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WHEN PUSH COMES TO SHOVE BETWEEN COURT RULE AND STATUTE: THE ROLE OF JUDICIAL INTERPRETATION IN COURT ADMINISTRATION

Glenn S. Koppel*

I. INTRODUCTION

Who decides whether electronic recording technology may be used to make the verbatim record of court proceedings? (a) judges; (b) litigants; (c) administrators; (d) legislators; (e) court reporters.

The correct answer in California is: (e) court reporters. The California Court Reporters Association recently sued the California Judicial Council to invalidate rules of court that would have given local superior courts discretion to use electronic recording technology. These rules would allow a verbatim record to be made when an official reporter is unavailable or when the parties do not object. In 1995, in *California Court Reporters Association, Inc., v. Judicial Council of California* ("CCRA I"),¹ a state appellate court held that these rules were "inconsistent with statute," and therefore exceeded the Judicial Council's rule-making powers under Article VI, Section 6 of the California Constitution.² This decision exemplifies the stranglehold that the court reporters' lobby has

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1. *California Court Reporters Ass'n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997) [hereinafter *CCRA I*].

2. *Id.* at 51.

over the legislative process and significantly impairs the Judicial Council's role in court administration. The *CCRA I* opinion has seismic implications for court administration in California, raising the larger issue of the appropriate role of appellate judges in interpreting statutory and constitutional text regarding the power over court administration.

Judges wear two hats. Traditionally, they are adjudicators on the trial and appellate levels, deciding cases one at a time. Judges also perform the extra-judicial function of managing court operations,³ a role that has blossomed in the last half of the twentieth century. The protracted battle in California between the court reporters and judicial administrators over the use of electronic recording in superior courts ended with a victory for the court reporters that reduced the rule-making power of the Judicial Council in court administration. Ironically, the hand that delivered this blow to the judiciary's *administrative* power was attached to the judiciary's *decision-making* arm. The *CCRA I* court interpreted a collection of court reporting statutes to mean "that the Legislature implicitly intended [the court record] be made by certified shorthand reporters rather than by electronic recording."⁴ In the process, the *CCRA I* court re-calibrated the balance of power in court administration between the judicial and legislative branches in California. The *CCRA I* decision raises important questions about the relationship between the decisional and administrative roles judges play in court administration. Part II of this article tells the tale of this struggle for control of the court record and lays the groundwork for an exploration of the relationship between the roles of judges as interpreters of text and as court administrators.⁵

Much has been written about the traditional role of

3. See, e.g., Carl Baar, *When Judges Lobby: Congress and Court Administration* 4 (1969) (unpublished Ph.D. dissertation, University of Chicago) (on file with the Department of Political Science at University of Chicago). Baar's study distinguishes between "judicial administration" and "judicial decision-making":

Judicial decision-making focuses upon the process of litigation—that is, the hearing and resolving of cases brought by aggrieved parties in accordance with traditional legal procedures. On the other hand, judicial administration refers to the way in which the process of litigation is organized—how courts are established, staffed and operated so that cases can be efficiently heard and resolved.

Id.

4. *CCRA I*, 46 Cal. Rptr. 2d at 51.

5. See *infra* Part II.

judges as adjudicators who shape the evolving common law and interpret statutes. Less has been written about the contemporary—extra-judicial—role of judges as court administrators. This article links these two roles, focusing on the impact judges as adjudicators have on the role of judges as court administrators.

Courts need to update their theories of statutory interpretation to keep up with dramatic developments in judicial administration. Part III of this article briefly surveys the rise of judicial branch leadership in court administration in the twentieth century.⁶ During the last thirty years, judicial involvement in court administration has rapidly evolved in response to increased caseloads, the technology revolution,⁷ and budget crises.⁸ The development of centralized judicial branch administrative authorities within state and federal judicial systems, replete with staffs of professional court administrators,⁹ has reversed the traditional dependence of the judiciary on the other two branches of government.¹⁰

At the same time, these last few decades have also witnessed political assaults on the judiciary that have eroded respect for the constitutional concept of separation of powers and judicial independence. Judges have been the targets of unprecedented attacks for their substantive law decisions.¹¹ In the procedural area as well, court administration has become increasingly politicized as interest groups increasingly turn to the legislative branch to bend the rules of practice,

6. See *infra* Part III.

7. See Fredric I. Lederer, *The Randolph W. Thrower Symposium: Changing Litigation with Science and Technology: Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095 (1994) ("Our increasing dependence on technology, particularly computer-based technology, is one of the distinguishing characteristics of late twentieth century American life.").

8. See, e.g., John K. Hudzik, *Financing and Managing the Finances of the California Court System: Alternative Futures*, 66 S. CAL. L. REV. 1813, 1840 (1993) ("Under all except the 'probable best case scenario,' the next decade's likely funding levels will put increasing pressure on the management of judicial system resources.").

9. See *infra* text accompanying note 120.

10. See RUSSELL R. WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE 37 (1988) ("A separate and effective judicial administration capability . . . stand[s] to provide the judiciary the strength to protect its independence, 'to defend itself against [the] attacks' of the other branches.").

11. See, e.g., Nancy McCarthy, *Judge Faces Discipline for Opinion*, CAL. B.J. Aug. 1998, at 1.

procedure, and court administration in their favor.¹² The *CCRA I* decision enabled powerful interest groups to hamstring judicial administration for private ends.

The convergence of recent historic changes in three areas—court administration, technology, and statutory interpretation theory—is rendering obsolete the application of traditional interpretative approaches when applied to statutory and constitutional text that affect court administration. The courts, as protectors of public values,¹³ need to assume an assertive role as interpreters of statutes that support, rather than undermine, their assertive role in court administration. The legal community engages in an ongoing conversation about the appropriate function of judicial administration.¹⁴ Courts, as interpreters, have a voice in this ongoing dialogue¹⁵

12. For a description of the politicization of procedure, see WHEELER, *supra* note 10, at 39. "The potential of legislative dominance of the judiciary is inherent in the nature of republican government." *Id.* at 39. See also Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 471-87 (1997). But see, e.g., CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST—FEDERAL JUDGES AND COURT ADMINISTRATION, 133-34 (1995) (scholars encourage Congress to be less deferential to the courts, fearing judicial arrogance):

[E]xcessive [Congressional] deference to federal judges amounts to abdication of the Congress's Article III responsibilities for designing and maintaining the federal court system. . . . By being more attentive to the resource problems facing the judiciary and by overseeing judicial administration in a more critical and less deferential fashion, Congress, with the assistance of input from scholars and interested groups, may be able to moderate the potentially detrimental risks attendant to manifestations of judicial self-interest.

Id.

13. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1062-73 (1989) (analyzing the role of courts as protectors of public values) [hereinafter Eskridge, *Public Values in Statutory Interpretation*].

14. See, e.g., WHEELER, *supra* note 10, at 34.

15. Eskridge, *Public Values in Statutory Interpretation*, *supra* note 13, at 1016.

Public values thinkers believe that the dialogue by which public values are articulated is best performed by courts, not just by the legislature Modern political science scholarship depicts the legislature as typically paralyzed and unable to take constructive action, when it does bestir itself to enact laws, they are typically feeble compromises or, worse, unprincipled doles to special interest groups Courts have the institutional ability to contribute more substantially to the politics of public values, because their independence reduces the inertia and interest group pressures of everyday politics, and because their open, reasoned, and incremental decision-making assures a more rational discussion of public issues.

Id.

about the appropriate balance of power between the judicial and legislative branches in court administration. Part IV draws upon recent statutory interpretation scholarship to critique the application of traditional "legislative intent" approaches to interpreting statutes bearing on court administration and proposes an alternative approach.¹⁶ Part V critiques the *CCRA I* decision to illustrate how courts could use the proposed alternative approach to resolve conflict between court rule and statute.¹⁷

II. CALIFORNIA COURT REPORTERS VERSUS THE JUDICIAL COUNCIL

A. A Historical Perspective: The Evolution of Verbatim Court Reporting

Stenographers rarely made verbatim records of court proceedings in the United States prior to the Civil War.¹⁸ Until the mid-nineteenth century, verbatim records of trial proceedings were scarce.¹⁹ American courts did not appoint stenographers as salaried court employees until April 16, 1860, when the New York State legislature enacted the first statute authorizing a court to appoint a court reporter.²⁰ California followed New York's lead the following year, enacting a law authorizing, but not requiring, judges to appoint shorthand reporters.²¹ The text of the original 1861 California court re-

16. See *infra* Part IV.

17. See *infra* Part V.

18. The first system of modern shorthand was invented in Elizabethan England by Dr. Timothy Bright who, in 1588, published a treatise entitled "Characterie An Arte of shorte, swifte, and secrete writing by Character." For a history of court reporting in England, see Harry M. Scharf, *The Court Reporter*, 10 J. OF LEGAL HIST. 191-227 (Sept. 1989). Phonography was imported from England to the United States in 1845. See JULIUS E. ROCKWELL, *THE TEACHING, PRACTICE AND LITERATURE OF SHORTHAND* 35 (1884). See also Oswald M. T. Ratteray, *Verbatim Reporting Comes of Age*, 56 JUDICATURE 368 (1973).

19. See Jim Haviland, *Philander Deming's Role*, NAT'L L.J., Apr. 12, 1982, at 15, 15 ("Until just after the Civil War, testimony wasn't recorded in trials. This led to considerable wrangling over the different recollections of what had been said by witnesses in court.").

20. ROCKWELL, *supra* note 18, at 46. As late as 1944, federal courts did not employ court reporters. Parties who desired a verbatim record made their own private arrangements to hire a reporter. See PETER GRAHAM FISH, *POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 230 (1973).

21. Chapter 434 of the Statutes of California of 1861 provided, in relevant

porter statute remains substantially intact in the current versions of Code of Civil Procedure sections 269 and 273 and Government Code section 69941, which were the key code sections interpreted by the *CCRA I* court.

While no legislative history survives to illuminate the purpose behind the early court reporter statutes,²² it is fair to infer that these statutes, enacted during the infancy of court reporting,²³ were designed to address a shortage of stenographers sufficiently skilled in the infant art of making a verbatim record of court proceedings.²⁴ It is reasonable to assume that competent court reporters were especially scarce in frontier California. Further, the early statutes were most likely

part:

Section 1. The District Judge of each of the Fourth, Sixth, Seventh, Tenth, Twelfth, and Fifteenth, Judicial Districts, is hereby authorized to appoint a competent Short Hand Reporter, who shall, at the request of either party in a civil case, or in criminal cases, triable in the District Court, at the request of the court, take down in short hand, the rulings of the court, the exceptions taken, and the testimony, and shall within five days after the trial of such case, write out the same in plain, legible, long, handwriting, and file it, together with the original short handwriting, with the Clerk of the court in which the cause was tried.

Id.

22. See Letter from Legislative Intent Service to Glenn S. Koppel, Professor, Western State University 3 (July 1, 1997) (on file with author) ("As you review the materials we located for the legislation of the 1860's, you will find no substantive discussion of the background or intent of the measures. Unfortunately, none was left by the author, Governor, the committees, nor the state entities that were concerned with the legislation.").

23. See ROCKWELL, *supra* note 18, at 54 ("[N]o able or systematic efforts were made towards the formation of State or national [shorthand] associations until the centennial year [1876]."). See also Ratteray, *supra* note 18, at 369 ("Professionalism among reporters . . . increased at the close of the [19th] century. There was a decline in the fierce rivalry between the exponents of differing systems of shorthand during the previous two hundred years.").

24. "Many transcripts of this period [early to mid-nineteenth century] . . . show evidence of considerable condensation and gaps in the reporter's notes that were subsequently filled in. In many instances the reporters were probably not skilled enough to record every word." Ratteray, *supra* note 18, at 368 (footnote omitted). The shortage of skilled court reporters continues to challenge court administrators and is a major reason for the popularity of electronic recording. See William E. Hewitt, *Video Court Reporting: A Primer for Trial and Appellate Judges*, JUDGES' J., Winter 1992, at 4.

One or more of the following reasons . . . will be mentioned [by judges to explain why they sought alternatives to traditional reporting]: (1) there was a shortage of qualified court reporters and finding alternatives became a necessity; (2) there was a problem with timeliness of transcripts, quality of transcripts, or both; [and] (3) there was a financial crisis and the court had to save money.

designed to make available, at the option of the courts or the parties, an assured, quality source of the only available verbatim recording technology—shorthand. Consequently, California's 1861 court reporter statute merely "authorized," but did not require, selected superior court judges to appoint shorthand reporters and required the court reporter to take down proceedings *only* "at the request of either party in a civil case, or in criminal cases, triable in the District Court, at the request of the court."²⁵ This statutory scheme remains the same today.²⁶

However, many litigants in contemporary court proceedings in California do not request the creation of a verbatim record as, for example, in cases where appeals are unlikely or the proceedings are not complicated and can be recreated by "settling the record."²⁷

During the mid-twentieth century, electronic and information technology radically transformed verbatim recording methods. Courts began to experiment with sound recording as early as the 1950s, followed by audio-video recording in the 1980s. As judicial caseloads ballooned, the use of electronic recording grew from an experiment to a common practice and the supply of court reporters proved unequal to the demand.²⁸

Because of the rapid evolution of verbatim recording technology, court reporting statutes are a genre of court administration statutes that quickly become outdated unless updated by the legislature. Court reporter associations, who fear the demise of shorthand reporting, vigorously oppose the use of electronic non-shorthand verbatim recording technologies.²⁹ In California and New York, where the legislatures exercise power over court administration concurrently with the courts,³⁰ court reporter lobbyists successfully blocked efforts by court administrators to enact statutes expressly

Id.

25. 1861 Cal. Stat. 434.

26. See CAL. CIV. PROC. CODE § 269(a) (West Supp. 1999); CAL GOV'T CODE § 69941 (West Supp. 1999).

27. See CAL. R. CT., tit. 1, app. R.

28. See *Court Reporting: From Stenography to Technology*, GOV'T TECH., Mar. 1996, at 1 ("Overloaded and underfunded courts are increasingly looking at audio recording as a way to cut costs, which is achieved mainly by eliminating the salaries and related costs of court reporters.").

29. See Hewitt, *supra* note 24, at 5.

30. See *infra* note 131.

authorizing the general use of electronic recording in court.³¹

Notwithstanding the forceful opposition of the court reporters, electronic recording technology has proven to be an acceptable means for making the record,³² though not the best

31. However, there is one advanced verbatim reporting technology that has been enthusiastically embraced by the court reporting profession: computer aided transcription ("CAT"). CAT, a marriage of information-age computer technology to traditional shorthand reporting, has breathed new life into shorthand reporting.

32. Electronic verbatim recording technology has been extensively researched over the past thirty years. Even in New York, where the court reporter lobby has blocked the permanent and general use of electronic recording in New York courts, that state's demonstration project has been renewed by the legislature three times since 1992. In his 1997 report to the state legislature on the demonstration project, New York's Chief Administrative Judge wrote:

In sum, all indications continue to point to the success of the use of electronic recording in lieu of court reporters. The equipment has successfully been implemented in the courts, significant savings have been achieved each year, and the judges and other parties in the courtroom have continued to adapt to the presence of the equipment.

Hon. Jonathan Kippman, *Report of the Chief Administrative Judge to the New York State Legislature, The Governor, and the Chief Judge on the Effect of Electronic Recording in the State Court System*, Jan. 1, 1997, at 32. California's Judicial Council submitted a favorable report on the state's six-year electronic recording demonstration project which ended in 1992:

The use of electronic recording as an alternative method to produce and preserve the verbatim court record has been successfully demonstrated in the current pilot project This project confirms what has been found by the many state and federal courts who have used electronic recording for years. The issue is one of making a verbatim record, and electronic recording has proved to be as acceptable in making a record as that made by a stenographic reporter.

Jud. Council of Cal., *Report to the California Legislature on Electronic Recording Demonstration Project*, Jan. 1, 1992, at 36-37. In July, 1983, the Federal Judicial Center issued a 222-page report on the result of the one-year experiment with sound recording in the federal courts that concluded: "Given appropriate management and supervision, electronic sound recording can provide an accurate record of United States district court proceedings at reduced costs, without delay or interruption, and provide the basis for accurate and timely transcript delivery." J.M. Greenwood et al., *A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting*, FED. JUD. CTR. at 81 (1983). But see Resource Planning Corporation for the National Shorthand Reporters Association, *An Analysis of the Federal Judicial Center's Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting* (1983). The Institute for Court Management at the National Center for State Courts (NCSC) summarized the findings of 20 electronic court reporting studies (not including the reports on the New York and California demonstration projects) that were published between 1972 and 1992. The NCSC's summary reveals that 15 studies favorably evaluated electronic court reporting compared to five unfavorable studies. "Four of these five reports were commissioned and paid for by the National Court Reporters Association; one was prepared on behalf of the State of Hawaii Judiciary." Memorandum

means in every circumstance. Each verbatim recording technology has its costs and benefits; no single technology—even shorthand—is optimal in all courtroom settings.³³

Most American courts currently use either audio or video technology, or a combination of both.³⁴ Verbatim recording technology continues to evolve, becoming more reliable³⁵ and versatile.³⁶ The dire predictions of the court reporting profession that electronic recording will compromise the integrity of the record have not materialized.

B. Round I: The Legislative Arena—Private Versus Public Lobbying

The twenty-seven-year battle in the California legislature over electronic recording tells a tale of legislative dysfunction.³⁷ The California Court Reporters Association (CCRA) is one of the most effective lobbying organizations in Sacramento.³⁸ Since 1987, the CCRA has contributed over

from Rae Lovko & Susan Myers, NCSC, Institute for Court Management, *re: Literature Review of Electronic Court Reporting Methods*, and attached *Summary of Literature on Electronic Court Reporting* (Mar. 15, 1994, Ref. No. S94.0083).

33. See Lovko & Myers, *supra* note 32, at 1 ("In general, these findings reveal that while no technology is unquestionably superior in all respects or under all circumstances, audio recording and video recording are viable court reporting methods.").

34. According to a 1993 survey prepared jointly by the Conference of State Court Administrators and the NCSC, 45 state court systems, the District of Columbia and Puerto Rico courts, and the federal courts either "allow" or "require" the use of audio tape to record some or all trial proceedings. Video tape is "allowed" in 17 state jurisdictions, "prohibited" in 7 state jurisdictions, and "experimental for some or all types of cases" in 10 state jurisdictions and in the federal courts. David B. Rottman et al., *State Court Organization 1993*, tbl. 31, Conference of State Court Administrators and National Center for State Courts (Jan. 1995, NCJ-148 346).

35. The most recent technological advance is digital court recording which dispenses with tape, with its attendant playback retrieval problems, and which records the human voice directly into a computer where it can be processed like any other computerized data. See John Southherst, *Digital Court Recording: Trial Without Error*, 10 CT. TECH. BULL. 1 (1998).

36. Robert Anderson et al., *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future*, 66 S. CAL. L. REV. 1762, 1770 (1993).

37. See *infra* notes 181-185 and accompanying text.

38. See Dan Walters, *A Court Battle over Machines*, SACRAMENTO BEE, Dec. 10, 1993, at A3. The California Court Reporters Association has become one of the Capitol's most effective single-purpose lobbying groups, whose lone goal is to keep tape out of the state's courtrooms. *Id.*

\$470,000 to candidates for state office.³⁹

Since 1971, the CCRA has consistently outgunned the Judicial Council's lobbyists who promote bills authorizing electronic recording in superior court.⁴⁰ The CCRA prevailed in every legislative showdown with the Judicial Council over electronic recording, killing⁴¹ or watering down⁴² every bill it actively opposed. Usually, the CCRA prevented electronic recording bills from reaching the Assembly or Senate floor by aborting these bills in the Assembly or Senate Judiciary Committees.

However, the legislature expressly authorized the use of verbatim electronic recording in California courtrooms in two limited instances: (1) in municipal court, a court of limited jurisdiction,⁴³ and (2) in selected superior courts on a demonstration basis for a limited time period (i.e., 1986 to 1994).

1. *Electronic Recording in Municipal Court*

California Government Code section 72194.5 expressly authorizes electronic recording in municipal courts whenever official court reporters are unavailable.⁴⁴ The Judicial Council

39. See LEXIS, Legis Library, Cagin File (California State Campaign Finance Receipts).

40. See Baar, *supra* note 3, Vol. 2, app., at 664-73 (discussing private and public lobbying).

41. See Tom Dresslar, *The Bill Rejecters—In Sacramento, Court Reporters Swat Away Endeavors to Change Their Status*, L.A. DAILY J., Aug. 3, 1993, at 1.

[T]he CCRA no doubt would rank with the greatest shot blockers in history. The record shows that when it comes to legislation detrimental to its members' financial and professional interests, the association can kill with the best of them Assembly Judiciary Committee Chairman Phil Isenberg puts a slightly different spin on the historical record. "The Legislature has kowtowed to court reporters in a shameless fashion," said the Sacramento Democrat who has lost several duels to what he calls the "court reporter monopoly."

Id.

42. See *infra* notes 48-68 and accompanying text.

43. Municipal courts cannot hear civil action in which the amount in controversy exceeds \$25,000. See CAL. CIV. PROC. § 85(a). Municipal court criminal jurisdiction is limited to misdemeanors. See CAL. PENAL CODE § 1462 (Deering Supp. 1999). In the 53 out of 58 counties that have voted to unify their trial courts under Proposition 220, municipal courts no longer exist. On January 2, 1998, the voters approved a ballot measure that "provides for the abolition of municipal courts within a county, and for the establishment of a unified superior court for that county, upon a majority vote of superior court judges and a majority vote of municipal court judges within the county." S.B. 2139, Ch. 931, 1997-98 Reg. Sess. (Cal. 1998) (Legislative Counsel's Digest).

44. Section 72194.5 provides that:

sponsored this bill to address a critical shortage of court reporters in municipal court in the 1970s; neither the text of the bill nor its legislative history addressed the use of electronic recording in superior courts.⁴⁵ The CCRA did not actively oppose section 72194.5⁴⁶ because—with the exception of felony preliminary hearings⁴⁷—business is sparse in municipal court. That is, because few parties appeal municipal court decisions, most parties do not order transcripts in municipal court proceedings

2. *Electronic Recording in Superior Court:
The Demonstration Projects (1986 to 1994)*

In 1986, the legislature also approved the limited use of electronic recording in selected superior courts by enacting California Assembly Bill 825—codified as Code of Civil Procedure section 270—that authorized California's first electronic recording "demonstration" project.⁴⁸ The act contained a sun-

Whenever an official court reporter or a temporary court reporter is unavailable to report an action or proceeding in a municipal or justice court, . . . the municipal or justice court may order that the action or proceeding be electronically recorded The court shall assign available reporters first to report preliminary hearings and then to other proceedings.

