bond measures.[16]

With conservative support at their backs, CIVICC — now a coalition spurred by Boland and Bernson, among other Valley leaders — was joining with the south and west Valley chambers of commerce, plotting out a vision that this time actually had a chance of succeeding.[17]

The Veto: L.A. Gets the Law Changed "in the Middle of the Night"

A loophole in state law offered an opening for secession that centered on the city of San Fernando, one of the few in the Valley — along with

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[13] Sharon Bernstein, "Secessionists Taking Their Cues from the Past," *Los Angeles Times*, Oct. 4, 2002, https://www.latimes.com/archives/la-xpm-2002-oct-04-me-prop-134-story.html.

[14] Howard Blume, "School busing and race tore L.A. apart in the 1970s. Now, Kamala Harris is reviving the debate," *Los Angeles Times*, June 28, 2019, https://www.latimes.com/local/lanow/la-me-busing-schools-los-angeles-harris-biden-20190628-s tory.html.

[15] Doug Smith and Lisa Leff, "Boland Gaining Political Clout on Secession Drive," *Los Angeles Times*, May 12, 1996, https://www.latimes.com/archives/la-xpm-1996-05-12-mn-3338-story.html.

[16] Sonenshein, *The City at Stake*, 75.

[17] In the 1940s, the City Council rejected a borough plan when a secession bill floated by a group of Northridge ranchers failed in the state legislature. Ibid., 74.

Glendale and Burbank — that had not joined L.A. when the Valley was annexed in 1915.[18]

"We were going to go to the city of San Fernando and have them annex us," Boland said of CIVICC's "stealthy" plan.[19] The idea was that by annexing the Valley, the city of San Fernando would allow part of it to secede.[20] San Fernando narrowly rejected the plan. But as secessionists have subsequently told it, other business interests essentially double-crossed CIVICC, trying to get the city of San Fernando to annex Granada Hills and Mission Hills — without the rest of the Valley.

"That's the double-cross that hurt the movement more than anything else," Bernson later recalled.[21] It hurt because it got L.A. officials' attention.

"Sacramento got wind of it. In the middle of the night, they went and made it impossible" to break away, said Boland. "That's why we didn't get it there right on the spot."[22] In 1978, with heavy lobbying from Bradley and The League of California Cities, L.A. got the state legislature to amend what was then known as the Municipal Reorganization Act. Sponsored by Assemblyman John Knox (D-Richmond), the legislation required the Valley secession proposal to be approved by the Los Angeles City Council before it could become a reality.

In itself, the "dark of the night" law would be a major barrier in municipal detachment and incorporation for the next twenty years, giving statutory power to the city of Los Angeles (or any other city) to unilaterally veto a breakaway. Just like that, under state law, the L.A. City Council could veto any secession, dooming the chances of secession — for the moment.

The Fight to Change the Law: State v. Local Control

The state's intervention was a first glimpse at what would become a secession movement defined by the ability of city political actors to influence state government — and hence legislation. While L.A. won the first round

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18 Staff report: "1915–1916: Annexation spurred growth, *L.A. Daily News*," Oct. 31, 2010, https://www.dailynews.com/2010/10/31/1915-1916-annexation-spurred-growth.

19 Interview with Boland, Nov. 17, 2021.

20 Hogen-Esch, "Urban Secession and the Politics of Growth," 790–91.

21 Phil Willon, "Valley Secession Roots Go Back to the 1970s," *Los Angeles Times*, Aug. 16, 1998, https://www.latimes.com/archives/la-xpm-1998-aug-16-mn-13780-story.html.

22 Interview with Boland, Nov. 17, 2021.

in the Legislature, west San Fernando Valley secession leaders were galvanized around a sense that "you couldn't fight City Hall."[23]

"Our taxes were outrageous . . . and we were a million and half people, which is bigger than most cities," Boland said. "We weren't getting our fair share of anything. The mayor never even showed up. Bradley was a joke, if he even knew his way out here."[24]

Boland was echoing early studies commissioned by CIVICC, including a 17-page report coordinated by Jackson Mayers, an economics instructor at Valley College, which concluded that Valley residents contributed 40 percent of the city's taxes and received only 15 percent of the city's services.[25] While the study garnered its share of scholarly criticism, it was clear that the movement to change the law would not die — and Boland and her allies would not give up. Flashforward twelve years, and the same fervor that propelled Bernson into the L.A. City Council fueled Boland's rise to the state Assembly in 1990, representing the northwest Valley. It's in Sacramento where she would battle to tear down the very L.A. law that she and her allies sparked in the first place.

Boland's battle was happening against a backdrop of a rapidly changing city of L.A. — and Valley — many saw in a state of crisis. It's that perception that only propelled her legislation to secede.

By the 1990s, the Valley's once powerful aerospace and manufacturing bases — which powered its residential boom — were giving way to a job market consolidating around immigrant labor and lower-skill jobs. By 1990, one-third of the Valley's 1.7 million residents were foreign born; only half were Anglo. The "Mestizo Valley" was rising.[26]

"The Valley looked less like a post–World War II bedroom suburb and more like a sprawling, economically and ethnically fragmented city unto itself."[27] And the change was not easy.

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[23] Smith and Leff, "*Boland*."

[24] Interview with Boland, Nov. 17, 2021.

[25] Willon, "Valley Secession."

[26] Joel Kotkin and Erika Ozuna, "The Changing Face of the San Fernando Valley," Pepperdine University and the Economic Alliance of the San Fernando Valley, 2002, https://publicpolicy.pepperdine.edu/davenport-institute/content/reports/changing-face.pdf.

[27] Jean-Paul R. deGuzman, "Resisting Camelot: Race and Resistance to the San Fernando Valley Secession Movement," *California History* 93, no. 3 (2016): 28–51.

Once Again, Secession Thwarted

In the foreground was Prop. 187 — the 1994 measure that aimed to prohibit undocumented immigrants from using public services. And the region was reeling from the civil unrest that came in the wake of the beating of Rodney King Jr. and the subsequent acquittal of LAPD officers who beat him during a traffic stop. No longer was the Valley not just getting its fair share, but civil unrest, rising crime, poverty and immigration were fueling a rejiggered argument for local control. That's why Boland thought she had political momentum going into the Senate vote in August of 1996.

"I had gone to all the Democrats up there and talked to them before I even presented the bill. They understood it. They knew where I was coming from. They knew I would never lie to them," she said. "I had the voters on the Democratic side in the Senate. We'd locked it up in the Assembly."[28]

August 22, 1996: Vote fails. 19 to 18, and she needed 21.

Once again, Boland's secession drive ended with last-minute politics and legal maneuvering, over which Boland still appears indignant.

At the time, a nascent Valley group — composed of Van Nuys and Sherman Oaks homeowners, the Valley Industry and Commerce Association, the San Fernando Valley Association of Realtors — was meeting. They called themselves VOTE — or Valley Organized Together for Empowerment. Their aim was to mobilize voters in support of Boland's bill.[29]

Knowing they needed key Democrats to support a change in the law, the group engaged with then state Senator Bill Lockyer, D-Hayward, who opposed Boland's bill. Lockyer — who would become known as the "villain" who engineered the defeat — had offered amendments that would add a requirement to study the cost implications of Los Angeles and the Valley breaking up. He wanted to know what the respective tax bases would be and how services would be allocated. "This is a complicated issue that requires a revamping of California urban policy," Lockyer would say

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[28] Interview with Boland, Nov. 17, 2021.

[29] Kate Folmar, "Group Forms to Back Secession Bill's Passage," *Los Angeles Times*, May 30, 1996, https://www.latimes.com/archives/la-xpm-1996-05-30-me-9989-story.html.

at the time. "It strikes me, given the issue's complexity, that this bill is more public relations than policymaking."[30]

For Boland, it was the end of a six-year battle in the Assembly for Valley cityhood. Without Democrats on board, "nothing was possible."[31]

But it marked the start of a whole new coalition aimed at changing the law to make it easier to secede. From here on out, the battle would more formally amplify the tensions between state and local control and the limits of "self determination." And it would test the power and strength of coalitions in Los Angeles while giving rise to the power of a previously obscure state agency that would determine the fate of secession.

PART II: A NEW FIGHT, NEW WARRIORS, THE SHADOW OF TIEBOUT AND "RIGHTSIZING"

History of California's Municipal Organization Law / The Birth of LAFCOs

The legal barriers that had stopped San Fernando Valley secession for so long were baked into what by the mid-1990s was California's long-established but often obscure set of municipal reorganization laws. It was a law rooted in the municipal incorporation explosion that occurred throughout 1950s.

The law did not come without considerable tension over who would get to control municipal incorporation and how easy should it be.

Incorporations in California exploded in the '50s. The state saw fifty new city incorporations, fueled by migration, a doubling of the state's population over twenty years, and freeway construction. In Los Angeles County alone, ten new cities formed in the single year of 1957.[32] A watershed moment for that explosion in L.A. County emerged when the city of Lakewood incorporated. The city of Long Beach might have annexed it, but supporters of incorporation realized a new city could afford to incorporate

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30 Greg Lucas, "San Fernando Valley Wants to, Like, Secede from L.A./Little support for legislator's bill, however," *San Francisco Chronicle*, Aug. 19, 1996, https://www.sfgate.com/news/article/SACRAMENTO-San-Fernando-Valley-Wants-to-Like-2969446.php.

31 Sonenshein, *The City at Stake,* 75.

32 State of California, *Growth Within Bounds: Report of the Commission on Local Governance for the 21st Century* (Jan. 2000), https://calafco.org/sites/default/files/resources/GrowthWithinBounds.pdf.

if it continued to contract with the county for its municipal services. Ultimately, 60 percent of voters approved the incorporation. Dubbed "The Lakewood Plan," it was advertised by Los Angeles County and the new City of Lakewood as a more affordable means to successfully incorporate.[33]

But it was also a key moment for Sacramento, by then looking for a way to deal with growth and urban sprawl in a rapidly growing Southern California. At the time, even as independent districts were on the rise, no state or regional agency was regulating or reviewing the formation of municipalities. And there was a lack of coordination among districts in dealing with common problems.

