
The Most Adequate Branch: Courts as Competent Prison Reformers

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INTRODUCTION

California prisons have long been overflowing with inmates, so much so that the state’s penal system finds itself mired in a crisis. While the state’s prisons were built to accommodate a total of about 80,000 inmates,¹ they have

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1. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

for several years housed roughly twice that number.² As the Supreme Court recently explained:

Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet. . . . The consequences of overcrowding . . . include increased, substantial risk for transmission of infectious illness and a suicide rate approaching an average of one per week.³

Indeed, California's prisoners have for some time received disastrously poor medical and mental health treatment.⁴ And yet, as *The Economist* notes, "the human misery stayed somewhat hidden because most state prisons are far away from cities, often in the dusty inland deserts."⁵

No longer. As the *Los Angeles Times* recently wrote, "California is on the verge of a justice revolution."⁶ In a process termed "Realignment," California is working towards reducing its prison population by tens of thousands of inmates over a two-year period.⁷ It will do so by sentencing certain new low-level offenders, individuals the state would formerly have sent to state-run prisons, to county-run jails, which will be afforded the discretion to employ alternatives to strict incarceration, such as GPS-monitored house arrest and mental health treatment.⁸ Said one Berkeley law professor to the *New York Times*: "This is the largest change in the California state system in my lifetime."⁹

This revolution was not fomented by a radical legislature or a reform-minded California Department of Corrections and Rehabilitation ("CDCR"). Rather, the fundamental overhaul of California's prison system has arisen out

2. *Id.* An excess of prisoners, while perhaps acutely felt in California, is a nationwide phenomenon. As *The Economist* recently noted, "[t]he country has about 5% of the world's population but almost 25% of its prisoners, with the world's largest number of inmates and highest per capita rate of incarceration." *California's Overcrowded Prisons: The Challenges of Realignment*, THE ECONOMIST, May 19, 2012, <http://www.economist.com/node/21555611>; See also Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 28 (2009) ("Currently, one in every hundred Americans (more than one in every fifty Americans aged twenty to forty) is behind bars, making America by far the most heavily jailed nation in the developed world.").

3. *Plata*, 131 S. Ct. at 1924 (internal quotation marks and citations omitted).

4. *Id.* at 1924-25.

5. *California's Overcrowded Prisons*, *supra* note 2.

6. Editorial, *California's Justice Revolution*, L.A. TIMES, April 25, 2012, <http://www.latimes.com/news/opinion/editorials/la-ed-realignment-district-attorney-20120425,0,258563.story>.

7. *Id.*

8. *California's Overcrowded Prisons*, *supra* note 2.

9. Jennifer Medina, *California Begins Moving Prison Inmates*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/us/california-begins-moving-prisoners.html>.

of the federal courts. It was the Supreme Court's decision in *Brown v. Plata*¹⁰ that ultimately galvanized the Golden State, and its political branches, into action.¹¹ There, the Court decided an appeal of a three-judge district court's order that the state release tens of thousands of prisoners in order to remedy severe Eighth Amendment violations.¹²

The High Court's decision revealed deep internal divisions regarding the propriety of structural reform litigation, specifically prisoner release orders under the Prison Litigation Reform Act of 1995.¹³ This Note examines whether federal courts are uniquely positioned to be a bulwark against unconstitutional confinement conditions, as the *Plata* majority suggested,¹⁴ or whether they are so grossly lacking in institutional competence that they do more harm than good, as Justice Scalia contended in dissent.¹⁵ I aim to make this determination keeping in mind basic institutional choice principles: that "decisions should be assigned to the institutions most competent to make them, and that the competence of any given institution must be assessed in comparison with other candidate institutions rather than in isolation."¹⁶ Thus, the question is whether the judiciary would be better suited than the political branches.

The Note begins with a summary of the factual background out of which *Plata* litigation arose and explains why the Court's conservative wing found the case to be a classic example of courts overstepping their bounds. Part II takes a step back and looks first at how to undertake the comparative institutional choice analysis outlined above and then at the common critiques of courts' institutional competence. Part III uses a framework for judicial policy making first introduced by Malcolm Feeley and Edward Rubin in their seminal work, *Judicial Policy Making and the Modern State: How the Courts Reformed*

10. 131 S. Ct. 1910 (2011).