CAL. GOV'T CODE § 72194.5 (West 1997). To "accommodate the unification of municipal and superior courts in a county," section 72194.5 was amended in 1998 to permit "a court" to order electronic recording of "court" proceedings in a limited civil case, or infractions case "where an official reporter is unavailable." 1998 Cal. Stat. 931, § 324 (Law Revision Comm'n Comments, 1998 Amendment).

45. See CAL. GOV'T CODE § 72194.5 (West 1997) (Historical and Statutory Notes) ("The Legislature finds and declares that in many actions and proceedings presently heard in municipal and justice courts, official reporters are either physically unavailable in a given geographical location or it is not practical from a cost-benefit standpoint to have official reporters continually available for such proceedings."). See also JUD. COUNCIL OF CAL., *Judicial Council Annual Report for 1989*, Chap. 11: Audio & Video Recording Demonstration Projects (1989).

46. See S.B. No. 629, Background Information, Senate Committee on Judiciary (Cal. 1997).

47. As originally enacted in 1975, Government Code section 72194.5 restricted electronic recording to civil actions and *misdemeanor* criminal proceedings, excluding felony preliminary hearings. When Government Code section 72194.5 was amended in 1989 to expand electronic recording to *all* actions and proceedings in municipal or justice courts, the following sentence was inserted: "The court shall assign available reporters first to report preliminary hearings and then to other proceedings." CAL. GOV'T CODE § 72194.5 (West 1975).

48. CAL. CIV. PROC. CODE § 270 (Deering 1991) (authorizing California's first demonstration project).

set provision mandating the project's termination by January 1, 1992.⁴⁹ In 1989, the legislature enacted California Assembly Bill 1854, which amended Code of Civil Procedure section 270 to extend the life of the demonstration project until January 1, 1994.⁵⁰

As *originally* introduced in the legislature, both Assembly Bill 825 and Assembly Bill 1854 expressly authorized the blanket and indefinite use of electronic recording in all superior courts.⁵¹ However, in response to vigorous opposition by the CCRA, each bill was diluted to authorize a limited duration demonstration project "to assess the costs, benefits, and acceptability of utilizing audio and video recording as a means of producing a verbatim record of proceedings in [a limited number of] superior court departments."⁵² The demonstration project was not a thoughtful response to a legitimate need for further study of electronic recording in superior courts. Rather, the demonstration project was the product of a compromise between the Judicial Council and the CCRA, a compromise promoted by the Senate Judiciary Committee.⁵³

Early versions of Assembly Bill 825 expressly authorized any California court to use electronic recording to make the verbatim record "in any case where no party objects." Early

49. 1986 Cal. Stat. 373. ("An act to add Section 270 to the Code of Civil Procedure, and to amend Section 69950 of the Government Code, relating to court reporters.").

50. 1989 Cal. Stat. 678. ("An act to amend Section 270 of the Code of Civil Procedure, and to amend Section 72194.5 of the Government Code, relating to courts.").

51. See A.B. No. 825 (Cal. 1985). "SECTION 1. Section 270 is added to the Code of Civil Procedure, to read: 270. (a) Except in criminal proceedings the court may authorize electronic court recording or video taping to be used in lieu of the record prepared by a court reporter." *Id.* See also A.B. No. 1854 (Cal. 1989). "SECTION 1. Section 69960 is added to the Government Code, to read: 69960. [W]henever necessary to avoid delay in proceedings or to assure prompt delivery of transcripts, the superior court may order the verbatim record of oral proceedings in that court to be made electronically." *Id.*

52. CAL. CIV. PROC. CODE § 270(a) (Deering 1991).

53. See SENATE COMM. ON JUD., *Current Proposal Represents a Compromise: Hearing on A.B. 825 Before the Senate Committee on Judiciary* (1986).

Last year this measure arrived before this Committee in a significantly different form, establishing a pilot project in Los Angeles County and providing a blanket authorization for electronic recording devices in rural counties. Proponents and opponents agreed to undertake negotiations in order to determine if a compromise could be found. After months of work, they successfully developed the current language and are now in delicate agreement.

Id.

versions of AB 825 also authorized the presiding judge of the Los Angeles Superior Court to designate demonstration courtrooms where "electronic court recording or video taping devices shall be utilized for normal verbatim record keeping purposes."⁵⁴ An amendment to the bill limited the courts authorized the use of electronic recording in lieu of shorthand in superior courts "having six or fewer judges" (i.e., superior courts in rural counties).⁵⁵

Up to this point in the legislative process, the court reporters lobby did not actively oppose the bill because the CCRA hoped it could persuade the bill's author to limit electronic recording to a few "demonstration" courtrooms in Los Angeles County.⁵⁶ The situation changed dramatically on July 11, 1985 when Frank Murphy, CCRA's long-time and extremely effective lobbyist,⁵⁷ notified Senator Bill Lockyer that his client was "totally oppose[d]" to California Assembly Bill 825.⁵⁸ Murphy added that "there is no higher priority to the

54. A.B. No. 825 (Cal. 1985) (amended in Assembly May 9, 1985).

55. A.B. No. 825 (Cal. 1985) (amended in Senate July 8, 1985).

56. Frank Murphy, Jr., a lobbyist for CCRA, sent the following letter to Senator Lockyer in July 1985:

Dear Bill:

As you know I represent the California Court Reporters Association. CCRA has been cooperating with Assemblyman Harris and the supporters of AB 825 since its introduction in the hope of achieving a consensus on testing the use of tape recorders in certain limited and well-defined superior court settings in Los Angeles County. CCRA did not, nor did I, contact any member of the Assembly to oppose any previous version of the bill. Unfortunately our efforts at accommodation have been unsuccessful and we must ask your opposition to AB 825. The bill is scheduled to be heard by the Senate Judiciary committee on July 16th. We feel it makes no sense whatever for the State to require tape recorders to be made available in superior courts while testing their use in some Los Angeles County courtrooms.

Among those who join CCRA in opposing AB 825 are the members of Service Employees International Union.

There is no higher priority to the shorthand reporting profession than the defeat of AB 825.

Sincerely,

Frank Murphy, Jr. [signed "Frank"]

Letter from Frank Murphy, Jr., to Senator Bill Lockyer (July 11, 1985) (on file with author).

57. See Dresslar, *supra* note 41, at 1. "The court reporters usually win, said Schmidt, because of 'the sheer force of Murphy's personality, his persistence and his constant nagging.' He added, 'Nobody does it better than Murphy. The future of technology in the courts will depend on the retirement of Frank Murphy.'" Dresslar, *supra* note 41, at 1.

58. Letter from Frank Murphy, Jr., to Senator Bill Lockyer, *supra* note 56.

shorthand reporting profession than the defeat of AB 825," and that the Service Employees International Union joined the CCRA in opposition to California Assembly Bill 825.⁵⁹ Letters opposing the bill suddenly appeared in Senator Lockyer's office. The Judicial Council and the CCRA negotiated for almost ten months.

The price charged by the CCRA for dropping its opposition to California Assembly Bill 825⁶⁰ was steep. As a consequence of the vigorous opposition by the CCRA in the Senate Judiciary Committee, the version of Assembly Bill 825 finally enacted was radically different from the early versions of the bill. The blanket authorization to rural superior courts to use electronic recording in lieu of shorthand was deleted. A provision was added protecting the hours of presently employed court reporters.⁶¹ The court reporters believed that the Judicial Council's study would not be objective (since the council sponsored the bill).⁶² Thus, the enacted version of Assembly Bill 825 provided for a dual review of the demonstration project: one review by an advisory committee appointed by the Joint Rules Committee of the Legislature and another by the Judicial Council.⁶³ Finally, to sweeten the pot, the CCRA won a ten-cent-per 100-words increase in the transcription fee

59. *Id.*

60. A.B. No. 825 (Cal. 1986) (as amended May 22, 1986).

61. "(f) No presently employed permanent court reporter shall have his or her hours of employment reduced as a result of the demonstration project nor shall be required to prepare a transcript of a proceeding in a court of the demonstration project." 1986 Cal. Stat. 373.

62. The amended version of the bill stated:

Individuals originally opposed to this measuring [sic] questioned the objectivity of the Judicial Council in reviewing the use of the electronic recording, as the Council sponsored the bill in the first place. This dual review, providing also for minority reports from the advisory committee, is a compromise meant to ensure that all parties involved have input into the Legislature's evaluation.

A.B. No. 825 (Cal. 1986) (as amended May 22, 1986).

63. The enacted version of the bill stated:

(h) The Joint Rules Committee shall appoint an advisory committee consisting of two certified shorthand reporters, one person skilled in courtroom audio recording, one person skilled in courtroom video recording, two judges experienced in trial work, one court administrator, and two attorneys experienced in trial work to evaluate the demonstration project, and it shall report its findings and recommendations, including minority views, if any, to the Legislature at the same times as the Judicial Council reports pursuant to subdivision (g).

1986 Cal. Stat. 373.

that court reporters could charge for original ribbon copy.⁶⁴

3. *The Sunset of the Demonstration Project and the Demise of the Isenberg Electronic Recording Bill*

Anticipating the January 1, 1994 "sunset" of the demonstration project, the Judicial Council sponsored California Assembly Bill 2937, introduced on February 19, 1992 by Assembly Judiciary Committee Chair Phil Isenberg. This bill would have given any court the discretion to "utilize audio or video recording as the means of making a verbatim record of any hearing or proceedings."⁶⁵ Notwithstanding the eighteen-year experience with electronic recording in municipal courts and six successful years in selected superior courts under the demonstration project, the bill died in committee on its first hearing.⁶⁶ Since the defeat of Assembly Bill 2937, five other electronic recording bills have been introduced in the legislature. California Senate Bill 211 died in committee, Assembly Bill 2113 was defeated on the Assembly floor by forty-one percent of the total Assembly's membership, and Assembly Bill 128 died in committee. Assembly Bills 13545 and 1023 are currently pending in committee in the Assembly.⁶⁷ The legislature has never enacted a statute that expressly requires the use of shorthand to make the verbatim record,⁶⁸

64. See 1986 Cal. Stat. 373 § 2 (amending CAL. GOV'T CODE § 69950).

65. A.B. No. 2937 § 3 (Cal. 1992).

66. See A.B. No. 2937 (Cal. 1992), reprinted in 2 Assembly Final History, at 1968 (1992).

AB2937, carried by Isenberg in the 1991-92 session, would have allowed electronic recording of judicial proceedings. Isenberg was the only 'yes' vote in his own committee. Not only did Isenberg get hammered, but the Judicial Council got embarrassed. It supported the measure, but reporters persuaded individual judges to write letters to committee members opposing it.

Dresslar, *supra* note 41, at 1.

67. California State Assembly, *Bill Information*, (visited Oct. 26, 1999) <<http://www.assembly.ca.gov/acs/acsframeset2txt.htm>>.

68. For a brief time, Assembly Bill 721, sponsored by the CCRA, was pending in the Senate which would have expressly *required* the use of official court reporters who use computer-aided transcription equipment to make the verbatim record of all pretrial motions and trial proceedings in superior court civil cases, and all felony proceedings in justice, municipal, and superior court. The bill was sponsored in June 1993 by the CCRA as a bargaining chip in its negotiations with the Judicial Council over "long-term use of electronic recording" after the termination of the demonstration project. Frank Murphy, CCRA lobbyist, told the press he withdrew the bill "because court officials have rebuffed the association's invitations to negotiate an agreement on the long-term use of

nor has it enacted a statute expressly precluding electronic recording technology to make the verbatim record.

C. Round II: The Judicial Arena—The Judicial Council, as Court Administrative Agency, Promulgates Rules of Court Authorizing Electronic Recording

During the last few years of the second demonstration project, Los Angeles and Sacramento County superior courts expanded their use of electronic recording to courtrooms not officially designated as demonstration courtrooms.⁶⁹ It was the practice and policy in Los Angeles Superior Court to provide court reporters "on request" in non-demonstration courtrooms equipped with electronic recording equipment; no court reporters were provided in demonstration courtrooms.⁷⁰ The court did not require the parties' express consent to electronically record the proceedings. In expanding electronic recording beyond the limits of the demonstration project, the Los Angeles and Sacramento superior courts acted on their own inherent authority,⁷¹ without express authority from the Legislature or the Judicial Council.⁷² Through 1993, superior court judges in Orange and Ventura counties debated expanding the use of electronic recording.⁷³

electronic recording." Tom Dresslar, *Court Reporters Stall Electronic Recording Bill*, L.A. DAILY J., Aug. 25, 1993, at 1. See also Philip Carrizosa, *Judicial Council Expands Use of Tape Recorders—Court Reporters Lose Out*, L.A. DAILY J., Dec. 1, 1993, at 1 ("[T]he court reporters were unsuccessful earlier this year in pushing through their own bill, which would have required courts to use court reporters in all felony proceedings and all civil proceedings in superior courts.").

69. See Jean Guccione, *Suing for Security—Reporters Take to the Courts to Prevent Spread of Electronic Recording*, L.A. DAILY J., Aug. 3, 1993, at 5.

70. See Lauren Blau, *Court Reporters Win a Round in Taping Conflict—Victory Called Partial*, L.A. DAILY J., Sept. 3, 1993, at 1.

71. See Guccione, *supra* note 69.

72. The state Attorney General's office rendered an Informal Opinion to Frank Zolin, Los Angeles County Clerk and Executive Officer, dated Jan. 4, 1989, that "the Los Angeles County Superior court may lawfully expand the use of electronic recording in lieu of a court reporter in more than the five departments authorized for the demonstration project authorized by Section 270(a)(1) of the Code of Civil Procedure subject to a number of limitations." The opinion stated that electronic recording could not be used in lieu of an official reporter where an official reporter was available and where a party has requested an official reporter.

73. See Nancy Morse, *The Reporter Never Rests—Videotaping Program Expands; Not Everyone Happy*, L.A. DAILY J., Feb. 18, 1993 §2 at 1 ("Results from the first two years of a pilot program to replace court reporters with a video-

On February 2, 1993, the Los Angeles County Court Reporters Association (LACCRA) petitioned the Los Angeles Superior Court for a writ of mandate which "challenged the court's practice of using electronic recording devices rather than certified court reporters to make a record of general civil proceedings where neither the assigned judge nor the parties requested that an official shorthand reporter record the proceedings."⁷⁴ The LACCRA sought to enjoin the superior court from electronically recording proceedings in Los Angeles County courtrooms that were not officially part of the demonstration project. The superior court had a two-pronged response. First, the court asserted that the practice was not inconsistent with Code of Civil Procedure section 269(a), which requires an official court reporter to make a verbatim record of proceedings only "at the request of either party, or of the court in a civil case"⁷⁵ Second, the court claimed it had the "inherent power to utilize electronic recording when necessary for the orderly and efficient operation of the Los Angeles County superior courts," citing the "inadequate number of court reporters" and the "cost-effectiveness and efficiency of electronic recording" as policy justifications.⁷⁶

The case was transferred to Kern County Superior Court judge Robert Anspach who, on August 6, 1993, "split the baby" by prohibiting the Los Angeles superior courts from utilizing electronic recording of proceedings in excess of the number of courtrooms authorized by Code of Civil Procedure section 270 "except where the parties and the court do not request a court reporter and the parties agree with the approval of the court to the use of electronic reporting."⁷⁷ Observing that Code of Civil Procedure section 269(a) "does not provide for the use of electronic recording in lieu of a court reporter,"

taping system have been so positive [Orange County] Superior Court officials say they will expand its use from three courtrooms to six."); *see also* Dresslar, *supra* note 41.

74. Los Angeles County Court Reporters Ass'n v. Superior Court, 37 Cal. Rptr. 2d 341, 342-43 (Ct. App. 1995) [hereinafter LACCRA]. Court reporters also brought suit against the Sacramento Superior Court to confine electronic recording of proceedings to demonstration courtrooms. "Sacramento Superior Court Judge James T. Ford 'agreed with the court reporters' argument last September, ordering his own court to stop using electronic recording in at least six civil law departments." Guccione, *supra* note 69.

75. CAL. CIV. PROC. CODE § 269(a) (West Supp. 1999).

76. LACCRA, 37 Cal. Rptr. 2d at 343 (emphasis added).

77. *Id.* (emphasis added).

Judge Anspach held that, without express legislative authority, "only an official reporter can transcribe superior court proceedings."⁷⁸ The judge also wrote that "nothing in the statutes . . . suggest[s] that the required use of a court reporter cannot be waived and the parties stipulate to the use of electronic recording."⁷⁹

Both parties appealed. LACCRA wanted a ruling prohibiting electronic recording under any circumstances, asserting that "a variety of related statutes demand the conclusion that 'the Legislature has indicated its intent that only shorthand court reporters . . . be used in superior court courtrooms unless otherwise expressly authorized by the Legislature.'"⁸⁰ The Los Angeles Superior Court objected to the judge's extra requirement of an express stipulation by the parties in order to use electronic recording.

On November 30, 1993, one month before the sun set on the demonstration project, the Judicial Council promulgated the rules of court⁸¹ (the "Electronic Recording Rules"), authorizing superior court judges to use electronic recording to make the record of court proceedings. In substance, the Electronic Recording Rules expressly "authorized," but did not require, superior courts to use audio or video recording in either of two circumstances: (1) where an official reporter is "unavailable,"⁸² or (2) where the parties proceed in the absence of an official reporter "without objection." Where a court reporter is unavailable, parties remained free to hire a "shorthand reporter to serve as an official pro tempore reporter."⁸³

Thirteen months after the Judicial Council adopted the Electronic Recording Rules, and nine months before the California First District Court of Appeal invalidated them in *CCRA I*, the Fifth District Court of Appeal reversed Judge Anspach's ruling in the *LACCRA* case. The court found that the Los Angeles Superior Court was

78. *Id.*

79. *Id.*

80. *Id.* at 344.

81. News Release #46, Administrative Office of the Courts, Dec. 2, 1993.

82. Rule 980.3 liberally defines "unavailability" to include "when the court determines that the funds available for reporting services are insufficient to employ a qualified person for the position at the prevailing wage or at the normal per diem rate of compensation." CAL. CT. R. 980.3(b)(2) (repealed 1997).

83. CAL. CT. R. 891.

not prohibited, by any explicit or implicit legislative command contained in . . . [the same statutes relied upon by the *CCRA I* court], . . . from choosing to maintain a record of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by an official shorthand reporter pursuant to the provisions of section 269.⁸⁴

*D. Round III: The Judicial Arena—The Superior Court
“Adjudicates” the Constitutional Validity of the Electronic
Recording Rules*

Immediately after the Judicial Council promulgated the Electronic Recording Rules, the CCRA petitioned the Alameda County Superior Court to enjoin the Judicial Council and Alameda County court officials from implementing the Electronic Recording Rules in *CCRA I*.⁸⁵

The CCRA conceded that “no legislative act is expressly inconsistent with the challenged rules.”⁸⁶ Rather, the court reporters argued that the challenged rules exceeded the scope of the Judicial Council’s rule-making power under the California Constitution, Article VI, Section 6 (“article VI, section 6”).⁸⁷ Article VI section 6 of the California Constitution empowers the Judicial Council to “adopt rules for court administration, practice and procedure, not inconsistent with statute” The court reporters claimed that “the elaborate, integrated, extensive system created by legislative acts for certified shorthand reporting creat[ed] inconsistency with the Electronic Recording Rules.”⁸⁸

The superior court first addressed the standard for determining whether a rule of court was “inconsistent” with statute under article VI, section 6.⁸⁹ The superior court

84. *Los Angeles County Court Reporters Ass’n v. Superior Court*, 37 Cal. Rptr. 2d 341, 349-50 (Ct. App. 1995). The *LACCRA* court was careful to underscore that its holding was “very narrow We go no farther than this circumscribed conclusion; in particular, we do not decide the purposes, if any, for which the generated electronic recording may be used, because this question is outside the scope of the discrete issue presented by the association’s petition and evidence.” *Id.*

85. *California Court Reporters Ass’n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44, 47 n.9 (Ct. App. 1995), *aff’d*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

86. *Id.* at 51.

87. CAL. CONST. art. VI, §6.

88. Statement of Intended Decision at 11, *CCRA I*, *supra* note 1.

89. “To improve the administration of justice the council shall . . . adopt

adopted a narrow definition of "not inconsistent," which gave a broad scope to the Judicial Council's rule-making power by facilitating the reconciliation of rule with statute and, thereby, avoiding a conflict.⁹⁰

Under the superior court's liberal interpretation of the Judicial Council's rule-making power, article VI, section 6 empowers the Council to promulgate "parallel"⁹¹ rules that supplement, *but do not undercut*, the statute. The exercise of the council's rule-making power is not restricted to ground covered by the legislature, as is the case with legislatively delegated power of administrative agencies created by regulatory statutes.⁹² In effect, the council, as the state judicial system's constitutionally constituted rule-making agent, is independently empowered to "pick up the trail" where the legislature leaves off (or, for political reasons, "fears to tread"). Thus, the superior court's interpretation rejects the notion of an implied field preemption by the legislature of the council's rule-making power.

The superior court's narrow interpretation of "not inconsistent with statute" provided the lens through which it proceeded to interpret the statutes relied upon by the court reporters as evidence of an implied statutory scheme to preclude electronic recording from superior courts. The court's analysis did not begin with Code of Civil Procedure section 269(a), which mandates the duties of the official court reporter.⁹³ Rather, the court relied on Government Code sec-

rules for court administration, practice and procedure, not inconsistent with statute . . ." CAL. CONST. art. VI, § 6.

90. Statement of Intended Decision at 19, *CCRA I*, 46 Cal. Rptr. 2d at 44.

"Not inconsistent" does not mean merely inharmonious or unsymmetrical but connotes impossibility of concurrent operative effect, or contradictory in the sense that the provisions cannot co-exist; . . . "Inconsistent" means mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand. The acceptance or establishment of the one implies the abrogation or abandonment of the other.

Id.