"It was entirely up to the local government and the voters to decide when new governments or boundary changes were needed."[34]

By the 1960s, lawmakers were faced with clear tensions. On one hand, you could see the shadow of Charles Tiebout's "Theory of Local Expenditures" infusing the explosion of new and smaller cities across Southern California — the argument that municipalities were the rational result of market preferences among "consumer-voters."[35] Essentially, it was a free-market model that Tiebout and many afterward — including secession supporters — said "rightsizes" a local government between taxes and services based on the preferences of its residents.[36] For this school of thinkers, the explosion of smaller, independent cities was a positive, rather than a negative result of free choices — public choice.[37]

On the other hand, many urban planners and social scientists were concerned about duplication of government functions across regions and social inequities arising from what were permissive state statutes.[38]

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33 Ibid., 15.

34 Ibid., 25.

35 Charles M. Tiebout, A Pure Theory of Local Expenditures, *Journal of Political Economy* 64, no. 5 (Oct. 1956): 416–24, https://www.jstor.org/stable/1826343.

36 Ronald Oakerson and Shirley Svorny, "Rightsizing Los Angeles Government," *The Independent Review* IX, no. 4 (Spring 2005): 516, http://www.csun.edu/~vcecn007/publications/OakersonSvorny.pdf.

37 Sonenshein, *The City at Stake*, 81.

38 Raphael J. Sonenshein and Tom Hogen-Esch, "Bringing the State (Government) Back in: Home Rule and the Politics of Secession in Los Angeles and New York City," *Urban Affairs Review* 41, no. 4 (March 2006): 473, https://www.csun.edu/sites/default/files/LA_and_NY.pdf.

By 1959, then Governor Edmund G. Brown Sr. was concerned about "the lack of coordination and adequate planning" that "led to a multitude of overlapping, inefficient jurisdictional and service boundaries, and the premature conversion/loss of California's agricultural and open-space lands." In 1959, Brown appointed the Commission on Metropolitan Area Problems to study and make recommendations on the "misuse of land resources" and the growing complexity of local governmental jurisdictions.[39]

The result was LAFCOs — local agency formation commissions. But it took compromise to get there. Just as the desire for municipal sovereignty was blanketing Southern California, there was considerable fidelity to Dillon's Rule — the principle that local governments are creatures of the state. At first, state policymakers proposed a statewide commission that would oversee the process of incorporation, annexation and secession. But by 1963, state policymakers had worked out a compromise with local counties and cites: A LAFCO in each county. The agreement was fragile, but the new agencies were charged with reviewing and approving or disapproving proposals for incorporation, creation of special districts, and annexations. In reviewing these proposals, LAFCO was required to consider several factors, such as population, need for community services, and the effect of the formation or annexation on adjacent areas. After approval of a proposal by LAFCO, the affected jurisdiction would hold a protest hearing on the proposal and, if no majority protest existed, it would be put before the voters for approval or deemed approved if a vote was not required under the provisions of the statute.

By 1996 — as San Fernando Valley secession heated up — California's legal framework for city incorporation was governed by the fusion of three laws rooted in the still relatively obscure LAFCOs: The Knox-Nisbet Act of 1963, which established local agency formation commissions (LAFCOs) with regulatory authority over local agency boundary changes; the District Reorganization Act of 1965 (DRA), which combined separate laws governing special district boundaries into a single law; and the Municipal Organization Act of 1977 (MORGA), which consolidated various laws on city incorporation and annexation into one law. MORGA also added legislative

[39] CALAFCO, *What is LAFCO's History?*, The California Association of Local Agency Commissions, https://calafco.org/lafco-law/faq/what-lafcos-history.

intent language, which declared as state policy the encouragement of orderly growth and development of cities, the need for logical local agency formation, and the finding that a single governmental agency was better able to respond to community service needs. But LAFCOs had to consult three sets of laws to process different types of applications. In 1985 the Knox-Nisbet Act was renamed the Cortese-Knox Act, consolidating the laws into one act. The L.A. amendment that the city pushed through to save itself was part of MORGA. And it would stay that way until Valley VOTE picked up the cause for secession.

Valley VOTE/The Rise of a Coalition and Changing the Law

With the City Council veto law still embedded in the Cortese-Knox Act, Boland's loss marked the rise of Valley VOTE — an uncommon coalition in a city where up to that point business interests and conservatives had dominated the secession activists' ranks. A fragile alliance of homeowners associations and business associations emerged, led by Sherman Oaks Homeowners Association President Richard Close and business leader Jeff Brain. In contrast to previous secession attempts, it brought together HOAs and business on ground where they were often opposed: a "shared suburban land-use vision."[40] It was a vision that sought to protect single-family areas while creating high-end retail districts catering to middle-class tastes — and it would generate tax revenue. It was a vision that pushed poor residents and undesirable businesses to other areas.[41] It still lamented lack of fair share and local control.[42]

"But underneath it was much more about land-use," Hogen-Esch said.[43]

Within a month after Boland's bill failed, the resurrected idea of secession grew into a coalition of 24 business groups and 17 homeowners

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40 Hogen-Esch, "Land Use in Los Angeles," 787.

41 Ibid.

42 There is some scholarly disagreement on the message of "local control" in contrast to "fair share." Hogen-Esch and Saiz have posited that secessionists failed to embrace a larger vision of "multicultural suburbia." But Michan Andrew Connor posits that they were able to tap larger, more expansive minority partners in the coalition, by adopting "color-blind rhetoric." See note 69 below, Connor, "Color-Blind Rhetoric," 48–64.

43 Interview with Tom Hogen-Esch, Nov. 8, 2021.

associations that supported VOTE. But they still needed a new law that would do away with the L.A. City Council veto.

Path to Changing the Law: The Bipartisan Alliance

By 1996, there had been few major changes to state incorporation law.[44] LAFCOs were obscure agencies, made up mainly of a hodgepodge of political appointees from local cities and counties dealing with relatively minor boundary changes.[45] The first major change to the law came in 1992, with the passage of the "revenue neutrality" provision. It required that in a secession, neither area could be financially harmed.[46]

Lockyer, eyeing a run for state attorney general, apparently didn't want to be the villain. Convinced state law had to be reformed, he'd been working with Brain and Close on how to craft a kind of compromise bill. He still wanted a citywide vote, and secessionists still embodied the "local control" angst of Boland's bill, which was revived by her successor, Assemblyman Tom McClintock (R-Granada Hills).

Neither side was going to get what they wanted without a compromise. Nor was the city of L.A. going to walk away easily from the now twenty-year-old veto provision it had originally pushed into the law.

In 1997 — spurred by the San Fernando Valley secession movement — Assemblyman Robert Hertzberg, a key Democrat who represented Sherman Oaks, crafted a compromise.[47] It would become the next major change in state law, governing "special reorganizations." The city of L.A.

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[44] *Growth Within Bounds*.

[45] Sue Fox, "LAFCO feels heat from all sides," *Los Angeles Times*, May 21, 2002, https://www.latimes.com/archives/la-xpm-2002-may-21-me-method21-story.html.

[46] *Growth Within Bounds,* 27.

[47] The Valley VOTE secession movement was happening as political power in L.A. was shifting to the Valley. Hertzberg, who would become the speaker of the Assembly in 2000, "provided legitimacy to the idea of lowering the state's threshold for secession." (Sonenshein and Hogen-Esch, 477). But even as Wilson signed his and McClintock's legislation, Hertzberg noted . . . he wasn't a secessionist. What he was interested in was reforming L.A.'s charter. Amid the push for secession was a concurrent push for reforming L.A.'s city charter that became more intense as secession got closer to becoming reality. Moreover, as Sonenshein and Hogen-Esch note, the Valley became the centerpiece of Richard Riordan's 1993 and 1997 mayoral campaigns, as well James Hahn's victory in 2001. Hertzberg himself could see the emerging influence of the Valley on the horizon.

would join, on three conditions: 1) that the removal of the council veto applied to all California cities, 2) that a majority vote of both the city as a whole and the area seeking separation was required, and 3) that secession had no negative fiscal impact on the remaining city.[48] It broke the legal "logjam."[49]

The result — The Cortese-Knox-Hertzberg Local Government Reorganization Act — would be the next major change to state law regarding incorporations. It eliminated the city's unilateral veto power and replaced it with the requirements that secessions win concurrent majorities citywide (including the seceding areas) and in the seceding area itself. It also defined "special reorganization" — which up to then was sparsely mentioned in state law, and which defined a whole new process for the obscure LAFCOs.[50] Moreover, any breakaway that did cause harm would have to be made whole by payments from the new city to the remaining city.[51]

But in a way, Governor Pete Wilson faced a tension similar to that faced by Brown back in the 1960s. This time the tension was over who gets to claim "home rule" — the urban core — cities like Los Angeles — or territories who want to break away and start their own city.

Opponents of the bill — like the League of California Cities — argued that elimination of the veto power would once again give rise to an exodus from urban cores — leading to the same kind of explosion in the 1950s that state law aimed to control.

But by then, the shadow of Tiebout's theory had become a rationale that made it from the courts to state law. You could see it emerge in some form in foundational reorganization cases.[52] Proponents saw it as a fundamental

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48 Sonenshein, *The City at Stake*, 77.

49 Ibid.

50 Ibid.

51 Ibid.

52 See Bd. of Supervisors v. Loc. Agency Formation Com., 3 Cal. 4th 903, 924 (1992), where the Court upholds the constitutionality of the Cortese-Knox Local Government Reorganization Act against Equal Protection claims that it precluded county residents from voting to confirm a municipal incorporation unless they lived in the territory to be incorporated. "To frustrate the endeavor of individuals to fix the unit of their local governance . . . would be to stifle that self-determination. The seeds of democracy lay in the Greek city-state; we would be reluctant to stay the fruition of that democratic expression in the city of today. Neither the state nor federal Constitution sanctions such negation . . . ."

right of self-determination, and, conjuring Tiebout's language, the ability of residents — "consumer-voters" to vote with their feet. "This is Independence Day come in October," McClintock said at the bill-signing. "It's common in history for people to lose power to the government. It's a rare instance when government loses power to the people."[53]

With the stroke of Governor Wilson's pen, the threshold for secession was lowered, and LAFCOs would play a huge role in whether a city could secede.[54]

In assessing "home rule" in Los Angeles and New York city, Sonenshein and Hogen-Esch argue that secessionists in both cities were successfully "leapfrogging" traditional legal and political constraints within their cities. They expanded "the scope of the conflict" by forming political coalitions that allied with state leaders. In the end, the power of the city itself was diluted, and "Dillon's Rule" still casts a shadow over municipal self-determination."[55] That in itself was a huge victory.