11. Realignment was legislatively approved in 2011 California Assembly Bill Nos. 109 and 117, California 2011-2012 Regular Session. Assemb. 109, 117, 2011 Leg., Reg. Sess. (Cal. 2011).

12. *Plata*, 131 S. Ct. at 1922.

13. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, & 42 U.S.C.).

14. See, e.g., 131 S. Ct. at 1923 ("This Court now holds that the PLRA does authorize the relief afforded in this case and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights. The order of the three-judge court, subject to the right of the State to seek its modification in appropriate circumstances, must be affirmed.").

15. See, e.g., *id.* at 1951 (Scalia, J., dissenting) ("The proceedings that led to this result were a judicial travesty. I dissent because the institutional reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity.").

16. Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1816 (2005) (summarizing literature).

America's Prisons,¹⁷ to explain the ways in which, in the context of prison litigation, courts have expanded their institutional competence. Feeley and Rubin argue that in prison reform cases, courts violate traditional principles of federalism, separation of powers, and rule of law; I argue that for this very reason, courts are more competent than we normally think them to be.

Part IV argues that because courts have increased their competence, and in light of political intransigence caused by pressures placed on elected officials, structural realities, and challenges unique to the state of California, courts are at least minimally adequate to handle prison reform litigation. Finally, the Note reviews the changes that have come about in the California prisons since the judicial branch intervened. I argue that the Court has succeeded in bringing the political branches back into the fold as well as in improving conditions of confinement.

In the end, the lesson this Note hopes to impart is that contrary to Justice Scalia's protestations, courts are not so incompetent when it comes to structural reform.

I. *BROWN V. PLATA* EXPLAINED

Brown v. Plata, decided by the Supreme Court in 2011, arose out of grave constitutional violations in California's prisons.¹⁸ As the Supreme Court noted, "California's correctional facilities held some 156,000 persons[,] . . . nearly double the number that California's prisons were designed to hold."¹⁹ The case began as two separate class action suits, one filed in 1990 by prisoners with mental disabilities, the other filed in 2001 by prisoners with medical conditions, who alleged that California continually violated the Eighth Amendment prohibition of cruel and unusual punishment.²⁰ The Prison Litigation Reform Act of 1995, which was enacted in 1996, granted three-judge district courts the power to order prisoners released "to cure a systemic violation of the Eighth Amendment."²¹ The Supreme Court sought to address whether the three-judge panel's order was consistent with the PLRA.²²

The three-judge court issued an order requiring that California reduce its inmate population to 137.5 percent of "design capacity,"²³ either by building

17. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

18. 131 S. Ct. at 1922.

19. *Id.* at 1923.

20. *Id.* at 1922. The two cases below were *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995), and *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, (N.D. Cal. Oct. 3, 2005).

21. *Plata*, 131 S. Ct. at 1922 (citing 18 U.S.C. § 3626(a) (2012)).

22. *Id.* at 1922-23 (citing 18 U.S.C. § 3626 (2012)).

23. *Id.* at 1923.

new prisons, sending prisoners out of state, or if all other options were exhausted, by release.²⁴ The choice belonged to the state.²⁵ By the Supreme Court's calculation, that meant that California would be required to eliminate a total of 46,000 inmates, 9000 of which were removed from the system during the course of the appeal.²⁶ In reaching its decision to order the prison population reduced, the three-judge court conducted a two-week trial.²⁷ It heard testimony from—and judges questioned—prison officials and correctional experts and the court was able to rely on the work of a receiver and a special master, both of whom had long been involved in California prisons.²⁸ The three-judge panel authored a 184-page opinion.²⁹

This Part briefly examines the PLRA and its standards for prison release orders, the litigation in the lower courts to determine whether those standards had been met, and the Supreme Court's ultimate decision in *Brown v. Plata* affirming that a prisoner release order was indeed necessary. A general understanding of how the courts managed the case is important in determining whether they were competent to do so.