91. *Id.* at 22. "In *Ferguson v. Keays*, 4 Cal. 3d, 649 (1971), the Supreme Court held the Judicial Council was authorized to promulgate rules even if those rules created a [sic] alternative scheme, parallel to the existing legislative scheme." *Id.*

92. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 435 (1993). An administrative agency is a creature of statute and may not act "*ultra vires*, that is, beyond its statutory authority Agencies are to implement these statutes and neither amend nor ignore them." *Id.*

93. CAL. CIV. PROC. CODE § 269(a) (West Supp. 1998) (providing that the

tion 69941 which permits—but does not require—the superior court judge to appoint an official reporter. The court concluded:

[Code of Civil Procedure] section 269 sets forth the duties of a superior court official reporter. The duties set forth are to be performed by the official reporter upon the request of a party or court in a civil action or upon order of the court, attorney for the defendant, or district attorney in a criminal action or proceeding. *Particularly in light of Government Code Section 69941, Section 269 cannot be read to mandate the appointment of an official reporter, nor does it govern the making of the official record of oral proceedings before the court where a court reporter is not available.*⁹⁴

In the last paragraph of his opinion, the judge finally acknowledged the court administration policy justification for the council's Electronic Recording Rules. Emphasizing that the rules give courts and litigants the option to use or not use electronic recording, the judge concluded, "the ER authorizes electronic reporting only in the limited court and party choice determination, where it is necessary for the convenient operation of the superior courts and upon unavailability of official reporters."⁹⁵

E. Round IV: CCRA I—The Court of Appeal Strikes Down the Electronic Recording Rules as "Inconsistent with Statute"

In October, 1995,⁹⁶ the First District Court of Appeal reversed the superior court's decision. Its opinion is divided into three parts.

In Part A, the *CCRA I* court rejects the superior court's interpretation of "not inconsistent with statute."⁹⁷ Based on its review of California cases invalidating rules of court, the *CCRA I* court synthesizes a standard for measuring the va-

official reporter "shall, at the request of either party . . . take down in shorthand" the proceedings in superior court).

94. Statement of Intended Decision at 23, *CCRA I*, *supra* note 1, (emphasis added).

95. *Id.* at 24 (emphasis added).

96. At the time the *CCRA I* decision was filed, 71 courtrooms in the Los Angeles Superior Court used electronic recording. See *Lawmaker Proposes Bill to Allow Electronic Recording of Trials*, L.A. DAILY J., Feb. 1, 1996, at 11.

97. *California Court Reporters Ass'n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44, 49 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

lidity of rules of court against statutes. Under this standard, the interpreting court must not endeavor to reconcile the text of the rule with the text of the statute. Rather, the court must bypass the express statutory text—apparently whether the text is ambiguous *or not*—to find the legislative intent behind the text and then determine whether the rule of court is consistent with that legislative intent.⁹⁸

In Part B, the court applies its “legislative intent” standard to the statutes addressing official court reporters or electronic recording.⁹⁹ The court arranges these statutes like pieces of a jigsaw puzzle to reveal a “legislative pattern [that] suggests that while electronic recording is sometimes proper, the normal practice is that a shorthand reporter is to create the official record unless statutory law provides otherwise.”¹⁰⁰ The court found a “statutory scheme [that] addressed the making of the official record in such a manner as to *suggest* that the legislature *implicitly* intended that this record be made by shorthand reporters rather than by electronic recording.”¹⁰¹

Part C of the court’s opinion addresses the legislature’s failure to enact bills that expressly authorize electronic recording in superior court as further evidence of a legislative

98. *Id.* at 50.

[California courts that have invalidated rules of court as inconsistent with a statute] did not test the validity of the rule of court by determining whether it was impossible as a matter of law for both the statute and the rule to have concurrent operative effect, as the trial court did in our case. Instead, the courts measured the challenged rule against the statutory scheme to determine whether the rule was consistent with the intent expressed in the legislative enactment.

Id.

99. The court reviewed the following statutes in the following order: CAL. CIV. PROC. CODE § 269(a) (which, according to the court, “sets out the basic provisions for requesting an official reporter”); CAL. CIV. PROC. CODE § 270 (the demonstration project); CAL. CIV. PROC. CODE § 273 (which makes the official reporter’s certified transcript *prima facie* evidence of the proceedings); CAL. GOV’T CODE § 68086 (which prescribes the fees and costs of an official reporter); CAL. GOV’T CODE § 69941 (which authorizes superior court judges to appoint an official reporter); CAL. GOV’T CODE § 69952 (which prohibits the court from “order[ing] to be transcribed and paid for out of the county treasury any matter or material except that reported by the [official] reporter”); CAL. GOV’T CODE §§ 69948, 70044.5-70064 (which regulate the compensation to be paid to official reporters); CAL. GOV’T CODE § 72194.5 (which expressly authorizes electronic verbatim recording in municipal court when official reporter is unavailable).

100. *CCRA I*, 46 Cal. Rptr. 2d at 54.

101. *Id.* at 51 (emphasis added).

intent to preclude such electronic recording. The court acknowledges that “unadopted proposals have been held to have little value [as evidence of legislative intent]”¹⁰² and disavows basing its opinion on failure to enact electronic recording bills.¹⁰³ Nonetheless, it “cannot ignore the fact that the legislature’s rejection of the Judicial Council’s proposed amendments is in accord with our interpretation of the existing statutory scheme.”¹⁰⁴ However, the court refused to consider the history of legislative dysfunction behind each of the failed electronic recording bills and so again failed to keep its promise to look “behind the text.” The unenacted bills relied upon by the court were usually aborted by lobbying efforts of the court reporters in committee. *CCRA I* ratified this dysfunction by choosing to preempt for the legislature—and therefore, the court reporters—the judiciary’s power to manage the record of proceedings in superior court.

F. Round V: CCRA II—The Court of Appeal Revisited; Final Victory for the Court Reporters and Electronic Recording in Superior Court Goes Down for the Count

The court of appeal’s decision did not end the litigation between the courts and the court reporters over electronic recording. The *CCRA I* decision merely remanded the case back to the superior court for judgment in conformity with the *CCRA I* decision. A major dispute erupted over the scope of the appellate court’s holding in *CCRA I*.¹⁰⁵

102. *Id.* at 55.

103. *Id.* at 56 (“In light of the difficulties of determining the meaning of legislative rejection of proposed amendments to existing statute, we think it wiser to arrive at our conclusion independent of the Legislature’s rejection of the proposed amendments.”).

104. *Id.*

105. This dispute flowed from the continued use by a substantial number of superior courts of their electronic recording equipment to make the verbatim record. See Declaration of Gary M. Carmer in Support of Motion for Entry of Judgment at 1, *CCRA I*, *supra* note 1. Los Angeles County Superior Court, for example, continued to follow its practice, upheld in the *LACCRA* decision, of using electronic recording equipment in its courtrooms *but providing official reporters upon request*. In response to inquiries from superior courts about the “circumstances under which electronic recording may still be used by the courts,” the Administrative Office of the Courts advised superior court judges that the *LACCRA* decision permitted superior courts to “use electronic recording in the absence of a request from a party or the judge.” “Thus, in the absence of a request for a court reporter from a party or the court, electronic recording may be used.” Memorandum from Administrative Office of the Courts to All Pre-

The Judicial Council advocated a narrow interpretation of *CCRA I* that only invalidated the Judicial Council's Electronic Rules of Court and Alameda County Superior Court's local rule 17 but left untouched the electronic recording practices of superior courts apart from the invalidated rules of court. The CCRA contended that *CCRA I* holds *any* use of electronic recording to make the official record in superior court to be "inconsistent with statute," "*regardless of whether an individual litigant objects.*"¹⁰⁶ The broad holding urged by the CCRA would put the First Appellate District's *CCRA I* decision on a collision course with the Fifth Appellate District's holding in *LACCRA*,¹⁰⁷ rendered nine months earlier. The Fifth District held that superior courts "are not prohibited from choosing to maintain records of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by an official shorthand reporter pursuant to the provisions of Code of Civ. Proc. § 269."¹⁰⁸

On remand, the superior court sided with the court reporters. The superior court held that the appellate court's remittitur *implicitly* imposed a duty on the superior court to enter judgment invalidating the challenged rules and enjoining the respondents (the Judicial Council and Alameda County Superior Court officials) from expending public funds for the maintenance or creation of nonstenographic methods of making official verbatim records of superior court proceedings.¹⁰⁹ In other words, the superior court imposed a total ban on electronic recording, even where the parties do not request an official reporter.

On appeal from this second superior court decision, the First District Court of Appeal construed the scope of its *CCRA I* holding.¹¹⁰ The "*CCRA II*" court chose a broad holding and sustained the superior court's sweeping judgment in-

siding and Sole Judges of the Trial Courts (on file with author).

106. Memorandum of Points & Authorities in Support of Motion for Entry of Judgment at 6, *CCRA I*, *supra* note 1.

107. Los Angeles County Court Reporters Ass'n v. Superior Court, 37 Cal. Rptr. 2d 341 (Ct. App. 1995).

108. *Id.* at 342-43.

109. Order Denying Petitioners' Motion to Amend *CCRA I*, *supra* note 1.

110. California Court Reporters Ass'n, Inc. v. Judicial Council, 69 Cal. Rptr. 2d 529 (Ct. App. 1997), *aff'g* 46 Cal. Rptr. 2d 44 (Ct. App. 1995) [hereinafter *CCRA II*].

validating the challenged rules. The *CCRA II* court "declared that the use of nonstenographic methods for producing the OFFICIAL verbatim record of superior court proceedings [are] contrary to the intent of the Legislature,"¹¹¹ and enjoined both the Judicial Council and the Alameda County Superior Court from "authorizing and from causing the expenditure of public funds for the maintenance of or creation of a nonstenographic method and system for preparing the official verbatim record of superior court proceedings."¹¹² *CCRA II* creates a fundamental conflict between the First and Fifth District Courts of Appeal that needs to be resolved by the California Supreme Court.

After the *CCRA II* decision, a few California superior courts continued to utilize electronic recording devices. The will of the Los Angeles County Superior Court outlasted all direct attempts, in the legislature and the courts, to shut down their electronic recording machines. Los Angeles County avoided *CCRA II*'s proscription on the use of state funds by directly financing electronic recording with *county* funds.¹¹³ Ironically, however, a trial-court-funding reform bill, enacted in 1997 and sponsored by the Judicial Council to promote efficient financial management of the courts,¹¹⁴ sounded the death knell of electronic recording in Los Angeles County Superior Court as of January, 1998.¹¹⁵ Under Assem-

111. *Id.* at 530 (citing Judgment, *CCRA I*, *supra* note 1) (uppercase text in original).

112. *Id.* at 531.

113. See Robert Green, *Supervisors Approve Contracts for Electronic Recording in Superior Court*, METROPOLITAN NEWS CO., July 31, 1996 at 5; see also Rebecca Liss, *Court Workers Face Layoffs by New Year's—Electronic Taping of Trials Silenced by State Funding Bill*, L.A. DAILY J., Nov. 21, 1997, at 1.

114. See A.B. No 233 (Cal. 1997) Commentary: "The Legislature makes findings and declarations for use in interpreting the bill, including: The judiciary is a separate and independent branch of government. State funding of trial court operations is necessary to provide uniform standards and procedures, economies of scale, and structural efficiency and simplification." Section 3(l) declares the Legislature's intent to "acknowledge the need for strong and independent local court financial management," giving "strong preference to the need for local flexibility in the management of court financial affairs." (emphasis added). *Id.*

115. Responding to the *CCRA II* decision, the Los Angeles Superior Court terminated the use of electronic recording on January 1, 1998. See Telephone Interview with Juanita Blankenship, Administrator, Litigation Support Services, Los Angeles Superior Court (Jan. 6, 1999). Los Angeles Superior Court Judge Kurt Leriour still defends the ban on electronic recording in his courtroom. See Margaret Jacobs, *Stenographers Fraud; Bid to Keep Newer Technologies Out of Court*, L.A. DAILY J., May 3, 1999, at 4. See also Maraget Jacobs,

bly Bill 233, counties no longer give money directly to the courts but to the state which disburses funds through the Trial Court Budget Commission. Further, thirteen courtrooms in Orange County Superior Court still employ electronic recording to make the record.¹¹⁶ In Orange County, court-generated fees fund video recording of court proceedings.¹¹⁷ In a 1998 unpublished opinion that characterized *CCRA I* as a dubious decision, the Fourth Appellate District court upheld the use of electronic recording in Orange County Superior Court, relying on the *LACCRA* decision.¹¹⁸

III. EVOLUTION OF THE JUDICIAL ROLE IN COURT
ADMINISTRATION: JUDICIAL SELF-GOVERNANCE IS
THE KEY TO JUDICIAL INDEPENDENCE, EFFICIENCY, &
JUDICIAL ACCOUNTABILITY

One of the most significant developments in the civil justice system in the United States during the twentieth century has been the dramatic evolution of court administration from dependence on the legislative and executive branches, to the development of a professionally staffed "state court administrative office"¹¹⁹ functioning within the judicial branch.¹²⁰ Courts are ultimately still dependent on the legislative branch for funding, court reorganization, and other administrative matters.¹²¹ Nevertheless, the development, at mid-century, of professional administrative agencies within state

Stenographers Fight for Their Day Jobs in Court, WALL ST. J., April 30, 1999, at B1.

116. Letter from Pat Hill, Executive Director, Civil Operations and Special Services, Orange County Superior Court, to Glenn Koppel (Aug. 13, 1999) (on file with author). The practice in these courtrooms is to videotape proceedings where no party objects. *Id.* While particular practices vary, superior courts in Lassen, Amador, Kings, and San Bernardino counties still employ electronic recording under certain circumstances. See Richard Helius & John Palmer, Telephone Survey of California Superior Courts.

117. Telephone Interview with Pat Hill, Executive Director, Central Justice Center and Special Services, Orange County Superior Court.

118. *Gandall v. Grimes*, No. 710153 (Super. Ct. Cal. Orange County 1998).

119. WHEELER, *supra* note 10, at 30.

120. *Id.* at 3. ("What is new to the twentieth century—emerging only at mid-century, in fact—is the presence in this continually contentious process of a separate judicial branch administrative capability.").

121. Judges heavily lobby the legislature. See Baar, *supra* note 3, at 626 ("When final authority rests with Congress by virtue of the distribution of powers, members of the judiciary will have to lobby Congress so that Congress and the judiciary can take concerted action.").

and federal judicial systems has strengthened the courts' control over their own operations. Further, judicial control over court administration is a key to judicial independence.¹²²

Besides judicial independence, judicial control of court administration implicates other fundamental public values: efficiency and public accountability.¹²³ Efficient administration of justice was a major theme of progressive reformers who, at the turn of the century, laid the groundwork for modern judicial administrative reform.¹²⁴ The Judicial Council movement, which spawned California's Judicial Council, advocated a "business administration of justice led by a *minister of justice . . . the business manager* of our judiciary."¹²⁵ The emergence during the 1950s, 1960s, and 1970s of state court administrative offices was a watershed in judicial branch court administration. The tasks entrusted to judicial administrators expanded beyond mere "housekeeping" chores. Judicial administrators achieve efficiencies by "infusing the courts' operations with basic administrative skills, such as establishing and maintaining management systems for court records, personnel and finances" and "oversee the development of management of automated management information systems, techniques to improve jury usage, and systems to

122. See WHEELER, *supra* note 10, at 3-4 ("[T]he importance of judicial independence permeates judicial administration."). See also FISH, *supra* note 20, at 437.

Administrative institutions and politics are, after all, but means to an end; they are generally not ends in themselves. They give life to the separation of powers doctrine in that the judge-developed administrative system enables courts to adjust to changes in their legal, political, and economic environment without surrendering judicial independence. Through them, courts may obtain sufficient resources to exercise final legal authority. Administrative institutions thus foster the judiciary's long run capacity to function as a coordinate part of the national political system.

FISH, *supra* note 20, at 437.

123. WHEELER, *supra* note 10, at 4 ("For in the final analysis, the protection of judicial independence and of the just, expeditious, and economical case disposition for which judicial independence is instrumental is the higher value that defines judicial administration and legitimates its claim for respect.").

124. WHEELER, *supra* note 10, at 13 ("[The concept of efficiency] loomed prominently in the vocabulary of the early twentieth-century Progressive reformers, when judicial administration as a discrete activity was first taking hold.").

125. *Id.* at 28 (quoting Davidson, *A Business Administration of Justice*, 11 J. AM. JUD. SOC'Y 40, 48-49 (1927)).

manage courts' budgets."¹²⁶

Judicial self-governance furthers judicial accountability.¹²⁷ The judicial system needs the administrative authority to meet its constitutional obligation to provide efficient and effective justice to the public.¹²⁸

An essential tool in the hands of judicial administrators to enforce these public values is an effective rule-making power over practice, procedure, and, most importantly, court administration.¹²⁹ Whether by constitutional amendment or statutory delegation, the initiative for making rules of civil procedure in most jurisdictions has passed from the legislative to the judicial branch. In these jurisdictions, judicially promulgated rules supersede pre-existing statute.¹³⁰ However, in California the legislature is still the dominant rule-making authority.¹³¹ Article VI, section 6 confers only a sec-

126. *Id.* at 28.

127. See Hudzik, *supra* note 8, at 1881 ("It clearly is the judiciary's responsibility to define and implement an adequate system of adjudication for the state and its citizens. Further, as a public servant, it is the judiciary's responsibility to maximize the efficient and effective use of public resources.").

128. See WHEELER, *supra* note 10, at 37 ("By promoting judicial accountability in the proper sense, court administrative offices not only meet a function vital to republican government, but also fend off improper threats to independence.").

129. *Id.* at 37 ("Judicial control of rule making . . . protects the judiciary's ability to determine how it will operate.").

130. In these jurisdictions, the legislature possesses a reserve power to override rules of court through subsequently-enacted legislation. The Federal Rules Enabling Act is an example of such a rule-making regime. See *infra* text accompanying notes 155-156.

131. New York State's legislature, like California's, also has a powerful rule-making role in court administration. In 1977, the people adopted a constitutional amendment that bifurcated the rule-making authority between the legislature and the Chief Judge. Article VI, section 30 gives the legislature exclusive authority to regulate jurisdiction, practice and procedure, while article VI, section 28 confers on the Chief Judge plenary authority over all matters of court administration which she can delegate to the chief administrator of the courts. See N.Y. CONST. art. VI, §§ 28, 30. The jurisdictional line between court administration, on the one hand, and practice and procedure, on the other, is blurred. See *Bloom v. Crosson*, 590 N.Y.S.2d 328 (App. Div. 1992), *aff'd* 82 N.Y.2d 768 (1992). New York's court reporters challenged the validity of a rule of court authorizing the use of electronic recording as part of a demonstration project. At issue was whether

regulation of the manner and method of recording judicial proceedings is a regulation of practice and procedure such that the Chief Administrator's authority to exercise that power is subject to the constraints of the New York Constitution, article VI, section 30 or is an administrative function, inasmuch as the subject necessarily involves personnel issues and issues relative to the form of court records

ondary rule-making power on the council to promulgate rules that are "not inconsistent with statute."¹³² In the event of a conflict between a statute and a rule, the statute trumps the rule.

In the last thirty years, the judicial rule-making power nationally has been channeled more specifically toward court administration.¹³³ Reflecting and reinforcing the fundamental transformation of court administration in the 1960s through 1980s, the judiciary's rule-making power in many jurisdictions was expanded by constitutional amendment to explicitly add "court administration" to "practice and procedure."¹³⁴ California was one of those jurisdictions.¹³⁵

Paralleling the swift evolution of the judiciary's role in court administration in the last hundred years, technology has rapidly evolved from the industrial era of the late nineteenth century to the contemporary information age. Technology is quickly permeating all levels of court administration.¹³⁶ The key to efficient use of scarce judicial resources is the effective utilization of information technology, which judicial administrators increasingly deploy to meet the budget

Id. at 328.

132. The California Supreme Court confirmed the legislature's primary rule-making authority in *In re Lance W.*:

The Legislature and, a fortiori, the people acting through either the reserved power of statutory initiative or the power to initiate and adopt constitutional amendments (art. II, § 8) may prescribe rules of procedure and of evidence to be followed in the courts of this state. . . . That the authority of the judicial branch of government is subject to legislative enactment of rules of procedure is implicit in article VI, section 6 of the California Constitution which empowers the Judicial Council to "adopt rules for court administration, practice and procedure, not inconsistent with statute."

In re Lance W., 694 P.2d 744 (Cal. 1985). But for the determined opposition of a single legislator, the proposition submitted to the people in 1926 would have amended article VI, section 6 to confer full rule-making power on the council. See *infra* Part V.A.2.a.ii.

133. See Charles W. Grau, *Judicial Rulemaking: Administration, Access and Accountability: A Research Project of the American Judicature Society*, CHICAGO AM. JUDICATURE SOC'Y 1 (1978).

134. See *infra* note 243.

135. In 1966, the people adopted an amendment to article VI, section 6 of the California Constitution adding "court administration" to "practice and procedure" as the subjects of the Judicial Council's rule-making power.

136. Technology has transformed the way the verbatim record of court proceedings is kept. See *infra* Part IV. See also Anderson, *supra* note 36, at 1785 ("The growing trend toward audio recording of proceedings will give way to widespread use of video recording, yielding a far more comprehensive record.").

crises that are challenging the courts in the 1990s.¹³⁷ The marriage of technology and court administration is inevitable. The judicial system has been "conceptualized as an information processing system."

Individual courts need managerial flexibility to use technology to effectively manage their resources.¹³⁸ Court administrators struggle to find a productive balance between centralized and de-centralized court administration. Coordination of activities within the judiciary militates toward centralization while decentralization gives local court administrators flexibility to spend funds and utilize technological resources to suit local needs.¹³⁹ The Judicial Council's Electronic Recording Rules were an attempt to strike a balance between centralized and de-centralized court administration in the use of electronic recording in superior court.

The accelerated pace of technological change in court administration threatens vested interests that raise political obstacles to the "integrat[ion] of technology into a coherent, effectively managed system."¹⁴⁰ For example, court reporters adamantly and—in California—successfully opposed the use of electronic recording technology as an alternative means of making the verbatim record.¹⁴¹

The growth of active and increasingly powerful judicial branch administrative bureaucracies has "created another source of power within the courts"¹⁴² that provoked a backlash both within the judiciary, among judges who fear the loss of their individual independence,¹⁴³ and outside the judiciary, among legislators suspicious of mounting judicial assertiveness.¹⁴⁴

137. See, e.g., Hudzik, *supra* note 8, at 1840 ("Under all except the 'probable best case scenario,' the next decade's likely funding levels will put increasing pressure on the management of judicial system resources.").

138. *Id.* at 1889.

139. On the continuing efforts within the federal judiciary to achieve a balance between centralized authority and local autonomy, see JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE COURTS: AS APPROVED BY THE JUDICIAL CONFERENCE, 75 (1995).

140. See Hudzik, *supra* note 8, at 1790.

141. *Id.* at 1794 ("To the extent that courts substitute video tape recording for stenography in courtrooms we may anticipate a reduction in the use of court reporters.").