The Battle Had Just Begun

Even with the legal change in place, as Richard Close would say, it was just the beginning. An epic battle for the future of L.A. ensued over the next five years — underpinned by arguments over local control for the Valley,[56]

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[53] Nancy Hill-Holtzman, "Governor Signs Secession Bill," *Los Angeles Times*, Oct. 13, 1997, https://www.latimes.com/archives/la-xpm-1997-oct-13-mn-42262-story.html.

[54] Many other political chips were in the right places to make this happen. And they would be advantageous as the battle to get secession onto the ballot ensued. Larry J. Calemine, an early member with Boland of CIVICC, was executive officer of the nine-member LAFCO in Los Angeles — five years as executive officer and five years as alternate commissioner. Another alternate commissioner was Richard Close of the Sherman Oaks Homeowners Association. And while the city of L.A., by law, had only one pick for the board, its one commissioner was Hal Bernson, who worked tirelessly with Boland back in the '70s on secession. Bernson had been at LAFCO for several years at that point. Citizens Economy Efficiency Commission, LA County, Presentation by Larry Calemine, http://eec.lacounty.gov/Portals/EEC/Presentations/2000/10-05-00 percent20Presentation.pdf.

[55] Sonenshein and Hogen-Esch, 488.

[56] On December 9,1999, Valley VOTE submitted roughly 205,000 signatures to LAFCO. On March 15, LAFCO announced that enough signatures had been validated to meet the 25 percent threshold (132,000). Hogen-Esch and Saiz, "Why the Valley Failed to Secede," 2001.

versus unifying control of the city of L.A.[57] Valley VOTE's goal was to get the question of Valley cityhood onto the November 2002 ballot. LAFCO — whose role became amplified through the legal reform — would play a much larger role than it ever had as dueling cost estimates and feasibility reports volleyed back and forth.[58] Secessionists would double down on the rightsizing arguments as a large anti-secession coalition of unions, politicians, labor and downtown business leaders cascaded across the city.[59] In 2002, LAFCO approved the San Fernando Valley Proposal for Special Reorganization. Voters would have a say. Ballot Measure F was scheduled for the fall 2002 election, giving Los Angeles residents the opportunity to vote on the issue. They'd be able to name the new city, too. "Camelot," was among the potential names.

Voters: The Final Say

On November 5, 2002, Los Angeles voters defeated secession. In the San Fernando Valley, it was close — 50.7 percent (136,737) yes and 49.3 percent (132,831) no. But in the rest of the L.A., it was a landslide against — 19.5 percent (68,813) yes and 80.5 percent (283,914) no. Citywide, it was 33 percent yes to 67 percent no. There would be no Valley mayor, and the 14 Valley council seats designated by LAFCO would not happen.

The name "San Fernando Valley" easily won as the new city's name — beating "Camelot" and "Rancho San Fernando." Boland, who was running

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[57] The LAFCO comprehensive financial study was the biggest such study it had ever undertaken by that point, with the state legislature allocating $1 million for the study. Leah Marcal and Shirley Svorny, "Support for Municipal Detachment," *Urban Affairs Review* 36, no. 1 (Sept. 2000): 94, http://www.csun.edu/~vcecn007/publications/SuppportForMunicipalDetachment.pdf. Extensive reports from Valley VOTE and the city of L.A. would ensue. LAFCO decided a new Valley city's design should be akin to a contract city, where the Valley would essentially hire the city of L.A. to provide municipal services for a year, and, to compensate L.A. for lost tax revenue, the Valley would have to pay an "alimony payment" — with estimates ranging from $56 million to the city's number of $153.8 million.

[58] One city report, in 2001, raised issues over the legality of the authority a Valley city would have to collect tax revenues and share in water and power service at existing rates. Patrick McGreevy, "City Report Says Secession Not Viable," *Los Angeles Times*, June 16, 2001.

[59] Outgoing L.A. Mayor Richard Riordan and incoming Mayor James Hahn both opposed secession.

for the northwest Valley council seat also won easily. But it was a moot point. Despite the mammoth effort to change the law, the result was that the giant city of L.A. would remain intact.

A Huge Victory in Itself, but It Could Have Been More . . .

Despite losing at the ballot box, secessionists had achieved a mammoth victory in changing the law. Despite being far outspent financially and "facing enemies on all sides" — including a downtown establishment coalition highly organized against — they were able to go beyond local coalitions to include state legislators, who built a bipartisan alliance to lower the legal threshold of secession. Moreover, they shaped the state commission that was tasked with studying fiscal feasibility and whether breakaways should go to the electorate.[60]

"Given all the constraints, and the difficulties of it, they made a heck of a run at it," Sonenshein said.[61]

Hogen-Esch echoes Sonenshein: "They rewrote local boundary change law that had been in place since the 1960s . . . . It's amazing what they were able to accomplish."[62] In fact, the results in the Valley reflect how close the effort came to why that change mattered. If secessionists had created a broader coalition, it might very well have changed the result — at least in the Valley, and might have left them with more political clout than they had. That's because the depth of support was surprisingly strong in much of the Valley.

In 82 percent of the 685 Valley precincts, Measure F garnered more than 40 percent support.[63] It was soundly defeated in only five heavily Latino northeast Valley districts, where Latino union and political leaders had waged robust campaigns against it. It also failed in heavily liberal

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[60] It was also the first time that secession has been presented in the context of governmental reform, rather than a series of suburban complaints. Sonenshein, *The City at Stake*, 80.

[61] Interview with Raphael Sonenshein, Nov. 18, 2021.

[62] Interview with Hogen-Esch, Nov. 8, 2021.

[63] Tom Hogen-Esch, "Elite and Electoral Coalitions*:* An Analysis of the Secession Campaign in Los Angeles," Paper presented at 2003 Western Political Science Association Meeting, Denver (April 2002), 17, https://www.csun.edu/sites/default/files/Elite_and_Electoral_Coalitions.pdf.

and Jewish Studio City and Sherman Oaks.[64] Hogen-Esch noted that, had a more "diverse elite coalition emerged within the Valley, particularly among Latino and Jewish groups, unions and the Democratic Party, the results may have been quite different."[65] Indeed. As Sonenshein notes, the Valley was included in the city's tally of votes. So theoretically, a hugely enthusiastic pro-secession Valley turnout could have overcome the citywide vote.[66]

But the movement "never really incorporated those growing areas of the San Fernando Valley" where L.A. city services were highly valued, he added.[67]

Not all agree — including Boland and Close, both of whom say they were mindful of embracing communities outside of White, home-owning Valley-ites.

"It's not true," Boland said.[68] "It was to be abundantly fair, to have the east side of the Valley not feel isolated whatsoever," she added, remembering the drawing up of district maps for the new city. Scholars have disagreed on the extent to which secessionists missed the opportunity to build a larger tent for their movement.

Michan Andrew Connor argues that Valley activists did craft a "color-blind rhetoric" of "local control" and community empowerment that won Latino support.[69]

But Jean-Paul R. deGuzman pushes back, arguing that secessionists underestimated the extent to which Latinos, Blacks and Asian Americans in the Valley saw their fates inextricably linked to the rest of Los Angeles.[70]

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64 Ibid.

65 Ibid.

66 Interview with Sonenshein, Nov. 18, 2021.

67 Ibid.

68 Interview with Boland, Nov. 17, 2021.

69 Michan Andrew Connor, "These Communities Have the Most to Gain from Valley Cityhood: Color-Blind Rhetoric of Urban Secession in Los Angeles, 1996–2002," *Journal of Urban History* 40 (2014): 48, https://www.researchgate.net/publication/274635306_These_Communities_Have_the_Most_to_Gain_from_Valley_Cityhood_Color-Blind_Rhetoric_of_Urban_Secession_in_Los_Angeles_1996-2002.

70 deGuzman, "Resisting Camelot," 29.

Twenty years later, this leads to the question of whether this matters — as L.A. and the Valley grow and change — and whether conditions are ripe for a new secession attempt to take root.

PART III: COULD IT STILL HAPPEN?

When it came to secession, Richard Close spoke like a man on a mission.[71] Until his death in early 2022, he continued to head the Sherman Oaks Homeowners Association, which nearly twenty years after the secession ballot box loss, remains a powerful force among Los Angeles interest groups.[72]

The angst of twenty years ago is still there — along with the factors that fueled a massive movement. "Right now the Valley represents only about a third of the City Council, so two-thirds of the decisionmakers do not live in the San Fernando Valley," he said. "That's dangerous and it's not fair to the residents of the San Fernando Valley. That was the argument then, and that was the argument now."[73]

Yes. Secession could still happen, he said.

But could it?

Ironically, the very law that his coalition of homeowners and business groups brokered, to lower the secession threshold is the very law that would have to be struck down, Close said — at least the part where the whole city gets to vote.[74]

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[71] Close passed away not long after I spoke with him. Dakota Smith, "Richard Close, leader of Valley secession movement, dies at 77." *Los Angeles Times*, Jan. 31, 2022, https://www.latimes.com/california/story/2022-01-31/richard-close-sherman-oaks-homeowners-association-dies; Elizabeth Chou, "Richard Close, influential San Fernando Valley political player, dies at age 77," *L.A. Daily News*, Jan. 31, 2022, https://www.dailynews.com/2022/01/31/richard-close-influential-san-fernando-valley-political-player-dies-at-age-77.

[72] Elizabeth Chou, "Homeless housing proposal has some worried in Sherman Oaks," *L.A. Daily News*, Aug. 24, 2018. https://www.dailynews.com/2018/08/24/homeless-housing-proposal-has-some-worried-in-sherman-oaks; Jay Caspian Kang, "How Homeowners Associations Get Their Way in California," *New York Times*, Oct. 14, 2021, https://www.nytimes.com/2021/10/14/opinion/california-housing-renters.html.