A. The PLRA

The Prison Litigation Reform Act of 1995 came about, in large part, because of peanut butter.³⁰ And ice cream.³¹ And mind control devices.³² Indeed, supporters of the bill argued that lawsuits over such trivialities were clogging the courts, explained that “inmates . . . were unduly litigious, making federal cases out of the most trivial mishaps” and that as a result “the serious cases therefore risked getting drowned out by the frivolous; and the entire apparatus led to remarkably few successes for inmates.”³³ Senator Orrin Hatch,

24. *Id.*

25. *Id.*

26. *Id.*

27. *Plata*, 131 S. Ct. at 1928.

28. *Id.* at 1929-30.

29. *Id.* at 1928.

30. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1568-69 (2003) (“Perhaps the paradigmatic case, as described by NAAG members, was about peanut butter: ‘an inmate sued, claiming cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen.’”).

31. *Id.* at 1568 (citing Associated Press, *Vacco Targets Frivolous Lawsuits Filed by Inmates*, BUFFALO NEWS, June 13, 1995, at A4, available at 1995 WL 548144 (New York)).

32. *Id.* (citing Brett Lieberman, *Prisoner Suits: They Want Their MTV*, HARRISBURG PATRIOT, Aug. 2, 1995, at A2, available at 1995 WL 5071930 (Pennsylvania)).

33. *Id.* at 1567 (citation omitted); see also Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1772 (2003) (“By 1995, stories of outrageous inmate claims were a staple of newspaper reports. No regular reader of the nation’s dailies could avoid the tales of prisoners who sued

introducing the bill on the Senate floor, cast the bill's underlying purpose in a more benevolent light:

This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation. Our legislation will also help restore balance to prison conditions litigation and will ensure that Federal court orders are limited to remedying actual violations of prisoners' rights, not letting prisoners out of jail. It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts.³⁴

Superficially at least, the numbers supported the narrative: between 1990 and 1996, "the number of suits filed in federal court by inmates increased from 42,263 to 68,235."³⁵ Thus, with the PLRA, Congress set out to put an end to the supposed boom.³⁶

The PLRA forced wide-ranging new procedural requirements on, and imposed fairly significant changes to available remedies for, prisoners who wished to file suit.³⁷ The first set of changes concerned suits filed by individuals:³⁸ the Act, *inter alia*, required exhaustion of administrative remedies, permitted judicial screening, limited damages for mental or emotional injury to cases in which the prisoner also manifested a physical injury, and limited the recovery of attorneys' fees.³⁹ The second set of

for bad haircuts, broken cookies, and, most infamously, chunky peanut butter served when smooth was requested." (citation omitted)).

34. Schlanger, *supra* note 30, at 1565-66 (quoting 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch)). The degree to which Congress undertook an informed debate of the PLRA has been questioned. *See, e.g.*, Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998) ("The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate. The Act was passed as a rider to the Balanced Budget Downpayment Act, without a Judiciary Committee Report and without committee mark-up.").

35. Roosevelt, *supra* note 33, at 1771.

36. Some question whether there was really a boom in the first instance. *See id.* at 1776-77 ("The inspiration for the PLRA was not so much the fact that the number of inmate suits had increased as the perception that something had gone radically wrong with the system, that federal courts were struggling with a sudden epidemic of frivolous lawsuits. This perception did not rise unbidden from the data, which indicated that the rate of inmate filings had actually decreased by some seventeen percent between 1980 and 1996."); *see also* Schlanger, *supra* note 30, at 1692 ("Even though the *federal* litigation rate per prisoner was unusually high, once state cases are also included, it turns out that inmates brought suits at rates comparable to those of noninmates."); Ann H. Mathews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 549-59 (2002).

37. Schlanger, *supra* note 30, at 1627.

38. Roosevelt, *supra* note 33, at 1778 ("The PLRA provisions fell into two relatively distinct categories.").

39. Schlanger, *supra* note 30, at 1627-33.

provisions pertained to structural reform litigation and prospective relief; those parts of the bill “were intended to ‘get the federal courts out of the business of running jails.’”⁴⁰

With respect to prospective relief—after all, that is the section relevant to prisoner-release orders like the one at issue in *Plata*—as the three-judge panel’s order ably set forth,⁴¹ the PLRA has one set of standards that applies to all prospective relief⁴² and another that applies more specifically to prisoner-release orders.⁴³ Section 3626(a)(1) dictates that before granting any prospective relief, courts must determine that “such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”⁴⁴ It also requires that courts consider any potential public safety concerns to which their order could give rise.⁴⁵ Section 3626(a)(3) further requires that, before a prison release order issues, a court must have already ordered, and the defendant must have already tried to satisfy, “less intrusive relief.”⁴⁶