142. WHEELER, *supra* note 10, at 34.

143. See *id.* at 34.

144. See James Duke Cameron et al., *The Chief Justice and the Court Admin-*

The heightened level of extra-judicial lobbying in legislatures has stimulated a rising tide of skepticism.¹⁴⁵ Legislators perceive that recent judicial activism in statutory reform and rule-making as “born of self-interest.”¹⁴⁶ Compounding the court administrators’ problem, special interest lobbyists added procedural statutes to their shopping list,¹⁴⁷ seeking to shape procedure and court administration to serve their vested interests. Responding to special interest lobbying, Congress increasingly intervenes in federal rule making,¹⁴⁸ eroding the deference traditionally accorded the rules promulgated by the U.S. Judicial Conference.¹⁴⁹ Judicial lobbyists are generally at a disadvantage when going toe-to-toe with private lobbyists in the legislature.¹⁵⁰

Within the judiciary, tensions exist between centralized

istrator: The Evolving Relationship, 113 F.R.D. 442, 444 n.4 (1987) (“It should be noted that the opposition by the legislative and executive branch to court reform is not illogical It is not surprising . . . that there exists opposition to reforms that might increase the power of the judiciary.”).

145. See, e.g., Chief Justice Ronald M. George, State of the Judiciary Address to the California Legislature (Feb. 23, 1998).

146. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1166 (1996).

147. See, e.g., Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 669. See also William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988) [hereinafter Eskridge, *Politics Without Romance*].

148. See Koppel, *supra* note 12, at 471-87.

149. Professor Stempel writes that Congress’s deference to the judiciary in rule-making matters

[lasted only] so long as Congress (or the relevant congresspersons influential in judicial policy) are not besieged by interest group pressures at odds with the judiciary’s objective, and so long as Congress respects the judiciary enough to defer to it and the Enabling Act process. For the most part, it appears that this set of circumstances prevailed during the 1934-1974 period, enabling civil rules revision to be revised largely by the bench.

Stempel, *supra* note 147, at 712.

150. See Geyh, *supra* note 146, at 1216-17.

[Special interest] lobbyists routinely confront accusations that their positions are animated by self, not public interest, but judges and the Judicial Conference are not ordinary legislative lobbyists. For example, private sector lobbyists routinely campaign for, make contributions to, and attend functions for congressional candidates. One need not be a hardened cynic to appreciate the value of such undertakings to the lobbying enterprise. The Judicial Conference, in contrast, may not exploit these means of influence.

Id.

court administration and traditionally autonomous judges¹⁵¹ and their personnel.¹⁵² Early efforts by the U.S. Justice Department to assert administrative control of the "far-flung" federal district courts in the late nineteenth century evoked "anguished cries of protest" from judges, their staff, and their allies in Congress.¹⁵³ The mere fact that centralized administrative judicial authority moved in-house has not abated these tensions.¹⁵⁴

IV. THE COURT'S ROLE IN INTERPRETING STATUTES THAT DEFINE THE COURTS' ROLE IN COURT ADMINISTRATION: A PROPOSAL FOR CHANGE

A. Judicial Interpretation and the Traditional Role of Legislative Intent in Determining Conflict Between Rule and Statute

In most jurisdictions, the judicial and the legislative branches exercise concurrent authority over rules of practice, procedure, and court administration.¹⁵⁵ In the majority of these jurisdictions, the judiciary has the rule-making initiative, with the legislature reserving the power to override judicially-promulgated procedure. Federal courts, for example, follow this rule-making regime under the Rules Enabling Act of 1934.¹⁵⁶ In California, however, the balance of power is

151. See Cameron et al., *supra* note 144, at 455.

152. See WHEELER, *supra* note 10, at 19.

When judicial administration emerged as a recognizable phenomenon, judges and existing administrative personnel embraced the idea with much less enthusiasm, to say the least, than their predecessors had shown to the concept of judicial independence. The hostility, which has not disappeared entirely, reflects a fear that administration will snuff out independence.

Id.

153. See FISH, *supra* note 20, at 95.

154. See *infra* Part V.A.2.b. Tensions between judges and centralized court administration provide a possible explanation for the hostile tone taken by the First District Court of Appeal in *California Court Reporters Ass'n, Inc. v. Judicial Council*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997), *affg* 46 Cal. Rptr. 2d 44 (Ct. App. 1995).

155. See A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 7 (1958).

156. In the last 20 years, Congress has increasingly intervened directly in the rule-making process as interest groups have awakened to the benefits of lobbying court procedure.

tilted in the direction of legislative dominance. Although the legislative and judicial branches concurrently exercise rule-making power, in the event of a conflict between statute and rule, statute trumps rule.¹⁵⁷ In a minority of jurisdictions, assertive courts claim—through case law—exclusive rule-making power that precludes the legislature from enacting procedural law.¹⁵⁸

Where courts and legislatures concurrently exercise rule-making power, courts determine questions of conflict between a rule and a statute by exercising their traditional adjudicative function of interpreting constitutional and statutory text. The traditional, originalist, approach to statutory interpretation casts the court in the passive role of “honest agent” of the enacting legislature. As honest agents, courts purport to “mechanically retriev[e]”¹⁵⁹ legislative intent (or, in the case of ballot measures, popular intent) from statutes and constitutional provisions. When courts seek to determine issues of conflict between rule and statute, the rhetoric of legislative or popular intent can camouflage the constitutional values chosen and enforced by the interpreting court.¹⁶⁰

B. Abandoning the Search for Legislative Intent in Favor of a Dynamic Interpretation of Text that Affects Court Administration

A revolution in thinking about statutory interpretation in the last decade toppled the traditional primacy of legislative

157. CAL. CONST. art. VI, § 6.

158. See, e.g., Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951). See also Richard S. Kay, *The Rule-making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 34 (1975) (The “Connecticut doctrine” of exclusive judicial rule-making completely withdraws “the legislature from any role at all in formulating procedure, either as initiator or supervisor.”); John M. Mulcahey, Comment, *Separation of Powers in Pennsylvania: The Judiciary's Prevention of Legislative Encroachment*, 32 DUQ. L. REV. 539, 552 (“The Supreme Court of Pennsylvania has employed the separation of powers doctrine to declare acts by the legislature unconstitutional even if the acts do not conflict with any judicial order.”).

159. Jane Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 599 (1995) [hereinafter Schacter, *Metademocracy*].

160. I propose that the CCRA I court masked its policy choices regarding the balance of power in court administration behind the rhetoric of legislative intent. See *infra* Part V.A.2-3.

intent among interpretation theorists.¹⁶¹

The traditional concept of the court's role in statutory interpretation is rooted in the nineteenth century populist view of legislative supremacy in which the legislature is the only democratically legitimate source of policy. Under this "originalist" or "intentionalist"¹⁶² view, judges cannot appear to create policy, but merely troll statutes for legislative intent. However undemocratic the political realities in the legislature that produced the statute under review, the court must ignore any legislative dysfunction that may favor special interests over the public interest. In the words of one contemporary writer, "[O]nce a statute is enacted and comes to the court for interpretation, the democratic pedigree of the legislative process that produced the statute goes unchallenged and unscrutinized, absent some constitutional infirmity."¹⁶³

Legal process scholars¹⁶⁴ in the late 1940s and 1950s re-framed the interpretive task of the court from searching for original intent to constructing the enacting legislature's *purpose* behind statutory text.¹⁶⁵ This "legal process" approach relied on the fiction that legislatures were "filled with reasonable people acting reasonably [who] tend to pass public-

161. See Jane Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 110 (1995) ("The viability of such 'intentionalism' has long been discredited by scholars and is sharply undermined by widespread contemporary skepticism about objective theories of meaning and about the pluralist political process from which statutes emerge.") [hereinafter Schacter, *Pursuit of Popular Intent*].

162. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-80 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*].

[The] 'intentionalist' approach asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute. A 'modified intentionalist' approach uses the original purpose of the statute as a surrogate for original intent, especially when the latter is uncertain; the proper interpretation is the one that best furthers the purpose the legislature had in mind when it enacted the statute.

Id.

163. Schacter, *Metademocracy*, *supra* note 159, at 597.

164. Henry M. HART, JR., & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958), from which the appellation "legal process" derives.

165. Schacter, *Pursuit of Popular Intent*, *supra* note 161, at 601 n.33 ("This focus on purpose represents a judicial attempt to honor what the court concludes the legislative intent would have been had the legislature expressly contemplated and resolved the question at hand.").

seeking laws, so long as the legislators follow the deliberate procedures required by the [C]onstitution."¹⁶⁶

"Post-legal process" theorists, drawing upon public choice literature,¹⁶⁷ question the "optimistic pluralist" assumption¹⁶⁸ that the interplay of interest groups in the legislature produces public-seeking statutes.¹⁶⁹ Professor Schacter observes a "rising cynicism about the 'realities' of the legislative process."¹⁷⁰ Much of this cynicism flows from "public choice" scholarship, which "assumes that people [including legislators] are egoistic, rational utility maximizers in political as well as economic arenas."¹⁷¹ Rather than reflect rational public policy, a statute "tends to represent compromise because the process of accommodating conflicts of group interest is one of deliberation and consent What may be called public policy is the equilibrium reached in [the political] struggle at any given moment."¹⁷²

Statutory interpretation scholarship experienced a renaissance over the last ten years, spawning a variety of new approaches to statutory interpretation.¹⁷³ Dynamic interpretation is one of these new theories. Dynamic interpretation of statutory and constitutional text is not "an objective and mechanical process of 'discovering' historical meaning" but, rather, "the 'creation' of meaning from the interaction of the

166. Eskridge, *Politics Without Romance*, *supra* note 147, at 276.

167. See generally Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987) (describing public choice theory).

168. Eskridge, *Politics Without Romance*, *supra* note 147, at 276 ("Optimistic pluralists' posit that the legislature, filled with reasonable people acting reasonably, will tend to pass public-seeking laws, so long as the legislators follow the deliberative procedures required by the Constitution.").

169. See *id.* at 277 ("Public choice theory indicates that the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends."). See also Schacter, *Metademocracy*, *supra* note 159, at 598 n.14 ("Although the debate now rages about the virtues of the pluralist conception, scholars with widely divergent ideological views nevertheless analyze American democracy in terms of interest group activity.").

170. See Schacter, *Metademocracy*, *supra* note 159, at 605.

171. William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory and Constitutional Interpretation: Legislation Scholarship and Pedagogy in the Post-Legal process Era*, 48 U. PITT. L. REV. 691, 703 (1987) (quoting DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979)).

172. *Id.* (quoting Earl LATHAM, THE GROUP BASIS OF POLITICS 35-36 (1952)).

173. See Schacter, *Pursuit of Popular Intent*, *supra* note 161, at 606 n.59 ("Recent scholarship about statutory interpretation has been abundant and diverse.").

text, historical context, and evolutive context."¹⁷⁴ Dynamic interpretation is based on the proposition "that statutory interpretation is influenced by the ongoing, not just original, history of the statute."¹⁷⁵ Professor Eskridge observes that judges inevitably exercise discretion when they interpret old statutes that the legislature has not updated:

As society changes, adapts to the statute, and generates new variations of the problem which gave rise to the statute, the unanticipated gaps and ambiguities proliferate Moreover, as time passes, the legal and constitutional context of the statute may change. Should not an interpreter "ask [her]self not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society[?]"¹⁷⁶

Dynamic interpretation theory rejects the traditional role of the judge as "honest agent" of the legislature who mechanically discovers the enacting legislature's intent. Rather, the interpreting judge functions as the enacting legislature's partner in the ongoing, evolving process of creating meaning from statute.¹⁷⁷ Drawing upon "hermeneutics,"¹⁷⁸ Eskridge conceives of the interpretation process as "a dialogue between the statutory text and the judge."¹⁷⁹

Drawing upon public choice scholarship, dynamic interpretation theory also focuses on legislative dysfunction—the power of single-purpose interest groups to enact their own private interests at the expense of the public interest—as the reason why legislatures are reluctant to update obsolete statutes and prone to enact rent-seeking legislation.¹⁸⁰ Eskridge writes:

Both public choice theory and institutional process theory suggest that the legislature acting alone will be subject to three biases which undermine the overall legitimacy of government: failure to enact or update public

174. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 162, at 1498.

175. *Id.* at 1497.

176. *Id.* at 1480 (citation omitted).

177. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 330-31 (1989) [hereinafter Eskridge, *Spinning Legislative Supremacy*].

178. *Id.* at 346 ("Hermeneutics considers interpretation to be a dialogue or conversation between the present interpreter and the historic text.").

179. *Id.* at 347.

180. See Eskridge, *Politics Without Romance*, *supra* note 147, at 296.

interest laws, avoidance of hard choices, and favoritism directed at power groups. These biases may be ameliorated by treating judges as representatives charged with interpreting statutes dynamically.¹⁸¹

A creative judiciary should adopt "a more aggressive approach to statutory interpretation [that] can ameliorate these dysfunctions."¹⁸² Courts can perform a meta-democratic function of interpreting statutes to compensate for the misfiring of the democratic process in the legislature. Eskridge proposes that "[c]ourts can counteract the effect of legislative inattention to general public interests by interpreting statutes dynamically as the statutes grow older"¹⁸³ and also serve to "develop[] our nation's public values."¹⁸⁴

I propose that statutes and constitutional text that regulate court administration lend themselves to dynamic interpretation.¹⁸⁵ Court administration implicates basic public values such as judicial independence, judicial efficiency, and judicial accountability to the public for the administration of justice. Court administration has evolved dramatically over the course of the twentieth century; formerly autonomous courts have coalesced into coherent, statewide judicial enterprises and have developed in-house administrative mechanisms to manage judicial business.¹⁸⁶ The public value of judicial independence has taken on new meaning in the second half of the twentieth century as the establishment of offices of court administration wean courts away from their traditional dependence on the legislative and executive branches of government.¹⁸⁷ Similarly, technology has rocketed from the industrial age into the information age, transforming the way businesses, including the courts, manage their operations. Court administration statutes enacted at the turn of the century or earlier need to be updated to reflect these dramatic changes in public values and technology.

181. See Eskridge, *Dynamic Statutory Interpretation*, *supra* note 162, at 1530.

182. Eskridge, *Politics Without Romance*, *supra* note 147, at 314-15.

183. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 162, at 1531.

184. See Eskridge, *Spinning Legislative Supremacy*, *supra* note 177, at 321.

185. See discussion *infra* Part V.A.3.b.

186. See Eskridge, *Politics Without Romance*, *supra* note 147, at 276.

187. WHEELER, *supra* note 10, at 11 ("Most courts had an exclusive relationship with their corresponding legislative and executive bodies, usually municipal government.").

A dynamic interpretation of the verbatim reporting statutes would acknowledge the legislative dysfunction that allows a single-purpose interest group, with a vested interest in its own shorthand technology, to throttle virtually all efforts to update the acts. The key code sections that derive from the original 1861 statute currently read substantially as they did in 1861.¹⁸⁸ A dynamic interpretation of these statutes confines them to their original public-regarding purpose, thereby allowing the Judicial Council to update the rules to accommodate electronic recording technology.

Where legislative dysfunction prevents the updating of statutes that implicate core court administration concerns, I propose that courts resolve ambiguities in statutory text in favor of permitting the judicial rule-making arm to perform the updating function. My proposal is a variation on Eskridge's approach in that the updating function would not be performed by the court in its traditional adjudicatory role but in its extra-judicial administrative role.

V. AN ILLUSTRATION OF HOW COURTS COULD DYNAMICALLY INTERPRET STATUTORY AND CONSTITUTIONAL TEXT THAT REGULATES COURT ADMINISTRATION: A CRITIQUE OF THE CCRA I OPINION¹⁸⁹

A. Critique of Part A of CCRA I—The Court's Interpretation of the Meaning of "Not Inconsistent with Statute" Stacks the Deck in Favor of Finding Conflict Between Rule of Court and Statute

In Part A of the CCRA I opinion, the court purports to interpret the meaning of "not inconsistent with statute" to develop an interpretive principle—a lens—through which it construes selected statutes in Part B and selected unenacted bills in Part C. This lens is flawed for three reasons. First, as a matter of separation of powers policy, this lens distorts the roles of the Judicial Council and, therefore, the California

188. See *supra* text accompanying notes 18-26.

189. My focus is on the challenged rules of court of the Judicial Council and whether or not they are "inconsistent" with statute. I, therefore, do not consider, as a separate question, whether individual superior courts, exercising their inherent powers, could purchase and operate electronic recording devices to make a record of proceedings in the absence of a Judicial Council rule of court.

courts in court administration, making the Council's role appear smaller than it is. Second, as a tool for statutory interpretation, this lens is grounded in the fiction of *implied legislative intent* that bypasses statutory text and reflects the court's *own* view of the proper balance of power between the courts and the legislature, rather than the view of the legislature, or of the constitution. Third, the lens developed in Part A of *CCRA I* itself is the product of distorted constitutional interpretation of article VI, section 6 that masks the court's own separation of powers policy choices behind the fiction of popular intent and *stare decisis*.

The court interprets the ambiguous phrase "not inconsistent with statute," in article VI, section 6, to require the court to "measure[] the challenged rule against the statutory scheme to determine whether the rule was consistent with the intent expressed in the legislative enactment."¹⁹⁰ Based on this interpretation, the court sets for itself, in Part B, the following task of statutory interpretation: "We must determine whether the statutory scheme addresses the making of the official record in such a manner as to suggest that the Legislature *implicitly intended* that this record be made by certified shorthand reporters rather than by electronic recording."¹⁹¹

1. *What the CCRA I Court Purported to Do, But Didn't*

In interpreting "not inconsistent with statute," the court purports to follow the command of the people, as articulated in article VI, section 6, and of the California Supreme Court through its case law invalidating the rules of court. The phrase "not inconsistent with statute" is ambiguous. Its meaning does not spring inexorably from text and high court precedent but, rather, from the court's own policy choice to view the Judicial Council as a legislatively created administrative agency rather than a constitutionally constituted agency of the state judicial system. The court's policy choice is rooted in California's nineteenth-century populist tradition and does not accurately reflect the contemporary role of the Judicial Council in court administration. Similarly, the

190. *California Court Reporters Ass'n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44, 50 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

191. *Id.* at 51 (emphasis added).

court's legislative-intent-based interpretive approach is similarly rooted in an anachronistic concept of the court's role in statutory interpretation.

The court's interpretation of "not inconsistent with statute" follows a two-step analysis.

a. *Step 1: Measure the Rule of Court for Consistency With Statute*

The court first transforms the phrase "not consistent" into "consistent" by concluding that "the challenged rules must be measured for *consistency* against the legislative enactments."¹⁹² In determining the relative value assigned to the council's rules and the legislature's statutes, the court steers its analysis to the question of the relative *power* of the Judicial Council versus the legislature as institutions of government. The court rejects as "specious" its perception of the council's argument "that as it and the Legislature both derive their powers from the state constitution, the two institutions are coequals."¹⁹³ In fact, the Judicial Council's brief made the following argument: "The legislature and the Judicial Council (*as the representative of the judiciary*) are thus coequal branches of government, each deriving authority from the Constitution of the State of California."¹⁹⁴ By omitting the

192. *See id.* at 49.

193. *Id.*

194. Respondent's Brief at 5, *CCRA I*, *supra* note 1. Unfortunately, this argument placed the emphasis on the Judicial Council rather than on the judiciary, placing the council's role as the judiciary's agent in parentheses and emphasizing the council's constitutional rule-making authority rather than the judiciary's co-equal status as a constitutionally-constituted branch of government invoking the concept of judicial independence from the other two branches. In support of its Petition for Rehearing, pursued by new counsel, the Judicial Council made the "coequal" argument more persuasively:

[T]he Judicial Council is the rule-making body of the judiciary, a separate branch of government in the tri-partite system established by the California Constitution The Judicial Council has authority granted by the Constitution—not by the Legislature—to enact any rules it deems appropriate for better court administration, practice and procedure, so long as its rules are 'not inconsistent with statute.' . . . Under the tripartite system of government established by the California Constitution, the Judicial Council does not exist to carry out the will of the Legislature, and does not depend on the Legislature for its authority. The fact that the Legislature has—for whatever political, parliamentary, or arbitrary reasons—not enacted a statute embodying a particular rule of procedure is no bar under the California Constitution to the adoption of such a rule by the Judicial Council.

critical words in parentheses, the court distorted the council's fundamental separation of powers argument. Relying upon oft-cited language in *Lane v. Superior Court*,¹⁹⁵ adopted by the California Supreme Court in *Stockton Theaters, Inc. v. Palermo*,¹⁹⁶ that the council's *rule-making* power is limited by the legislature's higher *rule-making* authority, the *CCRA I* court concluded that the Legislature, *as an institution of government*, was an inherently higher authority than the Judicial Council. "[The Judicial Council's] *rule-making* power is limited by existing law as enacted by the Legislature, thus making the legislative *branch* an *inherently higher authority* than the Judicial Council itself."¹⁹⁷

Viewing the Judicial Council as institutionally subordinate to the legislature, the court concludes that "[t]he challenged rules must be measured for consistency against the legislative enactments."¹⁹⁸ This standard effectively relegates the status, or "value," of the council's rules of court to that of administrative agency regulations which, "[t]o be valid, . . . must be within the scope of authority conferred by the enabling statute."¹⁹⁹ *CCRA I* makes this analogy between Judicial Council rules of court and administrative regulations explicit by stating that, "[a]s with Judicial Council rules, administrative regulations are only valid if they are consistent with statute."²⁰⁰

The court's logic is flawed in concluding that because a statute trumps a conflicting rule, the Judicial Council is *a fortiori* hierarchically subordinate to the Legislature in court administration, rather than a parallel rule-making institution. In fact, *Lane v. Superior Court* does not support the court's inference that the legislature is hierarchically superior to the Judicial Council.²⁰¹ *Lane* stands for nothing more than

Petitioner for Rehearing of Respondent Judicial Council of California at 13-14, *CCRA I*, *supra* note 1.

195. *Lane v. Superior Court*, 285 P. 860 (Cal. Ct. App. 1930).

196. *Stockton Theaters, Inc. v. Palermo*, 304 P.2d 7, 11 (Cal. 1956) (quoting *Lane* at 862).

197. *California Court Reporters Ass'n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44, 49 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997) (emphasis added).

198. *Id.*

199. *Association for Retarded Citizens v. Dep't of Developmental Servs.*, 696 P.2d 150, 153 (Cal. 1985).

200. *CCRA I*, 46 Cal. Rptr. 2d at 56.