[73] Interview with Richard Close, Nov. 9, 2021.

[74] Ibid.

"When we got started, state law gave the City Council the authority to prevent any Valley cityhood. We were able to get that law changed. And it now provides that if the Valley majority and the whole city votes for secession, then it happens. One of the first things we need to do in a new movement is to convince the Legislature to eliminate that second hurdle," he said.[75] But that would not be easy today.

On the legal front, a movement today would need to have allies in Sacramento who would change the law — much like they did in 1997 — and a governor who would sign that bill. Wilson, the governor who signed the compromise bill that eliminated L.A.'s veto power, had long been attuned to the wishes of secessionists. After all, they helped elect him. And voter discontent was strong twenty years ago. It's not clear that's the case now — at least to push through a law that would eliminate L.A. voters' voice.

"They would have to go back up to Sacramento and find some way to lower the threshold for secession, and I just don't see that happening in Sacramento, coming out of a two-thirds Democratic–controlled Legislature," Hogen-Esch noted.[76]

Moreover, what has been clear over nearly fifty years of California state incorporation law is that "special reorganization," despite lowering the threshold for secession, is still an uphill climb in comparison to municipal incorporation.

"A secession is not supposed to be easy," Sonenshein said.[77] This is not like a referendum. Or a proposition on the ballot. This isn't like putting in a bond measure for mass transportation. This is breaking up the second largest city in the country. Cracking it right down the middle and saying we'll figure out how to distribute the assets later on. "If a city can break up because people in an area just want to get out, that's a pretty hard way to run a city. Basically, the cities would have breakups nonstop."

Moreover, as Sonenshein and Hogen-Esch have observed, it tweaks the angle on the debate between public choice and collective goods theory. Secession is different from the traditional issue of movement between cities, because the issue is "no longer a question of whether there should be many

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75 Ibid.

76 Interview with Hogen-Esch, Nov. 8, 2021.

77 Interview with Sonenshein, Nov. 18, 2021.

cities available so that dissatisfied city residents can opt out and move away. It is about whether big cities themselves should even exist."[78]

Framing in such terms makes it hard to imagine that parts of contemporary L.A. would seek a breakup.

The Power of Reform in Response to Secession

The secession movement itself spurred reforms that in theory brought downtown L.A. government closer to once disconnected neighborhoods. This in itself could make secession less likely.

"Charter reform [in L.A.] was a direct response to secession," said Sonenshein, who between 1997 and 1999 was executive director of the City of Los Angeles Charter Reform Commission.[79] "I mean, there were other fish being fried like the power of the mayor and stuff like that. But the creation of the neighborhood councils was a direct response to secession. After that, I think what you started to see was a more sophisticated sense at City Hall that they needed to be more attentive to the San Fernando Valley both politically and in terms of services. In that sense, you could say the secession movement shook some things loose."

It was secession that provided the spark that when fused with then Mayor Richard Riordan's own desire for more formal authority, provided the energy for charter change that for some years had been simmering.[80] Faced with the breakup of the great metropolis, voters by a 60 percent majority passed a new charter on June 8, 1999, the first comprehensive charter revision in twenty-five years.[81] The new charter's Section 900 created a system of Neighborhood Councils,[82] advisory boards that gave residents a public forum on issues in communities from Chatsworth to San Pedro. Their power was not binding, but the goal was that they "include representatives of the many diverse interests in communities and . . . have an

78 Sonenshein, *The City at Stake*, 81.

79 Interview with Sonenshein, Nov. 18, 2021.

80 Sonenshein, *The City at Stake*, 57–71.

81 Ibid.

82 The neighborhood councils have grown to a system of 99, each serving about 40,000 people on issues including development, homelessness and emergency preparedness. Thirty-four of them are in the Valley. City of Los Angeles, https://www.lacity.org/government/popular-information/neighborhood-councils.

advisory role on issues of concern to the neighborhood."[83] The revisions also created area planning commissions, quasi-judicial bodies with power to make determinations and recommend zone changes or similar matters referred to them.[84] "The Neighborhood Councils have made a difference," Hogen-Esch said. "There's greater possibility for participation. The regional planning commissions probably have some die-hard followers who otherwise might be frustrated by the long commutes to L.A." But others are less certain that L.A. city reforms have worked.

"Right now, who are making the decisions?" Close lamented.[85] Two-thirds of the decisionmakers are outside the Valley. They've never heard of these areas. If I represent San Pedro, why would I care about Northridge? But if we had a city council made up of Valley residents, these issues would be decided by Valley voters."

With regard to neighborhood councils, Close bemoned the lack of any binding power. Boland sees neighborhood and regional commissions as ineffective, plagued by low voter turnout, low participation and led by "wannabes."[86]

Still, with such reform, city officials had something they could point to, to offer some sense of government responsiveness — a reason secession was not necessary.[87]

The Power of Change

The Valley is also a different place than it was 20 years ago. The demographic landscape that was fertile ground for secessions decades ago is waning.

"That revolt was strongest among homeowners, White voters and among conservative voters, who don't represent the majority of the Valley," Sonenshein said.[88]

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[83] Los Angeles Charter, art. IX, https://codelibrary.amlegal.com/codes/los_angeles/latest/laac/0-0-0-3722.

[84] City of Los Angeles, Department of City Planning, "Area Planning Commissions," (Jan. 22, 2022), https://www.arcgis.com/home/item.html?id=da2e20211f8c4c2ca94a6c49e0b5e091.

[85] Interview with Close, Nov. 9, 2021.

[86] Interview with Boland, Nov. 17, 2021.

[87] Sonenshein and Hogen-Esch, "Politics of Secession," 478.

[88] Interview with Sonenshein, Nov. 18, 2021.

As of the 2020 Census, 762,316 — 41.5 percent — of the Valley's 1.84 million residents are Latino — near parity with 834,146 Whites in the region.[89] In 1990, when Boland took office in the state Assembly with a goal of breaking the Valley away, 56 percent of the population was White and Latinos comprised 32 percent of Valley residents. Today, 45.4 percent of the Valley is White.

With the change came profound political shifts — particularly in the northwest Valley, where movements like Prop. 13 and secession drew much of their support.

In 2019 — following the departure of L.A. City Councilman Mitch Englander — a race for City Council's northwest Valley seat pitted progressive Loraine Lundquist against John Lee, the presumed heir apparent to the succession of right-leaning elected officials from what was known as the city's most conservative seat. But the race was exceedingly close. In the runoff election, the final tally separated the candidates by only 50 votes. Lee would go on to win the seat in the general election, but for many observers it signaled that the politics of the northwest Valley — Porter Ranch, Northridge, Granada Hills, West Hills and parts of North Hills and Reseda — were changing.

Since 2000, the number of Republicans in the district has dropped from 37 percent of registered voters to 24 percent in 2018, while Democrats remained around 44 percent of voters.[90]

The Power of History

History suggests that secession is unlikely, though it leaves the door open.

In 1976 and 1978, the northern L.A. County communities of Saugus, Agua Dulce, Newhall, and Canyon Country tried to break away into Canyon County I and Canyon County II. In 1977, El Segundo and Hermosa Beach tried to break away into South Bay County and Peninsula County. And there were similar attempts in Santa Barbara, Fresno, and San

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89 United States Census Bureau, San Fernando Valley CCD, Los Angeles County, California (2020 Decennial Census), https://data.census.gov/cedsci/profile?g=0600000US0603792785.

90 Olga Grigoryants, "John Lee takes lead in race to represent Council District 12 and may elude runoff," *L.A. Daily News*, Mar. 3, 2020, https://www.dailynews.com/2020/03/03/john-lee-takes-early-lead-in-race-to-represent-council-district-12.

Bernardino counties.[91] The attempts had "remarkably similar patterns":[92] better representation, expanded local control over land-use and stronger services at lower tax rates. Each one got to a vote — what Hogen-Esch noted was an achievement in itself and shows such issues fuel the effort to bring attempted secessions to a vote. But in each case at the county level, a concurrent majority was needed. Voters countywide rejected the measures, in effect illustrating their fear of a loss of tax base.[93] This shows that while a successful secession is formidable, it's not out of the realm of possibility for the Valley, where so much of the city's voting power resides.[94]

The Power of Trust

Future secessionists would need to find ways to pierce layers of distrust among communities of color to expand their coalition and voting strength. As it is, many Latinos in the Valley's northeast area, despite reasons for being an agreeable audience for the idea of secession, have worked within the city's current system to invest in leaders from the area. By 2000, Latinos — who by then were 42 percent of the Valley's population[95] — were beginning to see a generation of Latino leaders come onto the scene. Richard Alarcon had gone from L.A. city councilman, representing the Valley's 7th District and its heavily Latino population in the northeast San Fernando Valley, to state senator. Alex Padilla would follow in Alarcon's footsteps in the L.A. City Council, ultimately becoming the council's first Latino president (and later U.S. Senator). Since 2013, Nury Martinez has represented the area — and was elected City Council president in 2019. For years, Latino Valley leaders had been battling for the day when they had some representation downtown at City Hall. That battle was rooted in the northeast San Fernando Valley, where Latinos had good reason for being open to arguments from secessionists.[96] By the end of the twentieth century, Pacoima had the highest unemployment

91 Hogen-Esch and Saiz, "An Anatomy of Defeat," 41.
92 Ibid., 46.
93 Ibid., 47.
94 Ibid.
95 deGuzman, "Resisting Camelot," 30.
96 Ibid., 36.

rate in the San Fernando Valley, at 9.6 percent.[97] More than 30 percent of Pacoimans fell under the poverty line. Housing shortages, healthcare inequities that blanketed the northeast Valley, and a crumbling infrastructure were all reasons why many organizers in the Valley decried the northeast Valley as "nothing more than a 'forgotten stepchild.' "[98]

But many saw those conditions as a result of the actions of the very generation who were leading the secession. Irene Tovar, then a community organizer who as head of the Latin American Civic Association opposed the secession, like Boland grew up in the Valley, but in a very different part: Pacoima. She pointed to "two Valleys" in the 1950s and 1960s — "There was a northeast Valley and the west Valley and the west Valley was White Valley."