B. Action in the Lower Courts

The three-judge district court recognized that it was addressing “two particular problems that every day threaten the lives and health of California prisoners.”⁴⁷ For the purposes of this discussion, it is most relevant to examine the three-judge court’s investigative and fact-finding processes, more so than its legal analysis and conclusions. The upshot is that the court found the PLRA’s requirements, outlined in Part I.A, *supra*, satisfied; the manner in which it arrived at that conclusion is more illuminating in a discussion of whether that court possessed the institutional competence to make that determination.

The three-judge court relied heavily upon the orders entered by the individual district courts, prior to the action before the three-judge panel. The *Plata* district court issued a stipulation for injunctive relief, a collection of

40. Roosevelt, *supra* note 33, at 1778 (quoting Benjamin v. Jacobson, 172 F.3d 144, 182 (2d Cir. 1999) (en banc) (Calabresi, J., concurring)).

41. See Coleman v. Schwarzenegger, No. CIV S-90-0520LKK JFM P, 2009 WL 2430820, at *28-30 (E.D. Cal. Aug. 4, 2009).

42. See 18 U.S.C. § 3626(a)(1) (2012).

43. See *id.* § 3626(a)(3).

44. *Id.* § 3626(a)(1).

45. *Id.*

46. *Id.* § 3626(a)(3)(i)-(ii).

47. Coleman v. Schwarzenegger, No. CIV S-90-0520LKK JFM P, 2009 WL 2430820, at *29 (E.D. Cal. Aug. 4, 2009); see also Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 172-184 (2013) (offering a more in-depth account of the history of the *Plata* litigation).

policies totaling 800 pages in length.⁴⁸ It also appointed medical and nursing experts, who visited state prisons and regularly reported on defendant's progress in satisfying the court-ordered relief.⁴⁹ Ultimately, the *Plata* court determined conditions had grown so bleak that it should appoint a receiver, which was granted almost total control over the prison system.⁵⁰

Coleman, first filed in April 1990, began with five years of litigation and then fourteen years defined by ongoing efforts to craft a viable remedy.⁵¹ To ameliorate a host of deficiencies in the prison system's mental health treatment systems, the court appointed a special master.⁵² The special master helped to create and implement a remedial scheme, ultimately "fil[ing] twenty monitoring reports and fifty-six other reports."⁵³ The court also issued over seventy orders seeking to remedy the violations at issue.⁵⁴

After settlement negotiations failed,⁵⁵ the three-judge court held a fourteen-day trial beginning on November 18, 2008. The trial before that court featured approximately fifty live witnesses and written testimony from several others, as well as hundreds of exhibits.⁵⁶ As the three-judge court explained in its final order, the defendants did not dispute that constitutional violations were ongoing, and thus focused on whether the prison release order demanded by plaintiffs conformed with the PLRA.⁵⁷

Finding that it did, the three-judge court concluded its opinion by noting that "[f]ederal courts do not intervene in state affairs lightly," explaining that "[p]rinciples of federalism, comity, and separation of powers require federal courts to refrain from addressing matters of state government in all but the most pressing of circumstances."⁵⁸ Still, because *Plata* litigation had persisted for eight years, and *Coleman* had languished for nearly two decades, the court concluded that "the political branches of California government charged with addressing the crisis in the state's prisons have failed to do so" and that "the

48. *Coleman*, 2009 WL 2430820, at *4.

49. *Id.* at *5-6.

50. *Id.* at *11 (explaining that the receiver was given "the duty to control, oversee, supervise, and direct all administrative, personnel, financial, accounting, contractual, legal, and other operational functions of the medical delivery component of the CDCR, and was granted all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care system").

51. *Id.* at *12.

52. *Id.* at *14.

53. *Id.* at *15.

54. *Coleman*, 2009 WL 2430820, at *15.

55. *Id.* at *27.

56. *Id.*

57. *Id.* at *31.