201. The rule-making power of the Judicial Council would seem to be limited

a statute trumps a rule *but only where the rule conflicts with the statute*.²⁰²

The court conflates two separate issues. The first issue is whether a statute overrides a conflicting rule. The answer is clearly yes, under article VI, section 6 of the California Constitution. However, this answer does not address the second question of *whether* rule, in fact, conflicts with statute.²⁰³ Article VI—which defines the Judicial Power—endows the Judicial Council with its *own* rule-making power that parallels that of the legislature. It is, therefore, inapposite to measure the validity of a rule of court, especially in the area of court administration, by an administrative agency standard of “consistency against legislative enactments.”²⁰⁴

The *CCRA I* court also relies on *Shay v. Roth*²⁰⁵ in defining “consistent” as “in agreement” or “harmonious” and rejecting the trial court’s definition as “more than merely in-harmonious, but . . . connoting an impossibility of concurrent operative effect.”²⁰⁶ *Shay v. Roth* is completely inapposite. The issue in *Shay* was whether certain terms of a *county charter* were “consistent” with the *California Constitution*.²⁰⁷ Article 7.5 of the California Constitution expressly requires county charters to be “consistent with and subject to” the constitution.²⁰⁸ By contrast, article VI, section 6 deliberately employs the word “not inconsistent,” rather than “consistent.”²⁰⁹ Consistency implies a subordinate hierarchical relationship

by any existing law. The constitution reserves to the legislature and the people the primary and higher right to provide rules of procedure for our courts, with the secondary right in the Judicial Council, to adopt rules only, when and where the higher authority of the legislature and the people has not been exercised.

202. *Stockton Theaters, Inc. v. Palermo* 304 P.2d 7, 11 (Cal. 1956) (citing the quoted language in *Lane v. Superior Court*, 285 P. 860 (Cal. Ct. App. 1930), to support the proposition that the legislature has the power to “enact, subsequently, a statute which would have the effect of amending the existing rule”).

203. CAL. CONST. art. VI, § 6 (Background Comments to 1966 Amendment, California Constitutional Revision Commission) (“But it should be remembered that while the Judicial Council is empowered only to formulate rules ‘not inconsistent with law(s),’ it is the courts which determine whether or not such a conflict exists.”).

204. *CCRA I*, 46 Cal. Rptr. 2d at 49.

205. *Shay v. Roth*, 221 P. 967, 969 (Cal. Ct. App. 1923).

206. *CCRA I*, 46 Cal. Rptr. 2d at 49 (referring to the trial court’s interpretation of the phrase “not inconsistent with statute”).

207. *Shay*, 221 P. at 967.

208. CAL. CONST. art. VI, § 6.

209. CAL. CONST. art. 7.5.

that agency regulations bear to a statute and county charters bear to the state constitution. Furthermore, article VI, section 6 requires the rule to be measured against a *statute*, not against clearly superior constitutional text. The *CCRA I* court implicitly viewed the Judicial Council rules of court as bearing the same *subordinate* relationship to the statute as a county charter bears to the California Constitution.²¹⁰

b. *Step 2: In Measuring a Rule's Consistency with Statute, Bypass Statutory Text and Go Directly to the Implied Legislative Intent Behind the Statutory Scheme*

Having determined that "the challenged rules must be measured for consistency against legislative enactments," the court defines "legislative enactments" to mean implied legislative intent behind a statutory scheme.²¹¹ The court's implied intent standard is not articulated in any of the cases cited in *CCRA I*. As a policy matter, this standard represents an abdication by the decision-making arm of the judiciary of the constitutionally granted rule-making power of the judiciary's administrative arm. This new yardstick of rule validity invites appellate courts to "imply" legislative preemption of vast tracts of court administration territory.

Again, the *CCRA I* court does not take responsibility for its recalibration of power over court administration. Instead, the court's standard for determining whether a rule is inconsistent with statute purports to be the product of the court's *synthesis* of "the pertinent California cases." A close analysis

210. *Shay*, 221 P. at 968. In *Shay*, the court adopts an ordinary-meaning-of-the-text rule of construction for constitutional text ratified by the people: "[i]t is the general rule that in construing the provisions of the constitution the words employed therein shall be given the meaning which they bear in ordinary use." *Id.*

211. *CCRA I*, 46 Cal. Rptr. 2d at 49. The court goes on to state:

Having reviewed the pertinent California cases [which invalidated rules of court], we conclude that when evaluating whether a rule of court is 'not inconsistent with statute' within the meaning of the California Constitution, a court must determine the Legislature's intent behind the *statutory scheme* that the rule was intended to implement and measure the rule's consistency with that intent. . . . We must determine whether the *statutory scheme* addresses the making of the official record in such a manner as to *suggest* that the Legislature *implicitly intended* that this record be made by certified shorthand reporters rather than by electronic recording.

Id. at 51 (emphasis added).

of these cases reveals that *stare decisis* does not dictate the court's formulation, which is a new standard of rule validity that undermines the secondary rule-making power of the Judicial Council.

The court's interpretive standard assumes that every statute is part of a thoughtfully and deliberately designed "statutory scheme." Only one of the five cases relied upon by the court refers to a "statutory scheme." In *People v. Hall*,²¹² the California Supreme Court invalidated a Judicial Council rule of court that cut back the discretion granted to the sentencing court under the Uniform Determinate Sentencing Act, which the high court described as an "elaborate sentencing scheme."²¹³ Unlike the "statutory scheme" stitched together by the *CCRA I* court from a congeries of statutes enacted by different legislatures at disparate historical periods in response to divergent challenges to court administration, the Uniform Determinate Sentencing Act was a single statute designed to overhaul the sentencing laws to provide a uniform sentencing scheme.

The *CCRA I* court's search for an *implicit* legislative intent suggested by the statutory scheme is also not supported by the cited cases. Courts have traditionally sought refuge in the rhetoric of legislative intent to avoid the undemocratic appearance of usurping the lawmaking function from the

212. *People v. Hall*, 883 P.2d 974, 975 (1994).

213. *In re Robin*, 579 P.2d 1 (Cal. 1978) (concerning the only other case cited by the court that arguably involves a statutory scheme, though not denominated as such by the California Supreme Court). "California's statutes dealing with the detention of minors during the pendency of juvenile court proceedings [which] are largely a product of the Legislature's overhaul of the Juvenile Court Law in 1961." *Id.* at 3. "In enacting the 1961 revisions, the Legislature substantially followed the recommendations and proposals of [the commission]." *Id.* None of the other cited cases required the court to discern the implicit legislative intent behind a "statutory scheme." See *Cortez v. Bootsma*, 33 Cal. Rptr. 2d 20, 22 (Ct. App. 1994) (local court rule that placed a cap on the amount superior court can award in reasonable attorney's fees held to be inconsistent with statute that vests the superior court with unrestricted discretion to award reasonable attorney's fees); see also *Sadler v. Turner*, 230 Cal. Rptr. 561, 564 (Ct. App. 1986) (rule of court requiring a "motion to dismiss for failure to amend following the sustaining of a demurrer [to be] made [on written notice]" held to be inconsistent with statute that had been interpreted by prior case not to require "notice" but merely an *ex parte* motion); *Iverson v. Superior Court*, 213 Cal. Rptr. 399, 401-02 (Ct. App. 1985) (rule of court requiring all papers opposing a motion to be served "at least five court days" before the hearing date held to be inconsistent with statute requiring service "at least five days" before the hearing).

people's representatives in the legislature. The new wave of statutory interpretation scholarship has debunked legislative intent as the lodestar of statutory construction.²¹⁴ Only three of the cited cases use the rhetoric of legislative intent underlying the statute, and none of these three cases ventures into the fictional realm of "implied" intent.²¹⁵ One of the three cases, instead, resorts to the "ordinary meaning of the statutory words themselves" as the best evidence of legislative intent.²¹⁶

Further, in each of the five cited cases, it is readily apparent that the challenged rule of court undercut the scope of the statute. In none of the decisions did the court inflate statutory scope, as did the *CCRA I* court, by arranging a collection of disparate statutory pieces, enacted over a 130-year period, to construct an implied scheme. The text of the pertinent "court reporter" statutes gave the trial judge discretion to appoint official court reporters but unlike the cited cases, the Judicial Council's Electronic Recording Rules did not undercut that discretion. Instead, the rules supplemented that discretion with express authorization to employ electronic recording as an alternative verbatim recording technology when an official reporter was unavailable or the parties consented. *CCRA I*'s fabrication of an implied statutory scheme that authorizes only official shorthand reporting to the exclusion of electronic technologies goes far beyond *Hall*.

Finally, *CCRA I* does not distinguish between rules of practice and procedure and rules of court administration.

214. See *supra* Part IV.B.

215. See *Hall*, 883 P.2d at 982 (holding rule of court that "limits trial court's discretion to consider the full range of aggravating factors that traditionally have been relied upon under the [Determinate Sentencing Act]" to conflict with the governing statutes where court determines the "*Legislature's intent* that aggravating circumstances, relating to the defendant's background and status, constitute proper matters for consideration by a court in sentencing under the DSA." (emphasis added)); see also *In re Robin*, 579 P.2d at 3 ("Clearly, the *Legislature intended* that a minor be released from detention if a jurisdiction hearing is not held within 15 days of the detention hearing."). The *Robin* court drew upon legislative history to determine the "*Legislature's purpose* to strictly limit[] preadjudication detention" and found that the rule of court that allowed the district attorney "to avoid the release of the minor after 15 judicial days by using the technique of dismissing the original petition, filing a new petition based on the same transaction, and, after a detention hearing on this second petition, detaining the minor for a new period of 15 judicial days" frustrated the "*Legislature's purpose*" and, therefore, conflicted with statute.

216. *Iverson*, 213 Cal. Rptr. at 401-02.

The Judicial Council rules of court administration, as distinct from practice and procedure, are entitled to special deference under the 1966 amendment to article VI, section 6. Although the council's Electronic Recording Rules intimately implicate court administration policy,²¹⁷ the cited cases deal with rules of practice and procedure that govern the course of the civil or criminal action,²¹⁸ not court administration.²¹⁹

2. *What the CCRA I Court Was Really Doing: The Court Imported Its Own, Outdated, Perspective of the Judicial Council as Servant of the Legislature*

In California, where a rule of court conflicts with a statute, the statute wins.²²⁰ Article VI, section 6 of California's constitution mandates this dominance of a statute over a conflicting rule. In essence, article VI, section 6 provides a vague yardstick for measuring a rule's validity: rules that are "inconsistent" with statute are invalid.

However, the text of article VI, section 6 does not provide a means for determining the *existence* of a conflict between a rule and a statute. A conflict between a rule and a statute can be found—or avoided—depending on how the court interprets the scope of the applicable statute(s). The *CCRA I* court compounds the dominance of a statute over a conflicting rule by inventing an interpretive principle for determining the existence of a conflict between a rule and a statute that

217. See *infra* Part V.B.3.a.

218. See *In re Robin*, 579 P.2d at 1 ("An order . . . dismissing the petition [in juvenile court] prior to the jurisdiction hearing shall not in itself bar the filing of a subsequent petition commencing new proceedings based upon the same allegations as in the original petition."). See also *Cortez v. Bootsma*, 33 Cal. Rptr. 2d 20 (Ct. App. 1994) (finding that in contested actions, no attorneys fees can be awarded exceeding the amount agreed by the plaintiff to be paid to the plaintiff's attorney); *Hall*, 883 P.2d at 974 ("When a [criminal] defendant is subject to an enhancement for which three possible terms are specified by [the Uniform Determinate Sentencing Act], '[t]he upper term may be imposed for an enhancement only when there are circumstances in aggravation that related directly to the fact giving rise to the enhancement.'"); *Sadler v. Turner*, 230 Cal. Rptr. 561 (Ct. App. 1986) (requiring motion to dismiss for failure to amend following sustaining of a demurrer shall be made on written notice); *Iverson*, 213 Cal. Rptr. at 399 (1985) (opposition papers must be filed five court days before hearing).

219. But see *Walker v. Superior Court*, 807 P.2d 418, 424 (Cal. 1991) (interpreting statute narrowly in deference to the superior court's "assessment of its administrative and supervisory needs," to avoid the "inefficient consequences that would flow from petitioners' narrow reading of the statute").

220. CAL. CONST. art. VI, § 6 (amended 1966).

stacks the deck in favor of finding a conflict.

The interpretive principle set forth in Part A of *CCRA I* invites the interpreting court to construct a statutory scheme that “suggests” an “implicit” legislative intent to preempt the Judicial Council’s rule-making power—even where the literal text of the statute and the rule can be reconciled. The *CCRA I* court’s reliance on an implied, unexpressed, legislative intent to determine the existence of conflict compounds the fiction of “legislative intent.” The *CCRA I* opinion encourages courts to construe court administration statutes broadly, thereby placing more rules of court on a collision course with those statutes. The resulting increase in judicial determinations of rule invalidity will weight the balance of power in court administration more heavily in favor of the legislature.

The *CCRA I* court engaged in a kind of reverse dynamic interpretation of article VI, section 6 that belies its “honest agent” rhetoric. The court’s interpretation of “not inconsistent with statute,” to mean consistent with an implied legislative intent constructed by the interpreting court, is not dictated by the language of the section, legislative or ballot history, or precedent.²²¹

Contrary to the *CCRA I* court’s subservient view of the power of the Judicial Council, court administration in California evolved from judicial dependence on the legislative and executive branches to self-governance.

a. *The Evolution of Court Administration in California from Popular Control to Self-Governance*

i. Phase I: The Code Tradition and Popular Control of the Courts (1846–1926):

CCRA I’s view of the Judicial Council as institutionally subordinate to the legislature reflects a culture of popular control of the courts that is deeply engrained in the political subconscious of California. California was imprinted at birth, in 1850, with the nineteenth-century “code” tradition of leg-

221. See discussion *infra* Part V.A.2.a.ii (The search for the legislative or popular intent behind the phrase “not inconsistent with statute” is chimerical. Judicial reform does not spark widespread interest among the bar let alone the public.).

islative dominance over the courts in rule making.²²² Sparsely settled frontier states like California, which achieved statehood after the adoption of the Field Code by New York's legislature in 1848, were receptive to a ready-to-wear, legislatively enacted code of civil procedure.²²³ As a former Mexican territory, California also inherited the civil law tradition of legislatively enacted codified law.²²⁴ Therefore, unlike the eastern states, California has no collective memory of a time when the courts exercised complete rule-making power.²²⁵

Furthermore, the nineteenth century witnessed a wave of popular participation in court administration that departed from the federal courts' model of appointed, life-tenured judges aloof from politics. In fact, "[t]he constitution of every state that entered the union after 1846 provided for a popularly elected judiciary."²²⁶ California's frontier society pro-

222. See Koppel, *supra* note 12, at 461, 464-67; see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 394 (2d ed. 1985) ("The ink was hardly dry on Field's Code when Missouri adopted it into law (1849). In 1851, California, a new state, at the uttermost limit of the country, enacted the Field Code.").

223. FRIEDMAN, *supra* note 222, at 406. See also Koppel, *supra* note 12, at 461. While most states have abandoned the code tradition, emulating the federal model of judicial rule-making embodied in the Rules Enabling Act of 1938, legislative dominance in procedural rule-making has remained entrenched in California. *Id.* But see Paul D. Carrington, *The New Order in Judicial Rule-making*, 75 JUDICATURE 161 (1991). What began in New York as a reform movement to use legislative codification to simplify and rationalize court procedure turned into a procedural nightmare as successive legislatures, in response to interest group pressure, added layer upon layer of patchwork amendments. Legislatures sought to regulate every detail of court activity. *Id.* at 163. See also Bloom v. Crosson, 590 N.Y.S.2d 328 (App. Div. 1992), *aff'd*, 624 N.E. 2d 175 (N.Y. 1993). Even New York state, the home of the Field Code, has, by constitutional amendment in 1977, transferred to the Chief Judge "plenary authority over matters of court administration," while reserving to the Legislature "exclusive authority to regulate jurisdiction, practice and procedure." *Id.* However, the Legislature continues to exercise considerable power over court administration as evidenced by the fact that the Chief Judge continues to seek legislative authorization for electronic recording, much the way California's Judicial Council did until it promulgated its own Electronic Recording Rules in December 1993. *Id.*

224. 1 Cal. 588, 604 app. (1850). After debating the merits of the common law versus the civil law systems, the first California legislature rejected the civil law system. *Id.*

225. See Koppel, *supra* note 12, at 464-65.

226. WHEELER, *supra* note 10, at 17. See also FRIEDMAN, *supra* note 222, at 371.

After the middle of the century, the popular election of judges was more and more accepted as normal. Every state that entered the union after 1846 provided that the voters would elect some or all of their judges.

vided particularly fertile soil for these populist seeds²²⁷ blowing from the East. The *CCRA I* court's emphasis on "legislative intent" as the end game of statutory interpretation is also historically rooted in the populist culture of the nineteenth century where "judges stressed that they did not make law." Thus, the populist movement solidified the concept of judicial dependence on the legislature. The *CCRA I* court adopted this populist-based concept.

ii. Phase II: The Judicial Council Era (1920s and 1930s) and Article VI, Section 6—Self-Governance in Judicial Administration

Review of the legislative and ballot history behind article VI, section 6 reveals a complete absence of any contemporaneous consideration of the meaning of the phrase "not inconsistent with statute." There are no clear commands to the courts, emanating from the 1926 legislature or the people who adopted the ballot initiative, to guide the courts' interpretation of this ambiguous phrase.

However, the bar sponsors of the 1926 amendment intended to create a Judicial Council that moved the administration of justice in California away from the populist model of legislative dominance and toward a progressive, self-governing model that transcends direct political influence. This progressive movement supports an interpretation of "not inconsistent with statute" that promotes a vigorous Judicial Council to manage court business.

The creation of the California Judicial Council in 1926 was the progeny of the national "progressive" judicial reform movement of the early twentieth century that espoused professionalism over politics²²⁸ in court administration.²²⁹ With

The California Constitution of 1849 made the whole system elective, from the supreme court down to justices of the peace.

Id.

227. For the effect of populism on court administration, see Cameron et al., *The Chief Justice and the Court Administrator: The Evolving Relationship*, 112 F.R.D. at 439. They attribute the rise of court administrators not only to increasing caseloads but to a "decline in the effect of populism, to the point that even legislators and even governors were willing to help the courts in becoming more efficient." *Id.* at 446.

228. See WHEELER, *supra* note 10, at 29 ("Progressives of the early part of this century saw their mission to promote the public interest against what a 1915 publicist called 'special and minority interests and corrupt special influence.'").

the support of the organized bar, twenty-six states created Judicial Councils during the 1920s and 1930s.²³⁰ The approval of the Judicial Council Amendment on the November, 1926 ballot was followed a year later by the enactment of the California state bar bill.

The bar sponsors of the Judicial Council Amendment emphasized that the amendment was a "promising beginning" toward "placing the sole responsibility for the administration of justice upon the judicial branch, giving it adequate power to prescribe the methods whereby the judicial machinery shall operate. . . ."²³¹ Consistent with the progressive movement's principles "to promote the public interest against what a 1915 publicist called 'special and minority interests and corrupt special influence,'"²³² the state bar promoted the Judicial Council Amendment as a first step toward a self-governing judiciary that would administer the courts on business principles rather than in response to special interests.²³³

Unlike most judicial councils, which merely "advised" legislatures,²³⁴ California's Judicial Council was constitutionally endowed with limited rule-making power to make it an important player, alongside the legislature, in court administration. The ballot initiative submitted to the people in 1926

229. See *id.* at 26-27; see also CAL. CONST. art. VI (Background Comments of Revision Commission).

230. SEE WHEELER, *supra* note 10, at 28; see also Harry N. Scheiber, *Innovation, Resistance, and Change*, 66 S. CAL. L. REV. 2049, 2080 (1993) ("In the mid-1920s California joined a widespread movement for the establishment of statewide judicial councils that would provide the structure for increased centralization of control over court operations.").

231. John Perry Wood, *Reform in Judicial Administration*, 1 CAL. ST. B.J. 50, 50 (1926).

232. WHEELER, *supra* note 10, at 29 (quoting BENJAMIN PARKER DEWITT, *THE PROGRESSIVE MOVEMENT* 156-61 (1915)); see also Wood, *supra* at note 231, at 25.

233. See, e.g., Hugh Henry Brown, *The Administration of Civil Justice*, 1 CAL. ST. B.J. 14 (1926); see also Hugh Henry Brown, *Judicial Councils at Work*, 1 CAL. ST. B.J. 52 (1926) ("In effect, the Judicial Council will function as a Board of Directors who supervise in a ministerial way the operation of our judicial industry. It is the injection of a modern business principle into the judicial system."). Advocates of the Judicial Council Amendment stressed that the Council would give the courts "an opportunity to put their own house in order" and "to handle [their] own business." CAL. CONST. art. VI (Background Comments of Revision Commission, 2).

234. See CAL. CONST. art. VI (Background Comments of Revision Commission, 8) (1966 amend.) ("Most [judicial councils] have power only to investigate and recommend, and do not possess the limited rule-making power of the California Judicial Council.").

would have provided the council with full rule-making power²³⁵ but for the determined opposition of a single legislator.²³⁶ The phrase "not inconsistent with statute" that qualifies the council's rule-making power is, therefore, the product of a legislative compromise rather than the considered judgment of a majority of the legislature regarding the appropriate balance of power between the judiciary and legislature in court administration.

iii. Phase III: The Professionalization of Court Administration—the 1960 and 1966 Amendments to Article VI, Section 6

Although article VI, section 6 has never been amended to confer the full rule-making power on the Judicial Council, two amendments in the 1960s accelerated the council's movement to center-stage in court administration.

Part III of this article described the coming of age of court administration during the 1960s and 1970s with the "[e]mergence of separate court administration capabilities" in the form of offices of court administration staffed with a corps of professional court administrators. Responding to burgeoning caseloads and budget crises, "court administration [in the 1970s] changed from an innovation . . . into an institutionalized part of the judicial landscape."²³⁷ Today, court administration is a profession with managerial and administrative theory and know-how that did not exist thirty-five years

235. Senate Constitutional Amendment No. 15, Introduced by Senator M. B. Johnson, Jan. 21, 1925, Sec. 1a. ("The Judicial Council shall from time to time . . . (a)opt or amend rules of practice and procedure for the several courts, *provided*, that such rules shall not affect substantive rights and shall be subject to amendment or repeal by the legislature.").