"We knew if there was a new city, the leadership that was advocating for secession were the ones who never helped us," Tovar said.[99] They were the ones who segregated us. They were against the things we represented as a community. Remember, there had been two Valleys that would have been reinforced more because of their leadership. We'd have a better chance of succeeding in a city of Los Angeles like it is now versus a Valley city. The leadership, . . . we knew who they were. They dominated its politics, its social life, its cultural life. And we were left out of that — the opportunity for betterment for our community. I was very outspoken against it."[100] She still is.

"It's almost the same issues today," she said.[101] "We'd still be left with a city that has a lot of poverty. A lot of homeless. It would reinforce poverty."

Any movement would have to disassociate itself from a difficult past that prompted much distrust among minority–majority populations and find ways to gain trust.

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97 Ibid.

98 Ibid.

99 Interview with Irene Tovar, Nov. 16, 2021.

100 It was Tovar, then the head of the Latin American Civic Association, who said just before a meeting on Valley secession in 1999 that "there are racial implications to secession. . . . We're not just going to follow like sheep." Miguel Bustillo, Latino Activists Planning Summit on Secession, *Los Angeles Times*, Dec. 3, 1998.

101 Interview with Tovar, Nov. 16, 2021.

CONCLUSION

Policymakers still reference the Valley's distinctiveness from the rest of L.A. when pushing for change at city and county levels. The Sherman Oaks Homeowners Association — and Close — loomed large in the city's recent fractious redistricting debate. Even on the county redistricting level, L.A. City Councilman Paul Krekorian made an eleventh-hour plea to the redistricting commission to keep the Valley "whole" in one supervisorial district. The commission was reapportioning boundaries based on population change in the 2020 U.S. Census. He told the commission:

> The Valley has for the last century had a distinctive identity, and today we have distinctive issues around public transportation planning, air quality, water quality, public health, housing — all issues that the Valley as a whole has common interests in, and yet we don't have any guarantee that a resident of the Valley, despite having 2 million people living here, will have a representative on the Board of Supervisors or on the Metro board.[102]

Hogen-Esch suggests that a new secession movement could resurface. "This is something that definitely rears its head every generation or two," he said. But taking hold today will be a challenge. Not only will this group need to change the law. It will have to broaden itself.

"If there's a reincarnation of Valley secession it will have to be from a whole broad spectrum of Valley interest groups."[103]

Paula Boland, still living in the Valley, continues to lament the lack of "fair share." For Boland, the Valley may have lost its chance.

"You don't have the passion we had over twenty years ago.[104] There was a cohesiveness in the Valley — there was an understanding," she said. "People might say they want to do it, but I don't see the commitment that there would ever be enough people to get together and work, and believe in it and do it."

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[102] Ryan Carter, "LA County Redistricting: Map debate takes an 11th-hour turn for San Fernando Valley," *L.A. Daily News*, Dec. 4, 2021, https://www.dailynews.com/2021/12/04/la-county-redistricting-map-debate-takes-an-11th-hour-turn-for-san-fernando-valley.

[103] Interview with Hogen-Esch, Nov. 8, 2021.

[104] Interview with Boland, Nov. 17, 2021.

Still, the movement changed the law enough to make secession at least a possibility, which in itself was a significant victory. If a movement did take root today, a coalition would have to emerge able to circumvent an exclusionary history, and engage and neutralize coalitions set up to fight secession. It would also have to be broad enough to negotiate with Sacramento legislators to change the law of concurrent majorities. Given reform that has taken place in L.A., and lingering distrust within minority communities, that kind of cohesion is not likely.

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WIND OF (CONSTITUTIONAL) CHANGE:

Amendment Clauses in the Federal and State Constitutions

SIMON RUHLAND*

I. INTRODUCTION

"We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."[1] On May 2, 2022, an anonymous Supreme Court insider leaked an explosive draft opinion penned by Justice Alito that sent the legal world and large swaths of civil society into a frenzy.[2] Law professors[3] and cable news

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[1] Thomas E. Dobbs v. Jackson Women's Health Organization et al. 5 (draft, 2022), *at* https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504.

[2] Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, Politico (May 2, 2022), *at* https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

[3] Mary Wood, *Unpacking the Supreme Court Leak: Professor Douglas Laycock Discusses Dobbs Breach*, University of Virginia School of Law (May 3, 2022), at https://www.law.virginia.edu/news/202205/unpacking-supreme-court-leak.

commentators[4] publicly debated what *Dobbs* would mean for women's rights and landmark cases of civil liberties. Citizens around the country took to the streets to protest against the judgment.[5] But it seems that, privately, some wondered why exactly it is that the right to abortion is not "protected by any constitutional provision," be it implicit or explicit. After all, a majority of Americans are in favor of such a right.[6] Within 24 hours of the leak, Google reported a 500 percent uptick in searches for the search term "amendment."[7] This is a familiar phenomenon. Whenever a breaking story highlights a mismatch between popular opinion and constitutional jurisprudence, Americans start to wonder how they could amend their constitution. Searches for "amendment" peaked, for example, in January 2021. With searches up 370 percent from December 2020, citizens asked Google what the Constitution had to say about ousting a president and rioters storming the Capitol. And all too often, when they found out the Constitution didn't say what they wanted it to, they started to wonder how that could be changed.

Inevitably, this lands them on one of the many articles that deal with either the necessity of new amendments,[8] impossibility thereof,[9] or both.[10] Such coverage is not just sensationalism. The last amendment

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4 Kevin Breuninger, *How the Supreme Court went from Cementing Abortion Rights in Roe v. Wade to Drafting their Demise*, CNBC (May 6, 2022), *at* https://www.cnbc.com/2022/05/06/how-supreme-court-went-from-roe-v-wade-to-drafting-opinion-to-overturn-it.html.

5 Joseph Guzman, *Nationwide Protests Planned in Response to Leaked SCOTUS Abortion Ruling*, The Hill (May 5, 2022), *at* https://thehill.com/changing-america/respect/accessibility/3478491-nationwide-protests-planned-in-response-to-leaked-scotus-abortion-ruling.

6 *America's Abortion Quandary,* Pew Research Center (May 6, 2022), *at* https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary.

7 *Amendment, April 29–May 6, 2022,* Google Trends, *at* https://trends.google.com/trends/explore?date=now%207-d&geo=US&q=amendment.

8 Ana Becker, *We the People*, N.Y. Times (Aug 4, 2021), https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html.

9 Eric Posner, *The U.S. Constitution is Impossible to Amend,* Slate (May 5, 2014), *at* https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html#:~:text=It%20provides%20that%20an%20amendment,two%2Dthirds%20of%20the%20states.

10 Dave Levinthal, *Why a Constitutional Amendment Enshrining Abortion Rights is Next to Impossible*, Insider (May 2, 2022), *at* https://www.businessinsider.com/roe-v-wade-abortion-rights-constitution-2022-5.

passed in 1992. Roughly 10 percent of voters are under the age of 25,[11] meaning that during their lifetimes, the Constitution has remained completely static. This is because the American constitution is notoriously resistant to change. It is so resistant, in fact, that when Donald Lutz[12] and later Zachary Elkins, Tom Ginsburg, and Tom Melton[13] turned the ease (or difficulty) of amendment into a numerical score, Article V of the U.S. Constitution ranked most difficult in a field of some 900 historic and contemporary amendment provisions.

This is no accident. Andrew Johnson was of the opinion that "[a]mendments to the Constitution ought to not be too frequently made; . . . [if] continually tinkered with it would lose all its prestige and dignity, and the old instrument would be lost sight of altogether in a short time."[14] This paper discusses two historic developments that played a crucial role in lending the amendment process its rigidity: the debates on Article V at the Constitutional Convention in Philadelphia and the rise of political parties in the early republic. It will then contrast the amendment procedure of the federal constitution with that in California and other states, which are plagued by excessive length rather than underinclusive brevity. Lastly, it will discuss legislative amendment clauses that are part of the constitutions of Delaware and Germany as possible solutions for both issues.

II. AMENDING THE FEDERAL CONSTITUTION

History of the Amendment Clause

"Depending on one's normative perspective, [the difficulty of amending the U.S. Constitution] is seen either as a reflection of the Constitution's genius

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[11] *Number of Voters as a Share of the Voter Population, by Age,* Kaiser Family Foundation (Nov. 2020), *at* https://www.kff.org/other/state-indicator/number-of-individuals-who-voted-in-thousands-and-individuals-who-voted-as-a-share-of-the-voter-population-by-age/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[12] Donald Lutz, *Towards a Theory of Constitutional Amendment,* 88 Am. Pol. Sc. Rev. 355 (1994).

[13] Zachary Elkins, Tom Ginsberg & James Melton, The Endurance of National Constitutions 101 (2009).

[14] Andrew Johnson, Speech at the Capitol in Washington, D.C. (Feb. 22, 1866).

and a key to its endurance, or as a barrier to modernization."[15] When the Constitutional Convention was in session in Philadelphia, most attendees did not see the impossibility of amending it as a reflection of constitutional genius. Just a few years after the Articles of Confederation were ratified, the constitutional order in the young republic was about to collapse. The Articles had proven to be too confederal and too restrictive of the new government. Besides featuring paralyzing oversights like the federal government's inability to regulate commerce or to raise taxes, it provided for no means of amending the document upon ratification unless all states agreed on a proposed change, which essentially fossilized the status quo of 1777.[16] Hence, a handful of state representatives were summoned to Annapolis in 1786 to revise how the Articles dealt with trade and commerce. Quickly, they came to the conclusion that this narrow objective was not sufficient to fix the Articles of Confederation and instead came to agree that "the Idea of extending the powers of their Deputies, to other objects, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention."[17] A year later, this convention then assembled in Philadelphia. Its "sole and express purpose" was to revise the Articles of Confederation.[18] In other words, amendment procedures are at the core of U.S. constitutional history.

Unsurprisingly, the debate around Article V was kicked off by deciding that the Constitution was to be amendable at all. The delegates "[r]esolved that the amendments which shall be offered to the confederation by the Convention ought at a proper time or times after the approbation of Congress to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the People to consider and decide thereon."[19]

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15 Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at all*? 13 Int'l J. Con. L. 686 (2015).