58. *Id.* at *115.

rights of California's prisoners have repeatedly been ignored."⁵⁹ Citing John Hart Ely, the court explained that "[w]here the political process has utterly failed to protect the constitutional rights of a minority, the courts can, and must, vindicate those rights."⁶⁰

C. The Supreme Court Affirms

The Supreme Court affirmed the three-judge district court, explaining that the PLRA authorized the prison release order in light of the fact that overcrowding was the primary cause of the ongoing constitutional violations.⁶¹ Writing for the majority, Justice Kennedy acknowledged that federal court oversight of state prisons raised significant federalism concerns, in that "[c]ourts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation," as well as separation of powers issues, given that "expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals" likely knew more about the day-to-day situation than did courts.⁶² But, the Court ultimately determined that providing a remedy for unconstitutional confinement conditions would take precedence.

Practically speaking, the Court needed to ensure that it had not been error to convene the three-judge district court and that the district court had faithfully adhered to the requirements set forth in the PLRA.⁶³ The Court undertook a "deferential" review of the three-judge panel's findings.⁶⁴ The specifics of the Supreme Court's analysis are not particularly important here, given this Note's focus on the institutional competence of the lower courts.

Justice Scalia, joined by Justice Thomas, found the entire exercise inappropriate. "Today the Court affirms," he wrote, "what is perhaps the most radical injunction issued by a court in our Nation's history."⁶⁵ Scalia dissented so vehemently because, in his words, "the institutional reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity."⁶⁶

Justice Scalia was most concerned that the judiciary was trenching on the roles of the coordinate branches. He explained that "[s]tructural injunctions,"

59. *Id.*

60. *Coleman*, 2009 WL 2430820, at *115 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103, 173 (1980)).

61. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (quoting 18 U.S.C. § 3626(a)(3)(E)(i) (2012)).

62. *Id.* at 1928-29.

63. *Id.* at 1930.

64. *Id.* at 1932.

65. *Id.* at 1950 (Scalia, J., dissenting).

66. *Id.* at 1951.

such as this one, “depart from that historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials.”⁶⁷

For Justice Scalia, the court below had done far too much policy making. He contended that “[t]his case illustrates one of [structural reform cases’] most pernicious aspects: that they force judges to engage in a form of fact-finding-as-policymaking that is outside the traditional judicial role.”⁶⁸ Stated another way, “[w]hen a judge manages a structural injunction . . . he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.”⁶⁹

The members of the three-judge district court, Justice Scalia said, did not act as Article III judges normally must. In structural reform cases, he explained, judges not only act like legislators and/or executive branch officials, they do so poorly. “[S]tructural injunctions do not simply invite judges to indulge policy preferences,” he noted. “They invite judges to indulge *incompetent* policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions.”⁷⁰ Scalia concluded that “[m]y general concerns associated with judges’ running social institutions are magnified when they run prison systems, and doubly magnified when they force prison officials to release convicted criminals.”⁷¹

In a separate dissent, Justice Alito, joined by Chief Justice Roberts, echoed some of the same institutional competence and separation of powers concerns.⁷² Justice Alito concluded his opinion with a chilling forecast. “I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong,” he wrote. “In a few years, we will see.”⁷³

67. *Plata*, 131 S. Ct. at 1953.

68. *Id.*

69. *Id.* at 1954.

70. *Id.*

71. *Id.*

72. *Id.* at 1959 (Alito, J., dissenting) (“The Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose.”).

73. *Plata*, 131 S. Ct. at 1968.

II. FIRST PRINCIPLES

A. Comparative Institutional Analysis

When a manager must determine whether to ask Sally to build the latest widget, assuming Sally is not his only employee, it is not enough to ask whether Sally is good at building widgets. He necessarily must also ask whether Jane would be better. In assigning tasks to branches of our government, we likewise do not merely inquire into whether a particular branch *could* do it; we ask whether it would be the most desirable of all the options. That, in short, is comparative institutional choice. In other words:

It is not enough to say that this or that institution is well- or ill-suited to handle a certain set of questions. Instead, the likely performance of each institution must be compared with that of the alternatives. “Issues at which an institution, in the abstract, may be good may not need that institution because one of the alternative institutions may be even better. In turn, tasks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse.”⁷⁴