236. See Brown, *Judicial Councils at Work*, *supra* note 233, at 63.

The rule-making power is an integral part of the Judicial Council principle. They go hand in hand. The rule-making power was embodied in Senate Constitutional Amendment No. 15 as originally submitted to the California legislature. The legislature was overwhelmingly in favor of it. A single legislator was radically opposed to it. [Through] his opposition he precipitated a tactical situation which forced the proponents of the measure to relinquish the rule-making power and to consent to its elision from the measure. Doubtless the rule-making power will be conferred by an early California legislature if the California Judicial Council shall recommend it.

Id. See also Phil S. Gibson, *Chief Justice Urges Effective Plan to Give Courts Rule-making Power*, 15 CAL. ST. B.J. 331, 333 (1940).

237. WHEELER, *supra* note 10, at 32.

ago.²³⁸

In 1960, California "joined this nation-wide trend"²³⁹ in the transformation of court administration when the voters approved an amendment to article VI, section 6 that created the Office of Court Administration (OCA) within the Judicial Council.²⁴⁰ For the first time, "the Judicial Council and its chairman have available to them the *power to delegate*. In the absence of such a power to delegate duties it is apparent that only general decisions, involving primarily broad policy questions, could result from the Council's deliberations."²⁴¹ The constitutional creation of the OCA accelerated the Judicial Council's evolution into an effective judicial branch agency of court administration.²⁴²

In addition to the proliferation of offices of court administration, thirteen states (including California), amended their constitutions to expressly recognize "court administration" as a discrete category of rule making, separate from traditional "practice and procedure."²⁴³ Consistent with this national trend, California voters, in 1966, approved a second amendment to article VI, section 6 that expressly added "court administration" to the appropriate subjects of the Judicial Council's rule-making power.²⁴⁴ The 1966 amendment affirms that court administration is a core judicial concern and that

238. *Id.* at 33.

239. See Ralph N. Kleps, *The Judicial Council and the Administrative Office of California Courts*, 37 CAL. ST. B.J. 329, 330 (1962).

240. See CAL. CONST. art. VI, § 1a (as amended Nov. 8, 1960) ("The Council may appoint an administrative director of the courts, who shall hold office at its pleasure and shall perform such of the duties of the Council and of its chairman, other than to adopt or amend rules of practice and procedure, as may be delegated to him."). See also Scheiber, *supra* note 230, at 2081, 2083.

241. Kleps, *supra* note 239, at 331.

242. See *id.* ("Creation of an Administrative Office of the Courts means that there is now an administrative arm for the Council, through which continuous and effective action can be taken to carry out the policies adopted by the Council.").

243. ALA. CONST. amend. 328, § 6.11 (1973); ALASKA CONST. art. IV, § 15; ARIZ. CONST. art. VI, § 5(5); COLO. CONST. art. VI, § 21 (effective Jan. 12, 1965); DEL. CONST. art. IV, § 13 (1994); MD. CONST. art. IV, § 18 (1970); N.J. CONST. art. VI, § II, ¶ 3; N.Y. CONST. art. VI, §§ 28, 30 (1977); PA. CONST. art. 5, §10(c) (1968); P.R. CONST. art. V, § 7; S.D. CONST. art V, § 12 (1972); TEX. CONST. art. V, § 31 (1985); UTAH CONST. art. VIII, § 12 (1984); VT. CONST. ch. II, § 37 (1974).

244. "To improve the administration of justice, the council shall . . . adopt rules for *court administration*, practice and procedure, not inconsistent with statute . . ." CAL. CONST. art. VI, § 6 (emphasis added).

the Judicial Council's rule-making power is a critical tool of court administration.

These two constitutional amendments both promote and reflect California's commitment to a strong, self-governing judiciary empowered to administer court business professionally and efficiently. *CCRA I*'s broad interpretation of "not inconsistent with statute," as the standard of rule validity, lags behind this commitment. The *CCRA I* court erroneously chose, as the basis for its interpretation of article VI, section 6, an administrative agency model²⁴⁵ rather than the contemporary court administration model embedded in the 1966 amendment. The court's myopic vision of the council's rule-making power fails to adjust to the dramatic evolution of court administration in the last half of the twentieth century.

b. *The Court's Ambivalence Concerning Strong,
Centralized Court Administration Within the
Judicial Branch*

The *CCRA I* and *CCRA II* opinions reflect a disrespectful attitude toward the Judicial Council²⁴⁶ and suggest the courts' ambivalence over a strong, centralized court administration within the judicial branch. This ambivalence contributed to the court's narrow perspective of the council's rule-making power over court administration. Baar's study of the "judging-administering distinction" notes the potential for "inter-role conflict . . . between the administrative and decision-making spheres."²⁴⁷ Judges called upon to interpret text that defines judicial power over court administration need to ex-

245. See *infra* text accompanying notes 343-350.

246. See *California Court Reporters Ass'n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997) [*CCRA I*]; *California Court Reporters Ass'n, Inc. v. Judicial Council*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997), *aff'g* 46 Cal. Rptr. 2d 44 (Ct. App. 1995) [*CCRA II*]. Other instances of such language are: "Simply put, the trial court is correct and the Judicial Council is wrong," *id.* at 529, and, "Simply stated, the Judicial Council's asserted inability to understand or comprehend the very language that it sues is, respectfully, not our problem," *id.* At the appellate court hearing on September 26, 1995, the three justices went on the attack in questioning the counsel for the Judicial Council, Richard Chernick, while "the attorney for the court reporters went relatively unscathed." Phillip Carrizosa, *Argument on Court Reporters Met With Skepticism by Justices*, L.A. DAILY J., Sept. 27, 1995, at 1.

247. Baar hypothesizes that, to minimize this potential conflict, "judicial decision-makers will take administrative policy into account in the judging process." Baar, *supra* note 3, at 620. This did not happen in the court of appeal in *CCRA I*.

amine critically their own attitudes toward court administration as a non-traditional source of power within the judiciary that threatens their traditional autonomy.²⁴⁸

The metamorphosis of court administration into a new source of judicial branch power is perceived by judges as well as legislators as a threat to their respective prerogatives in court administration.²⁴⁹ Judges have lobbied legislators to resist the proposals of court administrators that interfere with their traditionally autonomous relationship with their court-appointed staffs,²⁵⁰ *especially court reporters*.²⁵¹

Suspicion by trial and appellate judges of professional court administrators also stems from divergent professional training and outlook. This difference in outlook is due in part to "the inherent differences between the administrative and the judicial approaches to problem solving and decision making."²⁵² Judges, in their traditional adjudicative role, are trained "to individuate each case before them, to observe due process and insure a reasonably fair, full, and impartial hearing," while administrators "are trained to view the judiciary from a 'system' level . . . carrying a responsibility for tending to the system's productivity . . ."²⁵³ Judge-administrator conflict has been viewed as a variant of a larger "clash of cultures" between "professionals" and "managers."²⁵⁴

248. See Cameron et al., *supra* note 144, at 455.

A multi-judge court . . . is an aggregate of independent sovereigns Their independence is traditional and, in regard to the decisional processes affecting individual cases, essential. Judges and their often individually appointed court teams (i.e., bailiffs, court reporters, courtroom clerks) are difficult to weld into a court-wide, smooth-functioning team. Judges like lawyers are soloists by training and tradition.

Id.

249. See WHEELER, *supra* note 10, at 19; see also FISH, *supra* note 20, at 434.

250. See, e.g., FISH, *supra* note 20, at 433.

251. See Jean Guccione, *Reporters' Pay Can Top Judges' Salaries*, L.A. DAILY J., Aug. 2, 1993, at 10 ("[A]t home, [the court reporters] maintain strong personal ties with the judges they serve, who often protect their employment status. 'This is a real bond [with judges],' says Ginger Vadurro, the Los Angeles Superior court's director of human resources."); see also Tom Dresslar, *The Bill Rejecters*, L.A. DAILY J., Aug. 3, 1993, at 1 ("The human element also plays a big part [in the court reporters' lobbying success in the California Legislature], say observers. The close relationships reporters forge with judges and lawyers aids their cause.").

252. Cameron et al., *supra* note 144, at 442.

253. *Id.* at 472.

254. *Id.* at 473 (quoting J.A. RAELIN, *THE CLASH OF CULTURES* (1985)).

Legislators' suspicion of the motives of court administrators grows as court lobbyists have become increasingly assertive in pressing and opposing legislation affecting court operations.²⁵⁵ Relations between the judiciary and legislature have soured in recent years as a concomitant of the judiciary's strengthened role in court administration over the past three decades.²⁵⁶ An erosion of the federal judiciary's credibility with Congress has been observed:

As with the judiciary's role in statutory development, its role in rulemaking has been accompanied by a new skepticism of the judiciary's motives and credibility. Representatives of litigation user groups have accused the Judicial Conference of being an elitist corps of unelected officials who are unrepresentative of the public they ostensibly serve in the rulemaking process and whose rulemaking activities are influenced if not dictated by self-interest.²⁵⁷

The mutual mistrust of increasingly powerful court administrators shared by some judges and legislators makes them natural allies. This community of interest may partially explain the *CCRA I* court's pro-legislature position on court administration. The California judiciary is also acutely aware of its vulnerability to legislative backlash. Two years before *CCRA I*, in 1992, the legislature almost slashed the judiciary's budget in retaliation against a decision that undermined the prerogatives of legislative veterans.²⁵⁸ The decision rejected, in forceful terms, the legislature's constitutional challenge to Proposition 140, which imposed term limits on legislators and cut the legislature's budget.²⁵⁹ Acknowledging the strained relations between the courts and the legislature,

[P]rofessionals . . . are socialized through their disciplines and culture to carry out their technical responsibilities as members of a professional group . . . [that] typically cause[s] them to experience difficulty . . . in conforming to the direction of management Managers [on the other hand] . . . are expected to learn the bulk of their craft on the job. The corporate culture, which strongly influences their socialization, defines the managerial role essentially as articulating the goals of the organization and devising procedures to meet them.

Cameron et al., *supra* note 144, at n.86.

255. See Baar, *supra* note 3, at 631-32.

256. See *supra* text accompanying notes 148-149.

257. Geyh, *supra* note 146, at 1211.

258. *Legislature of the State of California v. March Fong Eu*, 816 P.2d 1309 (Cal. 1991).

259. See Bill Ainsworth, *Battle of the Branches—The Supreme Court vs. the Legislature*, 24 CAL. J., Jan. 1, 1993, at 21, 21.

the Judicial Council placed the renewal of legislative relations,²⁶⁰ along with preservation of judicial independence, at the top of its agenda.²⁶¹

The *CCRA I* decision should also be read against the backdrop of a surprisingly large number of recusals, at the request of court reporters, by judges at each stage of the adjudicatory process.²⁶² At the trial level, the entire Alameda County Superior Court recused itself because the court's chief executive officer was a named defendant.²⁶³ At the court of appeal, Justice Carl Anderson recused himself because of membership on a Judicial Council advisory committee.²⁶⁴ Finally, half of the supreme court justices abstained from voting on the Judicial Council's appeal petition.²⁶⁵ While two of the abstaining justices were members of the Judicial Council, the other two were not. Justices Baxter and Werdegarr merely served on the council's standing appellate advisory committee, which reviewed and supported the challenged rules.²⁶⁶

It is surprising that the court reporters' challenges to impartiality succeeded in the judicial arena.²⁶⁷ Most courts, in-

260. See Chief Justice Ronald M. George, State of the Judiciary Address to a Joint Session of the California Legislature (Feb. 23, 1998).

261. See JUDICIAL COUNCIL OF CALIFORNIA LONG-RANGE STRATEGIC PLAN, LEADING JUSTICE INTO THE FUTURE (1995).

262. Letters from CCRA counsel to the four supreme court justices stated in part:

We are writing because we believe that the facts require your honor's recusal for involvement in the proceedings in the case, Because of your honor's role [on] a Judicial Council committee that approved the rules at issue, a person aware of the facts "might reasonably entertain a doubt" about your honor's impartiality in a case to which the Judicial Council is a party and which concerns the legality of those rules.

Scott Graham, *Judicial Council Foes Ask Recusal of Four Justices*, THE RECORDER, Dec. 26, 1995, at 42 [hereinafter Graham, *Judicial Council Foes Ask Recusal*].

263. See Scott Graham, *No Holds Barred in Court Reporting Case; Politics, Judicial Conflicts, Fiscal Crisis Invoked in Flurry of Court Filings*, THE RECORDER, Jan. 4, 1996, at 39.

264. *Id.*

265. See also Scott Graham, *Judicial Council Loses Bid to Revive Reporting Case*, THE RECORDER, Feb. 7, 1996, at 34.

266. See Graham, *Judicial Foes Ask Recusal*, *supra* note 262, at 42.

267. In response to the court reporters' charge that the Judicial Council could not be trusted to objectively evaluate the electronic recording demonstration project, the legislature amended A.B. 825 and A.B. 1854 to require a parallel report by a legislative advisory committee. See *supra* text accompanying notes 72-73.

cluding the U.S. Supreme Court,²⁶⁸ do not question the propriety of judging the validity of court-promulgated rules.²⁶⁹ These recusals paint a picture of a judiciary on the defensive and in retreat from confrontation with the CCRA. These recusals may have also tilted the playing field by eliminating the very judges most acquainted with the needs of court administration. Thus, the many recusals, the clashes between court administrators and judges, and the distrust of the Judicial Council by legislators combine to reflect the ambivalence of the *CCRA I* court to permit a strong centralized court administration within the Judicial Branch.

3. *What the Court Should Have Done: A New Approach to Determining Conflict Between Rules of Court and Statutes in Court Administration*

a. *Form over Dysfunction: The Primacy of Legislative Intent in California*

California courts are firmly committed to the traditional intentionalist model of statutory interpretation,²⁷⁰ which flows from California's populist tradition of legislative supremacy forged during the state's formative years and imprinted on the judicial subconscious.²⁷¹ The California Supreme Court recently confirmed that the courts' "limited role in the process of interpreting enactments from the political branches of our state government . . . [is to] strive to ascertain and effectuate the Legislature's intent."²⁷² The intentionalist model requires the courts to blind themselves to dysfunction in the legislative process that may have produced rent-seeking legislation.²⁷³ The California Supreme Court recently affirmed: "In interpreting statutes, we follow the Legislature's intent . . . whatever may be thought of the wisdom, expediency, or policy of the act [T]he judicial role in a democratic society is fun-

268. See, e.g., *Sibbach v. Wilson*, 312 U.S. 1 (1941) (upholding the validity of FED. R. Civ. P. 35 and 37).

269. See *Grau*, *supra* note 133, at 13 ("State supreme courts, however, have not hesitated to rule on the validity of their own rules.").

270. *People v. Snook*, 947 P.2d 808, 810 (Cal. 1997).

271. See *infra* Part V.A.1.a and Part V.A.2.a.

272. *People v. Loeun*, 947 P.2d 1313, 1317 (Cal. 1997) (quoting from *California Teachers Ass'n. v. Governing Bd. of Rialto Unified Sch. Dist.*, 927 P.2d 1175, 1177 (Cal. 1997)).

273. See *Schacter*, *Metademocracy*, *supra* note 159, at 597.

damentally to interpret laws, not to write them."²⁷⁴

California courts must move beyond intentionalism when interpreting text that affects the scope of the judiciary's power to promulgate rules affecting court administration. Such text is pregnant with separation-of-powers policy concerns. In resolving textual ambiguity, California courts should fully acknowledge their inevitable policy-making role in calibrating the balance of power between the judicial and legislative branches in court administration. This calibration should keep pace with the evolution of court administration into a powerful judicial branch instrument of self-governance that is the key to judicial independence. Judicial independence requires a narrow construction of article VI, section 6's "not inconsistent with statute," which precludes the court from reading into statutes an *implicit* intent and a *suggested* statutory scheme that are not clearly expressed in the terms of the statute. A narrow construction of "not inconsistent with statute" would require courts to narrowly interpret ambiguous statutes that bear upon court administration.²⁷⁵

The proper, narrow construction of "not inconsistent with statute," is the trial court's "impossibl[e] of concurrent operation or effect," rather than merely "inharmonious," standard. This standard is premised on a vision of the council's rule-making power as "parallel" with that of the legislature, as long as the council's rules do not clearly undercut statutory procedure.²⁷⁶

The work of the new generation of statutory construction theories, such as dynamic interpretation and meta-democratic interpretation, provides the basis for bringing the interpretation of "not inconsistent with statute" into alignment with the contemporary concepts of judicial self-governance and independence. Contemporary statutory interpretation scholarship challenges the California courts to move beyond the reflexive invocation of strict legislative intent and legislative supremacy—initially, in the area of court administration—to a candid, critical reassessment of their

274. *California Teachers Ass'n*, 927 P.2d at 1177.

275. See *Walker v. Superior Court of Los Angeles*, 807 P.2d 418 (Cal. 1991) (interpreting statutes narrowly by California Supreme Court to avoid trenching on the inherent power of the courts to govern themselves).

276. Statement of Intended Decision at 19, *CCRA I*, *supra* note 1.

role in the interpretation process.²⁷⁷

CCRA I exposes judicial administration to interest group control that is not clearly authorized by statute. The California courts should self-consciously use their interpretation power to support the Judicial Council's rule-making power as an effective tool of efficient, businesslike court administration by reconciling rule of court with statute where the text reasonably supports such reconciliation.²⁷⁸ The result will be a narrower interpretation of "conflict" that gives the council latitude and flexibility to govern the courts with business efficiency—as intended by the state bar sponsors of the 1926 amendment and the 1966 amendment.

In the field of court administration, the courts, through dynamic and meta-democratic interpretation, should update nineteenth century populist notions. Those notions are (1) the passive role of the courts as merely discoverers and enforcers of legislative (or popular) intent,²⁷⁹ acknowledging the reality that courts themselves, in partnership with the legislature (or the people), are inevitably sources of policy, particularly in the area of court administration;²⁸⁰ and (2) judicial dependency on the legislature (or its local county equivalent) in matters of court administration, acknowledging the emergence of the Judicial Council as a powerful judicial branch agency of court administration that is the bulwark of judicial

277. See Schacter, *Metademocracy*, *supra* note 159, at 593-94 ("To carry out its task, the court must adopt—at least implicitly—a theory about its own role by defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature.").

278. The California Constitutional Revision Commission that proposed the 1966 amendment to article VI, section 6 stated:

[I]t should be remembered that while the Judicial Council is empowered only to formulate rules "not inconsistent with law(s)," it is the courts which have attempted to strike down rules promulgated by the Judicial Council, it is the courts which determine whether or not such a conflict exists. A number of cases have attempted to strike down rules promulgated by the Judicial Council as conflicting with law, but generally without success.

CAL. CONST. art. VI (Background Comments of Revision Commission, 5).

279. Schacter describes the traditional role of the courts as "in essence, to erase its own role—that is, to limit its interpretive work to a fairly mechanical retrieval of legislative meaning." Schacter, *Metademocracy*, *supra* note 159, at 597.

280. "If statutory meaning is necessarily created *both* by interpretation and by legislation, the very premises of the essentialist account are shaken, for legislative majorities cannot retain sole responsibility for making statutory policy choices." Schacter, *Metademocracy*, *supra* note 159, at 603.

independence.

b. *A Match Between Court Administration and
Dynamic Interpretation*

Article VI, section 6 provides fertile ground for application of dynamic and meta-democratic interpretation methodology for the following reasons.

i. "Not Inconsistent with Statute" is "Open-
Textured"²⁸¹—There Are No Clear Signals to the
Courts from the Legislature or the People

The constitutional phrase "not inconsistent with statute" is ambiguous on its face.²⁸² These words, in essence, articulate the amorphous concept of "conflict" between a court rule and a statute that is not unique to judicial administration in California. Courts construe conflict narrowly or broadly depending on their particular calibration of the balance of institutional interests between the judicial and legislative branches.²⁸³ Regardless of the rhetoric deployed by a court to explain its resolution of the conflict issue before it, conflict is an elastic concept that stretches to fit the interpreting court's view of the appropriate balance of institutional interests between the legislature and the courts and, therefore, does not benefit from a traditional legislative or popular intent-based

281. "Open-textured" is used to mean statutory ambiguity that requires the exercise of interpretive discretion. See Eskridge, *Spinning Legislative Supremacy*, *supra* note 177, at 323-24. See generally H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961).

282. The enacting legislature may have deliberately opted to use vague terms to describe the limits on the Judicial Council's rule-making power. The limitation on the council's rule-making power represented by these words was the result of the opposition of a single legislator. See *supra* Part V.A.2.a.ii.

283. In contrast to *CCRA I*'s broad interpretation of "not inconsistent with statute," the New Jersey Supreme Court's 1950 decision in *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950) provides an example of an aggressive court that narrowly construes an ambiguous constitutional limitation on the court's rule-making power in order to stake out for itself an exclusive rule-making role. The New Jersey Constitution provides: "The Supreme Court shall make rules governing the administration of all courts in the State and, *subject to law*, the practice and procedure in all such courts." N.J. CONST. art. VI, § II, ¶ 3 (emphasis added). In an opinion written by Chief Justice Vanderbilt, a leading advocate of the restoration of the rule-making power to the courts, the supreme court interpreted the ambiguous phrase "subject to law" to mean only *substantive* statutes, not procedural statutes. Through this narrow construction of "subject to law," the New Jersey Supreme Court assumed a dominant position over the legislature in procedural rule making.

analysis.

The *CCRA I* court's interpretation of "not inconsistent with statute" was not dictated by supreme court precedent. Nor does the legislative history behind the original 1926 proposition or the 1966 amendment provide any direct guidance on the meaning of "not inconsistent with statute." Based upon the written record, the issue was simply not anticipated. Not surprisingly, court administration and separation of powers issues fall outside the field of vision of most voters. Even the lawyers who sponsored these measures, and the legislature that voted to place the propositions on the ballot, did not discuss how to determine conflict between rule and statute.²⁸⁴

The California courts should no longer hide behind the myth of "popular intent" to escape the candid exercise of interpretive discretion of ballot initiatives, especially constitutional amendments, that implicate separation of powers theory.²⁸⁵

ii. The Rapid Evolution of Court Administration,
Nationally and in California, Requires California
Courts to Use the Interpretation Process to Update
Article VI, Section 6

Over the course of the twentieth century, the concept of court administration within the judicial branch has undergone a transformation that parallels the revolution in verbatim recording technology. The text of Article VI, section 6 that confers rule-making power on the council, and its amendment in 1966 to expressly include "court administration," reflect this rapid evolution toward a more central and

284. The record indicates that the sponsors of the 1926 amendment expected that the Council would soon receive full rule-making power and, therefore, viewed the qualified rule-making power as an interim arrangement. See *supra* note 236.

285. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 287 (1989).