16 Richard R. Beeman, Plain, Honest Men: The Making of the American Constitution 245 (2009).

17 *Address of the Annapolis Convention,* National Archives, Founders Online (Sept. 14, 1786), https://founders.archives.gov/documents/Hamilton/01-03-02-0556.

18 Journals of the Continental Congress, 1774–1789: Volume XXXII. 1787 January 17–July 20 (Roscoe R. Hill ed., 1936).

19 2 Record of the Federal Convention of 1787 85 (Max Farrand ed., 1911).

What exactly this meant, they were not sure. The debate quickly focused on one question: Should the power of amendment be given to the people or to the states? The faction wanting to empower the people could count on important advocates. After Oliver Ellsworth and William Patterson had moved to entrust the state legislatures with the power of amendment, George Mason of Virginia was the first to speak on their proposal. "A reference of the plan to the authority of the people," he exclaimed, was "one of the most important and essential of the Resolutions."[20] Mason argued that because the state legislatures were products of the states' constitutions, the power to amend should thus be granted to special conventions, elected directly by the people.[21] Nathaniel Gorham of Massachusetts and fellow Virginians Edmund J. Randolph and James Madison concurred with Mason. Madison pointed out that a constitution was no treaty. To him, changes to the constitution would make "essential inroads on the State Constitutions." Allowing state legislatures to amend a constitution would mean "that a Legislature could change the constitution under which it held its existence."[22] But if the existence of a constitution rested on the shoulders of the people, then they, too, should have the authority to amend it.

Outside the Convention, the Antifederalists also had strong opinions about proposed Article V. They, prophetically, pointed out the risks of bad faith politics and obstructionism by a minority of states. Patrick Henry, who had refused a call to serve on Virginia's delegation to the Convention, expressed fear "that the most unworthy characters may get into power, and prevent the introduction of amendments." To him, "[t]o suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous."[23] He went on to point out the undemocratic nature of the draft amendment clause: "[F]our of the smallest states, that do not collectively contain one tenth part of the population of the United States, may obstruct the most salutary and necessary amendments. Nay, in these four

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[20] *Id*. at 88.

[21] *Id*. at 89, 90; *see also* Beeman, *supra* note 16, at 245.

[22] *Id*. at 93.

[23] 3 The Debates in the Several State Conventions 49 (Jonathan Elliot ed., 1845), https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=60&itemLink=D?hlaw:1:./temp/~ammem_LAQ1::%230030061&linkText=1.

states, six-tenths of the people may reject these amendments." These lines have aged well; they are still an apt summary of the ills plaguing Article V.

Yet, the proponents of popular empowerment and their arguments did not prevail. To those in favor of having state legislatures amend the federal constitution, there was no need to directly empower the people in the first place. Elbridge Gerry, like Nathaniel Gorham a member of the delegation of Massachusetts, "could not see any ground to suppose, that the people will do what their rulers will not. The rulers will either conform to or influence the sense of the people." On the contrary, he thought that the people "would never agree on any thing."[24] Oliver Ellsworth was more cynical: "If there be any Legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents and pursue such a mode as wd be competent." He believed that "more was to be expected from the Legislatures than from the people." But he also had historical fact on his side: "To whom have Congs. applied on subsequent occasions for further powers? To the Legislatures; not to the people. The fact is, that we exist at present . . . as a federal society . . . ."[25] This seemed to convince the delegations at Philadelphia. All but one voted in favor of submitting amendments to the legislatures in the states.[26] The "populists" had to accept defeat by the "statists." One year after the debates in Philadelphia, former "populist" James Madison, writing as Publius, published *Federalist 43* and came to praise Article V:

> The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments

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24 *Id*., vol. 5, at 353, https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=374&itemLink=D?hlaw:1:./temp/~ammem_Stzt::%230050375&linkText=1.

25 *Id*., vol. 5, at 354, https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=375&itemLink=D?hlaw:1:./temp/~ammem_2574::%230050376&linkText=1.

26 Beeman, *supra* note 16, at 246.

> to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.[27]

Once this was settled, the framers still had to decide about the precise modalities of the amendment procedure. On August 6, 1787, the delegates decided that an application by two-thirds of the states would suffice to call a constitutional convention.[28] But one month later, on September 10, Elbridge Gerry voiced concern that this rule would allow a majority of states to "bind the Union to innovations that may subvert the State-Constitutions altogether."[29] Hamilton added that states would "not apply for alterations but with a view to increase their own powers."[30] Finally, they agreed on the procedure as we know it today: a two-thirds majority in Congress may submit amendments to the states, three-quarters of which then have to vote in favor of the proposal.[31]

It was clear that this design of Article V was not meant to serve the people or to make sure that the Constitution kept up with the political and social zeitgeist of a majority of Americans. Instead, it was meant to protect the states against tyranny by other states or by the federal government. During the Convention, Hamilton stated, "There was no greater evil in subjecting the people of the U. S. to the major voice than the people of a particular State."[32] And a year after the Convention had ended, he wrote to the people of New York:

> [H]owever difficult it may be supposed to unite two thirds or three fourths of the State legislatures in amendments which may affect local interests [there can be no] room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.[33]

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27 The Federalist No. 43, at 278–79 (James Madison) (Clinton Rossiter ed., 1961).

28 2 Record of the Federal Convention, *supra* note 19, at 188.

29 *Id*. at 557, 558.

30 *Id*. at 558.

31 *Id*. at 559; of course, Article V now also features two alternative modes of amendment.

32 *Id*. at 558.

33 The Federalist, *supra* note 27, No. 85, at 526 (Alexander Hamilton).

In essence, the difficulty of getting three-quarters of the states to accept an amendment was a conscious design choice and not an unexpected flaw. But as the past 230 years have shown, the delegates' fears of activism and even active bullying by some states were unfounded. On the contrary, it is the states that have had a foot on the brake when it comes to codifying social progress. If not for their hesitancy to amend the Constitution, we would have a constitutional ban on child labor, an amendment protecting equal rights, and D.C. would be the fifty-first state of the Union.[34] And those are just the proposed amendments that made it through Congress. All too many proposals died there, as members of Congress know all too well that if not Congress, the state legislatures would kill the proposals. Truly, "it is an unfortunate reality . . . that Article V, practically speaking, brings us all too close to the Lockean dream (or nightmare) of changeless stasis."[35]

Amendments and Partisanship

Of course, neither the Framers nor the states deserve all the blame. Raging partisanship in Congress has made it virtually impossible to get consensus on political matters ranging from ambassadorial confirmations to combating climate change. To change the Constitution, two-thirds of both the House and the Senate need to vote in favor of the proposed amendment. Such clauses disproportionately empower small, vocal minorities, especially if they stand to gain from the status quo. In light of this, achieving the constitutionally mandated supermajorities in both chambers of Congress seems to be a thing of the past. This poses the question: How did we get here?

When Article V was drafted, the Framers did not expect the rise of unfettered partisanship and bad-faith politics. Oliver Ellsworth's advice to lawmakers suggesting they ask for help if they do not feel competent to form an opinion is of course cynical, but it also contained an ounce of truth. There was still a widespread belief that legislatures would follow the better argument, vote in favor of the greater good, have the intellectual honesty to seek out advice, and not deal favors to interest groups.

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[34] Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 93 L. Libr. J. 303 (2001).

[35] Sanford Levinson, Our Undemocratic Constitution 21 (2006).

Holding this ideal high, the Framers were terrified of the formation of parties, fearing that they would erode the political culture of the young republic. John Adams, then residing in Amsterdam, stated in a 1780 letter to Jonathan Jackson, who had just served as a delegate to the Constitutional Convention of Massachusetts, "There is nothing I dread So much, as a Division of the Republick into two great Parties, each arranged under its Leader, and concerting Measures in opposition to each other."[36]

But it did not take long until partisanship started to creep up on the founders. The rift between Federalists and Antifederalists gave them an early taste of what was to come. In May of 1789, Thomas Jefferson, then minister to France, wrote a letter to John Adams. The summer before, civil unrest had shaken major French cities and in January, the Estates General was summoned to assemble in Paris later that spring.[37] Jefferson witnessed the growing divisions and tensions between factions in France firsthand. Indeed, just weeks after sending his letter to Adams, revolution broke out in Paris. Now, he felt pressed to declare whether he was affiliated with the Federalists or the Antifederalists, when the newly formed federal government was just a week old.

> I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in any thing else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all.[38]

Certainly, Jefferson's experience in France shaped his fear of the impact parties might have on American political culture. He was concerned about the free flow of ideas and independent thinking, without which parties would come to poison the practicability of the amendment process.

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[36] *From John Adams to Jonathan Jackson* (Oct. 2, 1780), https://founders.archives.gov/documents/Adams/06-10-02-0113.

[37] The Editors of Encyclopaedia Britannica, *French Revolution,* Encyclopedia Britannica (Sept. 10, 2020), *at* https://www.britannica.com/event/French-Revolution.

[38] *From Thomas Jefferson to Francis Hopkinson* (March 13, 1789), https://founders.archives.gov/documents/Jefferson/01-14-02-0402.

The American people got a last warning by George Washington as he left office. In his Farewell Address, he cautioned about the ruthlessness of parties and their officials. In his view, they served

> to organize faction, to give it an artificial and extraordinary force; to put, in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels and modified by mutual interests.

He went on to predict that

> they are likely, in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.[39]

Unfortunately, by that time, the Constitution had already been ratified and Article V embodied the final decision on its amendment procedure. It was too late to account for rising partisanship and the dangers associated with it.

Amendments as a Reflection of Constitutional Moments

So far, we have seen how the states were empowered in the amendment procedure at the expense of the people, and how the framers failed to make Article V party-proof until it was too late. Together, this has led to an increasing inability to amend the Constitution. In the eyes of some, this is a good thing. John O. McGinnis and Michael B. Rappaport, for example, argue that supermajority rules — like those of Article V — are "a sound method of producing legitimate and desirable entrenchments."[40] This may

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[39] George Washington, *Farewell Address* (1796), https://avalon.law.yale.edu/18th_century/washing.asp.

[40] John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution 11 (2013).

be true in theory. But has it worked out in practice? Are the entrenchments caused by Article V legitimate and desirable?