The essence of the strong conception is that judges are "just following orders" without regard to their own views of public policy. When directives are clear, this is a sound justification. But when the directives are reasonably open to conflicting interpretations (as is often the case), we should be reluctant to excuse judges from responsibility for their own actions on the ground that they were just implementing directives from above.

Id.

assertive role for the judiciary in court administration.²⁸⁶ Courts sometimes cling to “traditional, time-tested [public] values”²⁸⁷ and exhibit a reluctance “to expand . . . public values, or update them to reflect important changes in society and moral theory.” Through dynamic interpretation, California courts should update the meaning of “not inconsistent with statute”—by narrowly interpreting this phrase—to nurture a vigorous rule-making power in court administration that enables direct judicial accountability to the public.

Rapid technological change, which is transforming the justice system, engenders statutory obsolescence. It is democratically legitimate for courts to narrowly construe old, technologically obsolete statutes to give the judiciary the necessary flexibility to utilize technology most efficiently and effectively.

iii. California Courts Should Reinterpret “Not Inconsistent with Statute” to Preserve Public Values of Judicial Independence and Efficiency Inherent in Article VI, Section 6 as Amended in 1966

The phrase “not inconsistent with statute” is imbued with constitutional values concerning the proper balance of legislative and judicial authority over court administration. *CCRA I*’s interpretation of “not inconsistent with statute” to mean “consistent with an implied legislative intent suggested by a statutory scheme”²⁸⁸ is, in effect, a presumption in favor of legislative preemption of the Judicial Council’s rule-making power. The California courts should reverse this presumption. Unless the legislature clearly manifested its intent to preempt the council, the courts should narrowly interpret court administration statutes to permit the Judicial Council to make effective use of its rule-making power over court administration.

Dynamic interpretation methodology supports this approach. Current public values often inform statutory interpretation, especially where text is ambiguous and legislative

286. See *supra* Part V.A.2.a.

287. Eskridge, *Public Values in Statutory Interpretation*, *supra* note 13, at 1086.

288. *California Court Reporters Ass’n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44, 50 (Ct. App. 1995), *aff’d*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

history inconclusive.²⁸⁹ One of the three general rules of statutory interpretation “that reflect the gravitational force of constitutional values”²⁹⁰ is the “[i]nterpretation [of statutes] to [p]reserve [t]raditional [s]eparation of [r]esponsibilities in [g]overnment.”²⁹¹ The Judicial Council is institutionally more competent than the legislature to draft procedural rules.²⁹² The courts should, therefore, apply a meta-rule of statutory interpretation that presumes that legislative enactments do not eclipse rules of court unless statutes expressly so provide.

iv. Who Will Speak for the Courts?: California Courts Should Be Alert to Legislative Dysfunction in Interpreting “Not Inconsistent with Statute” in Article VI, Section 6 and Court Administration Statutes

The phrase “not inconsistent with statute” in article VI, section 6, as well as the enactment of, and failure to enact, assorted statutes regulating the verbatim record in the last thirty years, are the product of legislative dysfunction. The *CCRA I* court ignored these historical facts. The enactment of the electronic recording demonstration project bills (Civil Procedure Code section 270) was not a rational, deliberative decision by the legislature that electronic recording was an un-

289. See Eskridge, *Public Values in Statutory Interpretation*, *supra* note 13, at 1065 (“In many cases, the public values presumptions operate as ‘tiebreakers’ in the close cases, where there are good textual and legislative history arguments for different interpretations.”); see also Farber & Frickey, *supra* note 167; see also Schacter, *Metademocracy*, *supra* note 159, at 606 (“The critique of pluralism creates a normative gap, which requires the court to identify political values that will guide its analysis and its choice of an interpretative rule.”).

290. Eskridge, *Public Values in Statutory Interpretation*, *supra* note 13, at 1019.

291. *Id.* at 1023.

292. Referring to increasing direct congressional intervention in the federal rule-making process over the last 20 years, Professor Carrington writes:

In contrast [to rule making by the courts], our legislatures serve as forums of faction. . . .

Given a choice or an opportunity, most factions will try to claim the judiciary not only to control the selection of judges, but also to bend court administration and procedural rules to their own advantages. What vibrant political organizations want is not good procedure or due process, but victory for the interests they represent Perhaps the most outspoken of all [factional interests] are the court reporters who resist modification of rule 30 to allow the taking of depositions without requiring their services.

Carrington, *supra* note 223, at 162-65.

proven technology that needed to be tested. Rather, it was the product of a political compromise forced by the CCRA's political opposition to the original bills expressly authorizing electronic recording in all superior courts indefinitely.²⁹³ Similarly, the *CCRA I* court took note of the "[l]egislature's rejection of the Judicial Council's proposed amendments [to existing statute]" as reinforcing the court's interpretation of "the existing statutory scheme,"²⁹⁴ ignoring the political reality of the court reporters' power in the Legislature.²⁹⁵

Dynamic interpretation and meta-democratic methodology challenges the validity of the optimistic assumption that pluralism produces good—public interest—legislation. The courts have a legitimate role to play in compensating for dysfunction and in speaking for the disenfranchised. This role is particularly suited to the interpretation of judicial administration statutes because special interests frequently drown out the voice of the judiciary in the legislature.²⁹⁶

California courts must be alert to "rent-seeking" statutes "that . . . represent advantage-taking"²⁹⁷ by special interest groups when interpreting those statutes to determine inconsistency with rules of court. These courts should "focus on what can go wrong, and where"²⁹⁸ in the legislature, especially to the "primary legislative dysfunctions identified by public choice theory—a tendency of Congress to neglect general interest statutes and of Congress and agencies to create special rules and benefits for well-organized groups."²⁹⁹ "Courts can ameliorate . . . [legislative] dysfunction by narrowly interpreting rent-seeking statutes and by adopting public-

293. See *supra* text accompanying notes 51-64.

294. *California Court Reporters Ass'n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44, 56 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

295. Petition for Review at 6-8, *CCRA I*, *supra* note 1 (suggesting that the legislature's repeated failure to enact electronic recording bills does not reflect a legislative intent to preclude electronic recording from superior courts but, rather, the political muscle of the CCRA).

296. But see Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 256 (1986) (advocating "the use of traditional methods of statutory interpretation as the best means of addressing the problem of special interest group legislation").

297. Eskridge, *Politics Without Romance*, *supra* note 147, at 323.

298. *Id.* at 322.

299. *Id.* at 322.

regarding interpretations of regulatory statutes."³⁰⁰

These observations are especially applicable to court administration. Court personnel—from individual judges to court reporters—commonly pursue their self-interest through statute.³⁰¹ The politicization of court procedure by special-interest-group legislative lobbying over the last twenty years is a well-documented phenomenon. Also, court reform measures, inevitably upsetting the status quo, are often blocked or modified by powerful private interests in the legislature.³⁰² Judicial administrators, lobbying for public-regarding in court reform, are often overwhelmed in legislatures by tightly organized, well-financed special interest groups who—unlike the judiciary—make campaign contributions.³⁰³ There is no strong public lobby in the legislature.³⁰⁴

California courts should modify their traditionally passive interpretive role in the area of court administration by being "alert"³⁰⁵ to legislative dysfunction and willing to use the process of interpretation of ambiguous text to compensate for that dysfunction. In *CCRA I*, the court should have mini-

300. *Id.* at 318.

301. See SMITH, *supra* note 12, at 7 ("[A]s human beings, judges have an understandable self-interest in shaping court structures and procedures in ways that preserve their powers and privileges. Their actions affecting judicial administration frequently reflect their shared self-interest.").

302. See FISH, *supra* note 20, at 432-33 (referring to the power of individual federal judges to frustrate judicial reform).

Each of these measures would exert decided centripetal impulses through the federal court system. Each would threaten or appear to threaten the hallowed ground of judicial independence. More realistically every one would be seen as subverting existing status relationships by changing the internal distribution of power within the judicial system.

Id. See also Cameron et al., *supra* note 144, at 444 n.13 (quoting Judge Dorothy W. Nelson, 1982 CT. MGMT. J. 26, 27) ("[O]n balance, . . . the self-interest of powerful individuals, institutions, and groups rarely weighs in favor of judicial reform.").

303. See Geyh, *supra* note 146, at 1216-17.

304. See Carrington, *supra* note 223, at 162.

Alas, there is . . . no natural and effective lobby for sound judicial administration, no political force that regularly favors impartiality or disinterest. Judicial institutions, like the shoemakers children, are unshod when they walk the corridors of legislation. When one sees the representatives of the Third Branch on Capitol Hill, one is prone to wonder, how many divisions has the Pope? What is everyone's concern, as the old saw has it, is nobody's business.

Id.

305. See Eskridge, *Politics Without Romance*, *supra* note 147.

mized the impact of the dysfunction that resulted in the insertion of "not inconsistent with statute" into article VI, section 6 by narrowly construing that phrase to support the Council's rule-making power in court administration.³⁰⁶ As long as the interest group demand³⁰⁷ for procedural legislation continues unabated, it is unlikely that the legislature will voluntarily loosen its grip on the rule-making power.³⁰⁸

Bypassing the legislature by direct recourse to the people to complete the council's rule-making power will also be unavailing because the public lacks interest in, and understanding of, court administration.³⁰⁹ The court obviously cannot delete this phrase—which can only be accomplished by constitutional amendment—but the court can, with democratic legitimacy, minimize its adverse impact on judicial administration, especially where a broad interpretation would open the door to further legislative dysfunction by special interest groups.³¹⁰

306. See *California Court Reporters Ass'n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997). This narrow interpretation of "not inconsistent with statute" supports the trial court's interpretation as not just "inharmonious," but connoting an impossibility of concurrent operation or effect. See *infra* Part II.D.

307. See Eskridge, *Politics Without Romance*, *supra* note 147, at 285 ("Public choice theorists typically treat legislation as an economic transaction in which interest groups form the demand side, and legislators form the supply side. On the whole, this branch of public choice theory demonstrates that the market for legislation is a badly functioning one.").

308. See California Law Revision rejection of the author's proposal that the Commissioner advocate the transfer of complete rule-making power to the Judicial Council: "[T]he Commissioner has now reviewed this matter and decided not to take it on. It implicates the balance of power between the legislative and judicial branches It would not be appropriate for the Commissioner to step into the argument at this point." Letter to Glenn Koppel from Nathaniel Sterling, Executive Secretary, California Law Revision Commission (Mar. 3, 1999) (on file with the author).

309. See Kala Rogers Holt, *The Balance of Power: Weidrick v. Arnold and the Conflict Over Legislative and Judicial Rulemaking Authority in Arkansas*, 46 ARK. L. REV. 627, 654 (1993) ("It is highly questionable whether the struggle between the judicial and legislative branches over rulemaking authority will stimulate sufficient public interest for an initiative petition to be successful. Indeed, obtaining a constitutional amendment regarding rulemaking through the initiative process is less probable than proceeding through legislative procedure.").

310. The court also should have narrowly construed the court reporting statutes rather than infer that they comprise a rational scheme that bars electronic recording from superior court except where expressly authorized. See *infra* Part V.B.

c. *Proposed Dynamic Interpretation Methodology for Interpreting Verbatim Recording Statutes*

Interpreted dynamically, the phrase "not inconsistent with statute" is *itself* a dynamic interpretation methodology for interpreting the verbatim recording statutes. Dynamic interpretation theory does not offer a mechanical, by-the-numbers, formula for interpreting the court reporter statutes. Rather, it encourages judges to shed the pretense of mechanically extracting and enforcing "legislative intent" in favor of an open-minded "dialogue" between the judge and statutory text. Through this dialogue, the judge, as interpreter, strives to find common ground between his own contemporary context of assumptions and that of the enacting legislature.

Applying this dialogue methodology to the interpretation of statutes that regulate court administration, California courts should reject *CCRA I*'s approach that requires the court to begin its analysis with the fixed assumption that there is a rational, public-regarding, legislative design or scheme and then to endeavor to force the statutory pieces to fit that scheme. Instead, the court should start its analysis by focusing on the words of the text of each statute, "consider[ing] the most plausible meaning of the words used in the text, with due consideration for the whole text."³¹¹ If there is no conflict between the statutory text and the challenged rule of court, the court should uphold the rule's validity.³¹² This first analytical step is consistent with California's current intentionalist methodology as articulated in a recent decision of the California Supreme Court: "In determining the Legislature's intent, a court looks first to the words of the statute '[I]t is the language of the statute itself that has successfully braved the legislative gauntlet' When looking to the words of the statute, a court gives the language its usual, ordinary meaning."³¹³ For example, if the legislature

311. Eskridge, *Spinning Legislative Supremacy*, *supra* note 177, at 346.

312. See Farber, *supra* note 285, at 291-92 ("The ultimate question is whether genuine doubt exists about the meaning of the legislative command."). This assumes, of course, that it is possible for a text to communicate a clear meaning.

313. *People v. Snook*, 947 P.2d 808, 811 (Cal. 1997). See also *People v. Loeun*, 947 P.2d 1313 (Cal. 1997):

We give the words of the statute "their usual and ordinary meaning." . . . If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain

had enacted a statute that expressly banned the use of electronic recording technology to make the verbatim record in superior court, the process of analysis ends and the court declares invalid any rule of court authorizing electronic recording in superior court.

If the court believes the statutory text is ambiguous, it should study the text in light of the statute's "legislative history, its purpose(s), the evolution of its purpose(s) over time, and precedents concerning the statute's application in other circumstances."³¹⁴ This approach accords great weight to the "statute's integrity . . . and the truths that come from its history,"³¹⁵ but then brings those truths forward to the present day to reconcile them with contemporary values and conditions. Such conditions include, of course, fundamental changes in verbatim recording technology and court administration. In studying the statute's history, the court should identify "problems in the democratic process" that may have produced rent-seeking, "monopoly," legislation that benefits a powerful interest group at the expense of the public interest.

B. Critique of Parts B and C the CCRA I Opinion: Statutory Interpretation—The Illusory Quest for the Holy Grail of Legislative Intent

1. *What the CCRA I Court Said It Was Doing, But Wasn't*

a. *Part B of the Opinion: The Implied Statutory Scheme*

The *CCRA I* court reviewed the text of a variety of statutes regulating the appointment, duties, and compensation of official court reporters, as well as two statutes relating to electronic recording—one authorizing electronic recording in municipal court if a court reporter is unavailable, the other authorizing the now-defunct demonstration project. Based upon this review, the court discerned a "legislative pattern

meaning of the language governs." . . . Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist."

Id. at 1317 (quoting *Lennane v. Franchise Tax Bd.*, 885 P.2d 976, 978 (Cal. 1994)).

314. Eskridge, *Spinning Legislative Supremacy*, *supra* note 177, at 347.

315. *Id.*

[that] suggests that while electronic recording is sometimes proper, the normal practice is that a shorthand reporter is to create the official record unless statutory law provides otherwise.”³¹⁶

The *CCRA I* court failed to deliver on its promise to “look to the Legislature’s purpose *at the time the statutory scheme was enacted*.”³¹⁷ Instead, the court laid out the text of these statutes in their current form as they appear in the Code of Civil Procedure³¹⁸ and in the Government Code.³¹⁹ By doing so, the statutes appeared as though they had been enacted by a single, rational, contemporary legislature that set out to craft a comprehensive verbatim reporting scheme for making the “official record” that best served the public interest. These fictional legislators were, presumably, aware of the modern verbatim recording technologies, carefully deliberated on the pros and cons of shorthand versus electronic recording, and rationally determined that shorthand was the only reliable verbatim reporting technology.

Rather than evaluate each statute in its historical context, the court invented its fictional, rational-purpose, statutory scheme. The court erroneously began its statutory analysis with Code of Civil Procedure section 269³²⁰ as the foundation for inferring that there is a “statutory scheme providing for the official record to be taken down in shorthand.”³²¹ The court’s implication that section 269 is the key-

316. *California Court Reporters Ass’n, Inc. v. Judicial Council*, 46 Cal. Rptr. 2d 44, 54 (Ct. App. 1995), *aff’d*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

317. *Id.* at 55.

318. *See* CAL. CIV. PROC. CODE § 269(a) (Deering Supp. 1999) (setting forth the duties of an official court reporter; but mischaracterized by the court as setting forth the “basic provisions for requesting an official superior court record”) (emphasis added). *See also id.* § 270 (the expired demonstration project); *id.* § 273 (making the official reporter’s certified transcript prima facie evidence of the proceedings).

319. *See* CAL. GOV’T CODE § 68086 (Deering 1989 & Supp. 1999) (setting the fees and costs of an official reporter). *See also id.* § 69941 (authorizing the superior court judge to appoint an official reporter); *id.* § 69952 (prohibiting the court from authorizing payment for “any matter except that reported by the [official] reporter pursuant to Section 269 of the Code of Civil Procedure”); *id.* §§ 69948, 70044.5-70064 (prescribing compensation for official reporters according to fee schedules); *id.* at § 72194.5 (authorizing electronic recording in municipal court whenever an official court reporter is unavailable).

320. “Several statutes comprise the statutory scheme of making an official record. Subdivision (a) of section 269 sets out the basic provisions for requesting an official superior court record.” *See CCRA I*, 46 Cal. Rptr. 2d at 51.

321. *Id.* at 55.

stone of a scheme for creating something called the "official record" and that the legislature mandated that only the official reporter can create that record is unwarranted both by the text of section 269 and its history.

Had the court referred to history, it would have commenced its analysis with Government Code section 69941, which authorizes, but by no means requires, the superior court judge to appoint an official reporter.³²² No statute requires that a superior court appoint an official court reporter *at all*. The superior court's exercise of the power to appoint court reporters is entirely discretionary. All other sections of the Civil Procedure and Government Codes cited by the court assume that the superior court has, in fact, exercised its discretion in favor of appointing an official court reporter under Government Code 69941. Code of Civil Procedure section 269(a) simply defines the duty of the official reporter to take down in shorthand the oral proceedings, *but only if requested to do so by the parties or the court*.³²³ No statute requires that the superior court maintain an official record. An official record exists only if an official court reporter, *upon request*, prepares a verbatim record of proceedings.

The legislature's original purpose in 1861 was most likely to make available to the court, or the parties, a reliable source of the only verbatim recording technology available at the time, should the court or one of the parties desire a verbatim record.³²⁴ The enacting legislature, in 1861, could not possibly have intended to exclude an electronic technology of which it could not have even dreamed. In fact, had a reliable electronic recording technology been available in 1861, the legislature would likely have embraced it given the scarcity of competent shorthand reporters on the mid-nineteenth century frontier³²⁵ (especially because the court reporters had not organized as a profession and lobbying force until the late nineteenth century).³²⁶

b. Part C of the Opinion: The Legislature's Failure to Enact a Statute that Expressly Authorizes

322. See *supra* notes 21-256 and accompanying text.

323. CAL. CIV. PROC. CODE § 269a (Deering Supp. 1999).

324. See *supra* text accompanying notes 22-25.

325. *Id.*

326. See *supra* note 23.

Electronic Recording in Superior Court:

The court purports to reject the CCRA's invitation "to consider—as further evidence of an intent not to permit electronic recording—the Legislature's subsequent failure to pass legislation proposed by the Judicial Council specifically authorizing electronic recording."³²⁷

As in Part A, the court says one thing and does another. The court analogizes the Judicial Council to a legislatively created administrative agency,³²⁸ drawing upon case law that finds legislative rejection of a proposal identical to the challenged agency regulation as "more persuasive" evidence that the regulation is inconsistent with legislative intent.³²⁹ Based upon this inapposite case law, the court states: "In our case, the Judicial Council's attempt to obtain legislative amendment of the existing statutory scheme suggests that its present interpretation of that scheme as consistent with the rules it promulgated after rejection of the amendments is shaky, at best."³³⁰

The court makes two errors here. First, the Judicial Council is not a creature of the legislature that exists solely to carry out the legislative will. Second, the challenged rules of court were not the same as the "rejected amendments" referred to by the court. Rule 980.1 would have authorized electronic recording in superior court *only where an official court reporter was "unavailable."* By contrast, the Isenberg bill, Assembly Bill 2937, sponsored by the Judicial Council at the sunset of the demonstration project in 1992, would have given unqualified authorization to a court to "utilize audio or video recording as the means of making a verbatim record of any hearing or proceeding" *whether or not an official reporter was available.*³³¹ This distinction is significant because the

327. California Court Reporters Ass'n, Inc. v. Judicial Council, 46 Cal. Rptr. 2d 44, 55 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

When determining the meaning of statutory language, our high court recently held that very limited guidance can generally be drawn from the fact that the Legislature has not enacted a particular proposed amendment to an existing statutory scheme As evidence of legislative intent, unadopted proposals have been held to have little value.

Id.

328. *Id.* at 56.

329. *Id.* at 55-56.

330. *Id.* at 56.

331. A.B. No. 2937 § 3 (Cal. 1985).

courts are not required by statute to appoint official court reporters—in other words, to make them “available.” The appointment authority conferred by Government Code section 69941 and the other court reporting statutes is purely discretionary. Code Civil Procedure section 269(a) gives a party the right to have an official reporter make a verbatim record upon request, *but only if one is available*. Assembly Bill 2937, in contrast to the Electronic Recording Rules, would have authorized a superior or municipal court judge to utilize electronic recording to make a verbatim record, *even if an official reporter were available*, thereby cutting into Code of Civil Procedure section 269(a).

Finally, the court draws a questionable inference from the Judicial Council’s failed efforts to secure legislative authorization of electronic recording in superior court that, “[b]y its conduct, the Judicial Council impliedly admitted that legislative authorization is needed before electronic recording of superior court proceedings may be made.”³³² Legislative history indicates that the council sought express statutory authorization because judges were unsure of their inherent authority to use electronic technology in light of perceived statutory ambiguity. The council’s repeated efforts to have the legislature resolve this ambiguity, rather than the council through its own rule-making power, can reasonably be interpreted as a political choice to defer to the legislature as a matter of comity and to use its own rule-making power only as a last resort. The Judicial Council knows that the legislature is jealous of its rule-making prerogatives³³³ and, also, that legislators who suspect an overreaching judiciary are quite capable of retaliation.³³⁴

The court completely ignores the political clout wielded by the CCRA in the legislature, which enables the CCRA to kill, or critically injure, electronic recording bills. The legislature’s repeated failure to enact a statute that expressly authorizes electronic recording in superior court is evidence of the power of the CCRA to preserve its monopoly over verba-

332. *CCRA I*, 46 Cal. Rptr. 2d at 56.

333. See Statement of Bruce Enerson, Member of the Commission on Constitutional Revision, to the Constitutional Revision Commission re: 1966 Amendment to Article VI, § 6 (Nov. 7, 1964) (“[T]he Legislature has been very careful to preserve its authority to deal with the procedure in the courts.”).

334. See Ainsworth, *supra* note 259.

tim reporting in superior court. However, this failure to enact statutes is not evidence of a statutory scheme to permit only shorthand court reporting.

2. *What the CCRA I Court Was Really Doing:*

Deploying legislative intent rhetoric—that it was “just following orders”—the court, not the legislature, constructed a scheme for maintaining the “official” verbatim record that is unsupported by history or text. With a minimum of analysis, and no exploration of historical context, *CCRA I* essentially recites the text of selected sections of the Code of Civil Procedure and Government Code. By reviewing the statutes in the order in which they appear as code sections, beginning with Code of Civil Procedure section 269(a),³³⁵ rather than Government Code section 69941, the *CCRA I* court distorts the “meaning” of these code sections by making it appear as though the legislature mandated the use of shorthand court reporting to the exclusion of other technologies. Instead, Government Code section 69941 gives superior court judges the *option* to hire official court reporters and, thereby, make available to litigants *a* reliable means for making a verbatim record—in fact, the *only* reliable means known to the enacting legislators in 1861.³³⁶ In essence, the court’s interpretation amounts to a judicial preemption—on behalf of the legislature—of the judiciary’s rule-making power over court administration in an area that is a core concern to court administration. The court, not the legislature, thereby wrested from judicial hands state-of-the-art technological tools that the courts, after successful hands-on experience, determined will improve the administration of justice.

Rather than passively extract legislative intent, the

335. Code of Civil Procedure section 269(a) imposes a duty on the official reporter to take down in shorthand oral proceedings, only if requested by either party or the court. See the cryptic passage from *CCRA I* concerning what Code of Civil Procedure section 260(a) *requires*:

One court has held that section 269 does not require that the official reporter make the record of superior court proceedings, unless requested by a party or the judge. This conclusion is consistent with the opinion of the Legislative Counsel holding that section 269 *requires* that superior court proceedings be taken down by an official shorthand reporter if a request is made.

CCRA I, 46 Cal. Rptr. 2d at 52. (citation omitted).

336. See *supra* text accompanying notes 18-25.

CCRA I court aggressively imported into the interpretive process its own, nineteenth-century vision of the constitutional relationship between the legislature and the Judicial Council set forth in Part A of its opinion.

3. *What the CCRA I Court Should Have Done*

This section illustrates how courts could dynamically interpret statutes relating to court administration, using California's verbatim court reporting statutes analyzed in *CCRA I* as an example. The following analysis is loosely based on a dialogue between judge and text.

a. *Acknowledge that Regulation of the Court Record is a Core Administrative Concern*

The *CCRA I* court first should have determined whether the statutes in question implicate core court administration interests of the judiciary. If the statutes implicate core court administration interests of the judiciary, the court should adopt a dynamic interpretation of those statutes that is attuned to the public's interest in the efficient and impartial administration of justice.

The scope of contemporary judicial branch court administration has dramatically broadened since the "progressive" movement's program of a self-governing judiciary that operates on business management principles removed from the direct influence of special interests.³³⁷

Even before the advent of electronic recording techniques, the efficient management of court personnel, including court reporters and the court record, were core administrative concerns of the judiciary.³³⁸ These interests have only grown stronger as advanced electronic recording technology provide court administrators with management tools to more efficiently and effectively utilize court reporters, address personnel problems (such as unavailability of court reporters),

337. See *supra* text accompanying notes 124-125.

338. See *Lichter v. County of Monmouth*, 276 A.2d 382, 386 (N.J. Super. Ct. 1970) (stating that court reporters are "essential nonjudicial officers over whom the court must exercise control and without whom it could not properly function" and citing "other jurisdictions [that] likewise recognize that court reporting is an administrative matter and that its supervision is routinely administrative"). See also *Bloom v. Crosson*, 590 N.Y.S.2d 328, 330 (App. Div. 1992); see also *O'Coins, Inc. v. Treasurer of Worcester*, 287 N.E.2d 608 (Mass. 1972).

and manage courts' budgets.

Cost-effective utilization of verbatim recording resources and personnel management problems with court reporters continue to drive the rapid proliferation of electronic verbatim recording technology in the courts.³³⁹ In California, and nationally, shortages of qualified shorthand reporters have closed courts and delayed appeals over the past few decades.³⁴⁰ Budget crises have also sent court administrators scurrying for ways to achieve efficiencies in court operations, including electronic recording technologies.³⁴¹ The rational deployment of sophisticated technology requires a deft administrative touch. Court administrators need flexibility to

339. See Daniel H. Huyett, III, *Management of Federal Court Reporters*, 99 F.R.D. 243, 245 (1983) (recounting serious "court reporter problems" plaguing federal courts that prompted the General Accounting Office to recommend that "electronic recording systems be used as the primary court reporting method"). See also Ruth Marcus, *End Suggested to Court Report Use; Tape Recording Seen As Less Costly*, NAT'L L.J., July 27, 1981, at 3; Hewitt, *supra* note 24, at 4.

One or more of the following reasons . . . will be mentioned [by judges when explaining why they sought alternatives to traditional shorthand reporting]: (1) there was a shortage of qualified court reporters and finding alternatives became a necessity; (2) there was a problem with timeliness of transcripts, quality of transcripts, or both; (3) there was a financial crisis and the court had to save money. In short, trial judges adopt video reporting because of problems with the status quo, not because they have determined that videotape is inherently a better form of record.

Id.

340. See, e.g., *Judge Threatens to Jail Court Reporter*, L.A. DAILY J., June, 13, 1986, at 22 ("There's a real crunch. A lot of demand for their services and not enough court reporters to go around," quoting Burdett Harris, the director of Los Angeles Superior Court Staff Services). See also *Reporter Shortage Closes Alameda Courts: Judges Forced to Juggle Calendars with No Immediate Solution in Sight*, S.F. RECORDER, Dec. 7, 1988; *Court Reporter Shortage Plagues State*, L.A. DAILY J., Jan. 10, 1989, at 4.

341. See Brian Miller, *Court Reporting: From Stenography to Technology*, GOV'T TECH. 1, Mar. 1996, at 1 ("Overloaded and underfunded courts are increasingly looking at audio recording as a way to cut costs, which is achieved mainly by eliminating the salaries and related costs of court reporters."); see also Hudzik, *supra* note 8, at 1868-69.

[W]hen fiscal constraint is seen more as an ongoing, long-range condition, not merely a dip in a cycle, fundamental organizational behaviors must change in order to increase organizational effectiveness and survival. This is the environment the California courts will probably face for the next decade, an environment that requires transformational rather than translational behaviors. . . . Instead of returning to business as usual, organizations transform the ways they provide services.

Id.

effectively utilize rapidly developing technologies.³⁴² Legislative micro-management of technology utilization, often at the urging of special interest groups, paralyzes the administrative function of the courts.³⁴³ By giving individual superior courts the discretion to utilize electronic recording, the Judicial Council's Electronic Recording Rules exemplified the current trend towards decentralized management, which "maximiz[es] the managerial flexibility given to individual trial courts to manage their funds."³⁴⁴

*b. Focus on the Text of Each Statute, Giving Words
Their Ordinary Meaning*

Having determined that verbatim recording statutes implicate core administrative concerns, the court should continue the dynamic interpretation process by focusing on the text of each statute, giving words their ordinary meaning. Both the Fifth District Court of Appeal's *LACCRA* opinion and the superior court's opinion in *CCRA I* illustrate how the court reporting statutes can be narrowly construed by focusing on the literal words of the text of these statutes.

The *LACCRA* opinion upheld the practice of the Los Angeles Superior Court to use electronic recording technology to make the record of proceedings where neither the judge nor the parties requested an official court reporter. Narrowly interpreting Code of Civil Procedure section 269(a), the court held: "[Section 269] does not mandate that the official reporter report all the listed events. It requires instead that the official reporter 'take down' civil proceedings only if requested by either party or the judge; the official reporter need not 'take down' a record when no request is made."³⁴⁵

The *LACCRA* court also narrowly interpreted the text of the two code sections that expressly authorize electronic recording under limited circumstances: Code of Civil Procedure section 270 (which authorized the demonstration project) and Government Code section 72194.5 (which authorizes elec-

342. See Henry H. Feritt, Jr., *Video Depositions, Transcripts and Trials*, 43 EMORY L.J. 1071, 1092-93 (1994).

343. See Anderson et al., *supra* note 36, at 1790.

344. Hudzik, *supra* note 8, at 1889. "[E]fficiency and effectiveness can be improved substantially by increasing the power and authority of line managers to use their resources." *Id.* at 1890.

345. Los Angeles County Court Reporters Ass'n v. Superior Court, 37 Cal. Rptr. 2d 341, 344 (Ct. App. 1995) (emphasis added).

tronic recording in municipal courts where an official reporter is unavailable). The *LACCRA* court interpreted the text of Code of Civil Procedure section 270 as simply overriding Code of Civil Procedure section 269(a), concluding: “[a]s with section 269, nothing in section 270 or the proposed modification proscribed the use of electronic recording *where no request for an official verbatim record was made.*”³⁴⁶

The *LACCRA* court’s interpretation of Code of Civil Procedure section 270 is in accord with an Informal Opinion of the California Attorney General’s Office:

Nothing in section 270 indicates that the Legislature intended to limit the authority of the courts or departments not engaged in the demonstration project to provide for a record of its proceedings which may be authorized by other provisions of law We conclude that there is no requirement for the attendance of a court reporter in any superior court proceeding except a criminal proceeding and a juvenile court proceeding before a juvenile court judge *in the absence of a request by a party or an order of the court.*³⁴⁷

Similarly, the *LACCRA* court narrowly interpreted the text of Government Code section 72194.5 as merely overriding Code of Civil Procedure section 274c, “the municipal and justice court analogue to section 269,” concluding:

That the Legislature has allowed electronic recording in lieu of shorthand reporting in municipal and justice courts when shorthand reporting would otherwise be required by section 274c [i.e., where requested by a party or the court]

346. *Id.* at 345.

Thus, section 270 permitted the use of electronic recording devices in the demonstration courtrooms in place of the services of an official reporter in those instances where section 269 would otherwise have required that a verbatim record be taken by an official reporter, that is, where the judge or a party requested such a record.

Id.

347. Letter from Jack R. Winkler, Assistant Attorney General, Chief of Opinion Unit, Office of John K. Van De Kamp, Attorney General, to Frank S. Zolin, County Clerk and Executive Officer, Superior Court for Los Angeles County (Jan. 4, 1989) (responding to “a request for an Attorney General’s opinion on behalf of the judges of the Personnel and Budget Committee of the Los Angeles County Superior Court”) (emphasis added). The legislative history of Government Code section 72194.5 supports this narrow construction; each version of SB 629 referred solely to municipal courts and addressed the unavailability of court reporters in municipal courts. SB 629 did not place the issue of electronic recording in superior court before the Legislature.

does not suggest to us that the Legislature intended to prohibit electronic reporting of civil matters in superior courts when shorthand reporting is not required under section 269.³⁴⁸ Addressing the legislature's failure may enact AB 1854 as originally proposed, which would have authorized the superior court "to order the verbatim record of oral proceedings in that court to be made electronically,"³⁴⁹ the *LACCRA* opinion states: "The Legislature's rejection of the proposed amendment means only that the superior courts continue to lack statutory authority to substitute electronic recording for shorthand reporting when shorthand reporting is required by virtue of section 269, that is, *upon request of either party or the court.*"³⁵⁰

The *LACCRA* court also rejected the applicability of all the other statutes cited by the Los Angeles court reporters—and relied upon by the *CCRA I* court to support its statutory scheme:

None of the other statutes cited by the [Los Angeles court reporters] association are of consequence These statutes are perfectly compatible with section 269. They all either relate to the office of official reporter for purposes of section 269 or apply when a request is made in a civil case for the services of an official reporter within the scope of section 269. *If no such request is made, these statutes, like 269, are inapplicable.*³⁵¹

The *LACCRA* court held, relying solely on textual analysis, the following:

We therefore arrive at a very narrow holding: the court is not prohibited, by any explicit or implicit legislative command contained in those specific statutes cited by the association, from choosing to maintain a record of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by an official shorthand reporter pursuant to the provisions of section 269. We go no further than this circumscribed conclusion: in particular, we

348. *Los Angeles County Court Reporters Ass'n v. Superior Court*, 37 Cal. Rptr. 2d 341, 347 (Ct. App. 1995). The Informal Opinion of the California Attorney General's Office also supports *LACCRA*'s narrow interpretation of GOV'T CODE. §72194.5. See *infra* note 361.

349. A.B. No. 1854 (Cal. 1989) (watering down into an extension of the "demonstration" project in response to *CCRA* opposition). See *supra* note 551.

350. *LACCRA*, 37 Cal. Rptr. 2d at 347 (emphasis added).

351. *Id.* at 347-48 (emphasis added).

do not decide the purposes, if any, for which the generated electronic recording may be used, because this question is outside the scope of the discrete issue presented by the association's petition and evidence.³⁵²

The trial court's opinion in the *CCRA I* case interprets the text of the verbatim reporting statutes, without reference to legislative history, even more narrowly than the *LACCRA* court by rearranging the order in which it reviews the code sections. The court begins its review of the code sections with Government Code section 69941,³⁵³ rather than Code of Civil Procedure section 269(a) as did the appellate courts in *CCRA I* and *LACCRA*. Though supported by legislative history,³⁵⁴ the trial court's rearrangement of these code provisions, based solely on the text of the statute, encompasses the most natural reading of statutory text.

All other court reporting statutes, including Code of Civil Procedure section 269(a),³⁵⁵ flow from Government Code section 69941, which authorizes—but does not require—superior courts to appoint an official court reporter. Under this narrow interpretation, *completely justified by statutory text alone*, the superior courts do not require legislative authorization to use electronic recording because the legislature has not occupied the field of verbatim recording in superior court. No statute displaces the authority of the courts—inherent or under article VI, section 6—to decide how best to make the verbatim record or, in civil cases, to decide not to make available any verbatim recording technology.³⁵⁶ The statutory option to appoint an official reporter is not equivalent to a statutory exclusion of all other options—*unless the statute expressly provides*. No statute expressly precludes superior courts from utilizing electronic recording technology to make the record.

Under the trial court's interpretation, superior courts

352. *Id.* at 349-50.

353. Statement of Intended Decision at 11, *CCRA I*, *supra* note 1.

354. *See supra* text accompanying notes 22-27.

355. "Concerning duties of official reporters so appointed pursuant to 69941, Code of Civil Procedure section 269 provides . . ." Statement of Intended Decision at 11, *CCRA I*, *supra* note 1.

356. In criminal cases, due process rights of the defendant require a sufficient record for appeal. In civil cases, the parties would have to make their own arrangements with private court reporter services, as they do in depositions and as they did in federal court until 1940. *See* Henry P. Chandler, *Some Major Advances in the Federal Judicial System: 1922-1947*, 31 F.R.D. 307, 436 (1963).

have no duty to make available an official reporter to a party. Code of Civil Procedure section 269(a) does not require a superior court to make "available" a sufficient number of official court reporters to accommodate demand (or *any* official reporters, for that matter). The Judicial Council's Electronic Recording Rules did not conflict, therefore, with section 269(a), or any other statute, because they authorized superior courts to use electronic recording as a means of making the official verbatim record "when an official reporter . . . is unavailable" or "when the parties proceed with a hearing or trial in the absence of an official reporter . . . without objection."

The limited statutory authorization of electronic recording in selected superior courts under the demonstration project, and in municipal court under Government Code section 72194.5, does not imply a legislative intent to exclude electronic recording under any other circumstances.³⁵⁷ Under a literal interpretation of statutory text, express statutory authorization is not legally required for superior courts to use electronic verbatim recording technology except where such use would clearly contravene statute. For this reason, the legislature enacted Code of Civil Procedure section 270 as an express exception to Code of Civil Procedure section 269(a).³⁵⁸ Government Code section 72194.5, authorizing electronic recording in municipal court where an official reporter is unavailable, does not contravene Code of Civil Procedure section 274c (the municipal court analogue to section 269(a)). Thus, the Judicial Council could have authorized such use of electronic recording through its own rule-making power.³⁵⁹

357. The *CCRA I* court stated:

"The fact that the Legislature has by statute authorized electronic recording in some contexts suggests strongly that—unless the existing statutory scheme providing for the official record to be taken down in shorthand is amended—the Legislature does not intend that electronic recording of superior court proceedings be the method of creating an official record.

California Court Reporters Ass'n, Inc. v. Judicial Council, 46 Cal. Rptr. 2d 44, 55 (Ct. App. 1995), *aff'd*, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).

358. "Notwithstanding Section 269 . . ." CAL. CIV. PROC. CODE § 270 (West Supp. 1998).

359. The Judicial Council's request for legislative authorization was limited to addressing the problem of court reporter unavailability in municipal courts, and did not include the use of electronic recording in superior courts. Letter from Jon D. Smock, Asst. Dir. Legislation, Judicial Council, to Gov. Brown (Sept. 5, 1975) (court reporters are "not available in over one half of all municipal court proceedings").

c. *Study Each Statute's Text in Light of "Its Legislative History, Its Purpose(s), and the Evolution of Its Purpose(s) Over Time"*

The trial court's interpretation reinforces the history of Government Code section 69941 and Code of Civil Procedure section 269(a), both of which derived from the same statute. The text of these code sections has remained substantially the same through many minor amendments and codifications over 130 years. The interpreting court needs to interpret these statutes in light of the enacting legislature's technological and cultural context as part of the court's dialogue with the language of the statute.

The California Legislature enacted Chapter 434 of the California Statutes of 1861, the progenitor of Government Code section 69941 and Code of Civil Procedure sections 269(a) and 273, in the context of a frontier society, when court reporting was in its infancy. Enacted during the high-noon of the Field Code, when courts looked to legislatures to satisfy their rudimentary administrative needs,³⁶⁰ the legislature offered the courts and litigants the option of utilizing a cutting-edge technology—verbatim shorthand reporting—by authorizing each court to hire an official court reporter.

Chapter 434 was an option-expanding statute, designed to make available upon demand a quality source of a relatively new verbatim recording technology. The 1861 enacting legislature could not have meant to authorize *only* shorthand reporting since there was no other verbatim recording technology available. This statute did not comprise a mandatory scheme for making the official verbatim record because no statute required (or requires) the making of an official verbatim record.

In the twentieth century, verbatim recording technology evolved dramatically, along with the expanding role and needs of court administration. Court administration increasingly utilizes information-age technology to achieve efficiencies and to tailor the delivery of justice to the needs of consumers. Existing statutes do not impair the courts' authority to utilize alternative verbatim recording technologies. However, to the extent that courts would benefit from a uniform statewide policy regarding the use of electronic re-

360. See WHEELER, *supra* note 10, at 11.

cording to make the record, existing statutes do not provide such a policy for superior courts. In jurisdictions like California and New York, the legislative branch is incapable of performing this updating function because of interest group pressure. The California Judicial Council's invalidated Electronic Recording Rules were an attempt to provide a statewide policy regarding the use of electronic recording in California superior courts.

Following a dynamic interpretation approach, the California courts should narrowly interpret the verbatim reporting statutes to allow the Judicial Council, and local superior courts, to update court administration rules to keep pace with modern technology.

The failure of the legislature to update the verbatim recording statutes to authorize electronic recording in superior courts provides no evidence of a contemporary collective legislative intent to prohibit the Judicial Council from exercising its supplemental rule-making authority to authorize electronic recording in superior courts. The enactment of Government Code section 72194.5 addressed the problem of a dearth of official reporters in municipal courts only: electronic recording in superior courts was not an issue in the adoption of the bill.³⁶¹ Further, the demonstration project in selected superior courts was not the product of a rational, deliberative decision that electronic recording was not reliable enough to make the record in superior courts. Legislative history shows that the project was the product of a compromise forced by the CCRA's opposition to an unqualified authorization of electronic recording in superior court.³⁶²

361. See *California Attorney General Office Informal Opinion*, from Jack Winkler, Ass't. Attorney General, Chief of Opinion Unit, to Frank S. Zolin, County Clerk, Executive Officer, Superior Court, Los Angeles County (Jan. 4, 1989).

By specifically authorizing municipal and justice courts to use electronic recording when court reporters were not available in Government Code section 72194.5 it might be inferred that the Legislature intended to deny such authority to other courts. However, since enactment of that section was based on an expressed legislative finding of a shortage of court reporters in some municipal and justice courts there is no basis for inferring legislative intent with respect to other courts for which no legislative finding was made.

Id. at 4.

362. See *supra* text accompanying notes 48-64. See also Eskridge, *Politics Without Romance*, *supra* note 147, at 287-88.

Also, legislative failure to update the verbatim reporting statutes should not be used by the interpreting court to preclude the use of electronic recording, as such technology clearly was not contemplated by the enacting legislature in 1861.

An important formal problem with most of the legislative inaction cases is that they are inconsistent with the traditional proposition that the legislative "intent" relevant to statutory interpretation is the intent of the enacting [legislature], not the continuing intent of subsequent [legislature's]. . . . Formally, the job of [a legislature] ends when it passes the statute, and "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means."³⁶³

A narrow interpretation of the verbatim recording statutes forces the legislature to expressly—and authoritatively—declare its intent to deprive the Judicial Council of the power to authorize electronic recording in superior courts.

Such an interpretation is also faithful to the option-creating purpose of the enacting legislature in 1861 to enable California courts to take advantage of cutting-edge verbatim recording technology. The post of official court reporter was designed to address the problem of unavailability of qualified court reporters, a problem that challenges judicial administrators today.

VI. CONCLUSION

Courts that follow the traditional legislative intent approach to statutory interpretation have one foot mired in the past while the other—administrative—foot moves toward the future. Both feet will stride in the same direction when courts abandon outdated notions of legislative supremacy in the field of court administration.

In *CCRA I*, the court of appeal wrought a major shift in the balance of power in court administration in California under the guise of "just following orders." Purporting to follow state supreme court precedent, the appellate court broadly construed an ambiguous phrase—"not inconsistent

363. William N. Eskridge, Jr., *Symposium: Patterson v. McClean: Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95 (1988).

with statute”—to cut back the Judicial Council’s rule-making power over practice, procedure, and court administration. Under the guise of legislative intent, the court invented an implied statutory scheme that suggests the legislature’s intent to ban electronic recording from superior courts until further notice. The result was a poorly reasoned decision with potentially devastating consequences for court administration in California.

Courts need to openly acknowledge their role in articulating the constitutional value of a balance of power in court administration and openly endeavor to promote a vigorous and independent administrative role for the courts.