In 1993, Bruce Ackerman published the first volume of his *We the People* trilogy.[41] There, he develops a theory of "constitutional moments." These are distinct points in history that "involve the overthrow of preceding ruling arrangements, including the important role in these arrangements played by established judicial doctrine" and are "extremely high-temperature, high-pressure bursts of energy that sweep across the whole political system."[42] Originally, Ackerman felt that the United States had only had three of those moments: the Founding, Reconstruction, and the New Deal. Eventually, he accepted that there were more than three, including the Senate's accession to congressional–executive agreements in 1945[43] and the Civil Rights Era of the 1950s and 1960s.[44]

In the late eighteenth century, constitutional moments and constitutional amendments went hand in hand. This started with the Bill of Rights. During the drafting of the Constitution, it was subject to heavy debate between Federalists and Antifederalists. Initially, it seemed like the Federalists and their opposition to the Bill would emerge from this debate triumphant. Hamilton slammed the idea of a codified Bill of Rights and instead pointed to the people's *pouvoir constituent*: "Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government." And further: "[B]ills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous."[45]

The Antifederalists, meanwhile, strongly believed that the Bill of Rights was necessary. For example, to "Brutus," the much-quoted opponent of the Constitution, there was nothing distinct about a republic that would safeguard the people's rights better than monarchies did. To him, elected

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41 Bruce Ackerman, We the People: Foundations (1993).

42 Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's "We the People*," 108 Yale L.J. 2237, 2239 (1999).

43 Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 Harv. L. Rev. 799, 835 (1995); David Golove, *Against Free-Form Formalism,* 73 N.Y.U. L. Rev. 1791 (1998).

44 Bruce Ackerman, *The Living Constitution,* 120 Harv. L. Rev. 1737, 1765 (2007).

45 The Federalist, *supra* note 27, No. 84, at 513 (Alexander Hamilton).

politicians were as capable oppressors as monarchs: "But rulers have the same propensities as other men; they are as likely to use the power with which they are vested for private purposes, and to the injury and oppression of those over whom they are placed, as individuals in a state of nature are to injure and oppress one another."[46]

Eventually, James Madison stepped up and lobbied for the Bill, convincing eleven of the fourteen states to ratify it.[47] A constitutional moment happened, and ten constitutional amendments were at its center.

The next of Ackerman's moments happened just three-quarters of a century later. The young republic broke apart over the South's fervent embrace of slavery. After its defeat in the Civil War, the Union demanded that the former Confederate states ban slavery, accept a significant reduction in state power, and give Black men the right to vote. It was not a legislative bill or a treaty between the North and the South that codified this, but three constitutional amendments.[48] The Waite Court initially gutted them, but their continued existence as the Thirteenth, Fourteenth, and Fifteenth Amendments ensures that the constitutional moment of Reconstruction remains part of this nation's constitution.

The reflection of the next three constitutional moments in amendments is much murkier. The New Deal upended much of American economic policy and legislation. Yet its only reflection in the Constitution is the Twenty-first Amendment, which ended Prohibition. At least part of the rationale behind this amendment was that banning alcohol turned out to be exorbitantly costly for the taxpayer. Its enforcement alone cost $300 million, and it caused a loss of $11 billion in tax revenue.[49] During the Great Depression, this was a luxury the federal government could no

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46 *Brutus II,* New York Journal (November 1, 1787) *at* https://archive.csac.history.wisc.edu/Brutus_II.pdf.

47 Richard E. Labunski, James Madison and the Struggle for the Bill of Rights 178–255 (2006).

48 *The End of Slavery and the Reconstruction Amendments*, Bill of Rights Institute, *at* https://billofrightsinstitute.org/essays/the-end-of-slavery-and-the-reconstruction-amendments.

49 Michael Lerner, *Unintended Consequences of Prohibition*, PBS, *at* https://www.pbs.org/kenburns/prohibition/unintended-consequences/; Jesse Greenspan, *How the Misery of the Great Depression Helped Vanquish Prohibition,* History (January 2, 2019), *at* https://www.history.com/news/great-depression-economy-prohibition.

longer afford. But this is only a faint reflection of the New Deal. None of the core programs and institutions we now associate with the New Deal have found their way into the Constitution, nor has the extent to which it has transformed the role of the government in America's society and economy. The Twenty-first Amendment hardly does justice to the New Deal's importance as a fundamental constitutional moment.

The civil rights era suffered a similar fate. Its only reflection in the text of the constitution is the Twenty-fourth Amendment of 1964, which prohibits states from limiting suffrage to those who paid a poll tax. This amendment helped fight disenfranchisement of voters in the South and is an important achievement of the civil rights movement.[50] But it is not reflective of the movement's ambitious goals and far-reaching accomplishments. And the accession to congressional–executive agreements changed congressional dynamics and the way America interacts with the world so fundamentally that Ackerman deems it a constitutional moment, but it has left no trace in the text of the Constitution at all. Hence, in the almost six decades since 1964, no constitutional moment has been lifted to actual constitutional status.

This list is of course subjective and not exhaustive. One might disagree with the inclusion or exclusion of one event or another. But the general point stands: over time, moments of supreme historic importance are seeing decreasing reflection in the Constitution. Where, at the founding, social and political history had a strong influence on the text of the Constitution, this is not the case today. That is not for want of trying. The current Congress alone has made 117 proposals to change the Constitution.[51] All of them failed. And the proposed Equal Rights Amendment remains unratified. The last time a state legislature picked it up was in 2021, when the North Dakota Legislative Assembly actually rescinded its 1975 ratification.[52] Put simply, amendments and constitutional moments used to

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[50] Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax,* 103 Nw. U. L. Rev. 63 (2009).

[51] Congress.gov (saved search), *at* https://www.congress.gov/search?q=%7B%22congress%22%3A%5B%22117%22%5D%2C%22source%22%3A%22all%22%2C%22search%22%3A%22%5C%22Proposing+an+amendment+to+the+Constitution+of+the+United+States%5C%22%22%7D.

[52] Nicholas Quallich, *North Dakota Legislature Rescinds 1975 Ratification of The Equal Rights Amendment,* KX News (Mar. 19, 2021), *at* https://www.kxnet.com/news/local-news/north-dakota-legislature-rescinds-1975-ratification-of-the-equal-rights-amendment.

be intimately related. Just consider the Bill of Rights. Today, they seem to be strangers. Amending the federal constitution no longer plays a role in entrenching broad societal consensus.

III. AMENDING STATE CONSTITUTIONS

If states truly are to be laboratories of democracy, as Justice Brandeis suggested in his *New State Ice v. Liebmann* dissent,[53] then their amendment provisions are exhibits A and B for it. On the one hand, their drafting histories show disagreement on what the best provisions were, followed by a gradual convergence over time resulting in remarkable homogeneity today. On the other hand, they have come to create environments in the state that are hyper-conducive to experimenting with different constitutional clauses. The excessively long constitutions of California and also of states like Texas and Alabama, enabled by lax amendment provisions, are testament to this.

Revolutionary Constitutions

In 1816, Thomas Jefferson commented on proposals to revise the 1776 constitution of Virginia. In a letter to Samuel Kercheval, he lamented, "Some men look at Constitutions with sanctimonious reverence, & deem them, like the ark of the covenant, too sacred to be touched."[54] Since the first revolutionary constitutions were drafted, states had wrestled with this issue, unable to find a uniform answer to the questions: "Who should touch a constitution?" and "When should it be touched?"

In essence, there were three competing models of amendment clauses. Seven states, among them Virginia and New York, followed the lead of the Articles of Confederation and did not include any provision that allowed for subsequent amendments or delineated the process.[55] A second group of states, comprising South Carolina, Delaware and Maryland, allowed their

[53] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[54] *From Thomas Jefferson to "Henry Tompkinson" (Samuel Kercheval), Proposals to Revise the Virginia Constitution* (July 12, 1816), https://founders.archives.gov/?q=Ancestor%3ATSJN-03-10-02-0128&s=1511311111&r=2.

[55] Walter Fairleigh Dodd, The Revision and Amendment of State Constitutions 118 (1910); the states were New Jersey, Connecticut, North Carolina, New Hampshire, and Rhode Island.

legislatures to vote on amendments. And lastly, four states had provisions that allowed for special constitutional conventions to make amendments.

These four states — Pennsylvania, Vermont, Georgia, and Massachusetts — were the first to let the people participate directly in a constitutional amendment procedure. Section 47 of the 1776 constitution of Pennsylvania, for example, holds that amendments "shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."[56] In these systems, popular input played a vital role in the amendment process. About four months later, the constitution of Georgia adopted a similar mechanism that took this idea one step further. Article LXVII of the state's 1777 constitution states: "No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State."[57] For the first time, citizens of a state were directly called upon not only to voice their opinions on an amendment or to publicly discuss it, but to decide its fate by casting a vote.

Other states were quick to adopt this model. In 1784 New Hampshire did away with its 1776 constitution and drafted a new one. While the previous constitution had no codified amendment clause, part of the new constitution was a provision that allowed for amendments if they were proposed by delegates to a constitutional convention and "approved by two-thirds of the qualified voters present, and voting upon the question"[58] Such supermajoritarian amendment rules can still be found today.

While other states followed suit, there were no new developments in amendment provisions until 1818. It was then that Connecticut decided it could no longer rely on its so-called "charter" of 1662 but that it needed a proper constitution.[59] Article XI contained this new constitution's amendment provision:

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[56] Pa. Const. (1776), https://avalon.law.yale.edu/18th_century/pa08.asp.

[57] Ga. Const., art. LXVII (1777).

[58] N.H. Const. (1784), https://en.wikisource.org/wiki/Constitution_of_New_Hampshire_(1784).

[59] Wesley W. Horton, The Connecticut State Constitution: A Reference Guide (1993).

> [I]f two thirds of each house . . . shall approve the amendments proposed . . . , said amendments shall . . . be transmitted to the town clerk in each town in this State; whose duty it shall be to present the same to the inhabitants thereof, . . . and if it shall appear . . . that a majority of the electors present at such meetings, shall have approved such amendments, the same shall be valid, to all intents and purposes, as a part of this constitution.[60]

With this provision, Connecticut established the now-familiar practice of amending the constitution by a proposal in the legislature (and not a convention or delegation as was the case in previous constitutions) which is subsequently adopted by popular vote.

Some believe that Alabama's constitution was the first to let citizens vote directly on proposed amendments during regular elections.[61] This is correct but does not show the full picture. Alabama was merely the first state to combine regular elections and votes on proposed amendments. As seen, it was in fact in Connecticut that the legislature and the people started working on the constitution hand in hand. From there on, the idea caught on. Today, all but one of the states require constitutional amendments to be accepted by the citizens after they are placed on the ballot either by the legislature or by a ballot proposition.[62] In nine states, amendment by way of a constitutional convention has even been struck from the constitution altogether.[63]

Excessive Change in the States

Since then, state constitutions have exploded in length. Early constitutions were just a few thousand words long, which hardly changed for about a century. But once the responsibility over constitutional amendments was placed in the hands of two different entities — legislature and voters — as opposed to giving any one party (near) complete control over the process, the rate of amendment quickly picked up.

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60 Conn. Const. (1818), https://collections.ctdigitalarchive.org/islandora/object/30002:22194671.

61 Dodd, *supra* note 55, at 123; Ala Const. (1819), https://avalon.law.yale.edu/19th_century/ala1819.asp.

62 53 The Council of State Governments, Book of the States 8 (2021).

63 *Id*. at 11.

When the constitution of California was ratified in 1879, for example, it was about 8,900 words long. By the 1960s, amendments had caused it to grow to 75,000 words. This was deemed too long and convoluted, so a Constitutional Revision Commission was tasked with shortening it. It found that "too many amendments have been submitted and adopted"[64] and recommended cutting the document by an impressive total of 40,000 words, spread over several smaller proposals.[65] Californians got to vote on these proposals, but unfortunately, far from all recommendations were approved and, today, the constitution has surpassed its 1960s length, standing at 77,000 words. Other constitutions are doing even worse. The constitution of Alabama, for example, has been amended more than 900 times since its adoption in 1901 and has grown to an astonishing 403,000 words in length, making it the longest by far. For comparison, this is about 4.4 times more than the constitution of the runner-up, Texas.[66] Most of this length is due to a controversial provision that allows voters of just one county to single-handedly amend the constitution as long as the amendment only concerns this one county.[67]

Of course, constitutions that are this easy to amend and that are this flush with change are not reflective of constitutional moments either. In such systems, amendments do not come with "extremely high-temperature, high-pressure bursts of energy that sweep across the whole political system"[68] anymore, since change has become so commonplace. This is not just an academic problem. Early on, Californians felt that their constitution was getting out of hand and was awash with amendments that had nothing "constitutional" about them. In 1931, Charles Aikin observed in a short piece written for the *American Political Science Review* that "[t]he electorate has become so accustomed to approving or rejecting

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64 Constitution Revision Commission, *Minutes of the Article XVIII Committee* 2 (July 14, 1966).

65 Joseph R. Grodin, Calvin R. Massey & Richard B. Cunningham, The California State Constitution 19 (1993).

66 The Council of State Governments, *supra* note 62, at 7.

67 *Id.*; Ala. Const., § 284.01; William Histaspas Stewart, The Alabama State Constitution 242–43 (2016).

68 Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's "We the People,"* 108 Yale L.J. 2237, 2239 (1999).

constitutional amendments that the man in the street refers to all proposals placed on the ballot as amendments."[69] Little has changed. Today, clauses in the Californian Constitution stipulate that textbooks are to be used until the eighth grade[70] or that certain tax exemptions are applicable to buildings under construction.[71] This has nothing to do with the revered document a constitution should be and that citizens have come to expect. When the Golden State's constitution was ratified, it was described as "a sort of mixture of constitution, code, stump-speech, and mandamus."[72] California's amendment practices have all but made sure that it has become much heavier on the code aspect and even lighter on the constitution aspect.

IV. A WAY OUT?

Neither the situation on a federal level nor that in the states is ideal. But is change likely? Certainly not with the federal constitution. While Article V could itself be changed, making amendments easier and more reflective of popular opinion,[73] is all but impossible to get supermajorities in Congress and the states that would vote to cut their own powers.

In California, the situation is somewhat different, but not much more hopeful. In the 1960s, California's Constitutional Revision Commission remarkably managed streamlining the state's constitution significantly. But many of those recommendations were defeated at the polls, and, more importantly, they failed to adequately address the roots of the problem. While a modest proposal was made to reform Article XVIII, which lays out the amendment procedure, by requiring votes on amendment proposals on two separate days,[74] some members of the Article XVIII Subcommittee

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[69] Charles Aikin, *The Movement for Revision of the California Constitution: The State Constitutional Commission,* 25 Am. Pol. Sc. Rev. 337 (1931).

[70] Cal. Const., art. IX § 7.5.

[71] Cal. Const., art. XIII § 5.

[72] Henry George, *The Kearny Agitation in California,* 17 Popular Sci. Monthly 43, 445 (Aug. 1880).

[73] George Mader, *Unamendability in the Constitution,* 99 Marquette L. Rev. 841, 848 (2016).

[74] Constitution Revision Commission, *supra* note 64, at 2.

felt that even this was too much.[75] As a result, the provision ended up surviving the reform period of the 1960s and 1970s unscathed. As long as it is exceedingly easy to propose amendments, either through a ballot proposition or by a disinterested legislature, amendments will keep playing a subordinate role in constitutional moments.

But there is an alternative. Not all states suffer from the ills that plague the constitutions of California, Alabama, or Texas. Until now, Delaware has been the state of choice for corporate lawyers. Its 1,000,000 corporations — one for every Delawarean — are a testament to that.[76] For the most part, constitutional lawyers have overlooked the Diamond State. But it might be time to change that. Delaware is the only state in the Union that does not require its people to vote on constitutional amendments. Instead, it places the amendment process completely in the hands of the legislature. While it is counterintuitive that this would serve the people better, it actually means that state legislators have to take complete responsibility for the fate of the constitution. Unlike in California, they know that they would be punished at the ballot if the constitution deteriorated. This makes them trustees of the constitution of sorts. As a result, the state's constitution was not changed at all in 2020 and only 1.2 times per year on average since its inception, as opposed to Alabama's 8.1 times, California's 3.8 times, and Texas' 3.5 times.[77] This amendment system has also succeeded in preventing excessive length. Today, the Delaware Constitution is just 25,445 words in length, up from 7,495 in the original version of 1897. This is a rather modest increase that stayed well below the national average of 42,000.[78] In light of this unique attitude toward the amendment process, it seems like a fitting coincidence that Delaware was the only state in 1787 that objected to handing the power of amendment in Article V to the states.[79]

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[75] Constitution Revision Commission, *Article XVIII Minority Committee Report* (Oct. 1966).

[76] *About,* Delaware Division of Corporations, *at* https://corp.delaware.gov/aboutagency/#:~:text=The%20State%20of%20Delaware%20is,made%20Delaware%20their%20legal%20home; *Quickfacts: Delaware,* U.S. Census (July 1, 2021), https://www.census.gov/quickfacts/DE.

[77] The Council of State Governments, *supra* note 62, at 5.

[78] *Id.* at 8.

[79] 2 Record of the Federal Convention, *supra* note 19, at 188.

States might be served well if they adopted this model for their own constitutions. But it might also be the better option for the federal constitution. Take Germany, for example. The European country is also organized as a federal state with separate constitutions for the federal and state levels. There, the amendment process requires two-thirds majorities in both chambers of parliament (Bundestag and Bundesrat), but it involves the states only indirectly (through the Bundesrat) and no popular votes at all. As a result, the Basic Law of the Federal Republic of Germany (the German constitution) has been amended about fifty-four times in the first sixty years of its existence, a rate quite comparable to that of Delaware. The German people, in the meantime, could trust that societal changes and constitutional moments would be reflected in the federal constitution. In the same time period, they hardly touched the sixteen state constitutions. There, the total number of amendments is between zero and thirty-six.[80] This shows two things: First, entrusting constitutional amendment to one sufficiently democratically legitimated branch of government calms amendment rates.[81] Second, if the people feel that the federal government is responsive to popular discourse and a gradually changing consensus, they feel less need to make changes in the state. For the U.S. Constitution, this would mean that changing Article V and making amendments more frequent as a consequence, would likely cause amendment rates in the states to slow down.

The examples of Delaware and Germany are quite different indeed. But this is a good thing. They show that certain design choices — legislative amendments, limiting the actors involved in amendment processes — work in a variety of contexts and on both a federal and a state level.

V. CONCLUSION

Of course, neither changing Article V nor changing any of the states' amendment procedures is probable. The fact that a Constitutional Reform

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[80] Deutscher Bundestag Wissenschaftliche Dienste, *60 Jahre Grundgesetz – Zahlen und Fakten,* Deutscher Bundestag (2009), https://www.bundestag.de/resource/blob/414590/7c0ab6898529d2e6d7b123a894dbeb8f/wd-3-181-09-pdf-data.pdf.

[81] This would not be the case if, for example, the *states* had complete control over the amendment process of the *federal* constitution: *see e.g.*, Charles L. Black, T*he Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 957 (1963).

Commission in California could not even agree to recommend two readings instead of one should suffice as proof thereof. However, this paper is not intended as a policy brief. Instead, it aims to highlight the shortcomings of amendment clauses in the state and federal constitutions, investigate their historical origins, and finally show that better solutions are readily available. Importantly, it showed that both a lack of public participation and an excess thereof can be counterproductive to constitutional culture. Solid amendment provisions neither make it too easy to change the constitution, nor do they ensure that the constitution is all but fossilized. Instead, they give citizens an incentive to reach out and work together so that whatever is deemed a social consensus would be reflected in the constitution.

Luckily, we do not have to resort to our imagination or to foreign mechanisms to come up with a better solution. At least for states like California, Texas, or Alabama, this better solution has been tried and tested by one of their peers. Delaware has a model of amendment that has served the state well in preserving the constitution's "constitutionality," i.e., its limitation to essential social and political questions and its openness to change, while ensuring that the rate of amendment does not get out of hand. Today, Delaware is the only state with this model. But it needn't be. California, Texas, and Alabama all have multiple constitutions in their past. If they decide to add one more to that list, its drafters should take a look at the Diamond State. They might strike constitutional gold.

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