Komesar’s version of comparative institutional choice analysis would have us first ask whether the courts are the “best, or least imperfect, institution to implement a given societal goal.”⁷⁵ According to his framework, all institutions are imperfect and so the goal is to find the one that is least imperfect to handle a given task.⁷⁶ Rubin and Feeley, however, suggest that it may make more sense simply to ask whether a particular institution is merely “adequate.”⁷⁷ By that theory, one might start by asking whether there is an institution other than the courts better equipped to work toward solving the prison crisis, but would then turn to ask whether that institution can realistically be expected to act.⁷⁸ If we can expect it to do so, we should let it. But, if not, the question would become whether the courts “would be pretty good” at weighing in, if perhaps not the absolute best.⁷⁹ If that question is answered affirmatively, then the court should act.⁸⁰

This latter mode of analysis makes particular sense when different

74. Young, *supra* note 16, at 1818-19 (quoting NEIL H. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 6 (1994)).

75. Neil Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Analysis*, 79 MICH. L. REV. 1350, 1350 (1981).

76. *Id.* at 1352. For a succinct explanation of Komesar’s framework, see Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. Pa. J. Const. L. 617, 623-24 (2003).

77. Rubin & Feeley, *supra* note 76, at 636.

78. *Id.*

79. *Id.*

80. *Id.*

institutions possess overlapping competencies.⁸¹ That is in fact the case here; the existence of human decision makers mitigates the relative advantage of a given institution.⁸² Put plainly, the individuals who occupy the legislature are not terribly different from the individuals who head administrative agencies, who are not that different from judges—all “are members of a single political culture.”⁸³ Judges, like administrators and legislators, begin their careers as lawyers or academics—or as administrators or legislators—and thus come at their jobs with perspectives similar to those of their counterparts in the other branches.⁸⁴ As just one example, J. Clark Kelso, who served as the *Plata* receiver, attended Columbia Law School, clerked for then-Judge Kennedy on the Ninth Circuit, and in addition to serving as a law professor, has since worked not just with the federal courts, but also with the U.S. Department of Justice and all three branches of California’s state government.⁸⁵

Moreover, courts shed some of their institutional disadvantage given their keen awareness that other branches may be better equipped with relevant problem solving tools.⁸⁶ Rubin and Feeley argue that because of this realization, judges have taken steps to mitigate their shortcomings, pointing to the use of experts, special masters, and receivers.⁸⁷ Indeed, it is by utilizing those with real expertise, that judges overcome the fact that, while they may have started out similarly to administrators and legislators, and may come at various issues with similar worldviews, they are unlikely to have amassed as much substantive experience as their counterparts in the political branches.

At bottom, Feeley and Rubin’s mode of analysis—the version that calls for us to ask whether courts are merely adequate—is best because it accounts for the fact that institutions that in theory may be very competent sometimes lack the political will to use their competencies. Alternately, we could rebrand Komesar’s “least imperfect” inquiry to include a determination of whether a given institution is prepared to make use of its inherent advantages. After all, determining that a certain institution is ideal to handle a problem has no lasting value if there is no chance of that institution ever actually doing anything. But in any event, a comparative institutional analysis would be incomplete without an honest inquiry into whether an institution is seriously prepared to engage a particular problem.

With this mode of analysis in mind, it is worth next examining why courts

81. *Id.* at 638.

82. *Id.* at 639-40.

83. Rubin & Feeley, *supra* note 76, at 639-40.

84. *Id.* at 640.

85. See BIOGRAPHY OF J. CLARK KELSO, <http://shaking.stanford.edu/bio/jkelso.html> (last visited May 21, 2013).

86. Rubin & Feeley, *supra* note 76, at 641-42.

87. *Id.* (“Because they were so acutely conscious of their institutional disadvantages, those disadvantages were greatly reduced.”).

are classically considered incompetent to oversee structural reform.

B. Courts as Least Competent

Not all branches of Government were created equally. More precisely, each of the three branches has particular tasks that it is institutionally designed to be able to handle. As Feeley and Rubin explain it:

The legislature and the executive are properly assigned the task of making public policy, both because they reflect the popular will and because they can call upon trained specialists. But once policy is stated in terms of rules, the courts are properly assigned the task of determining whether particular persons have obeyed or violated those rules, because such determinations depend on reasoned arguments and must be made by following formal procedures.⁸⁸

By that logic, courts are likely not capable of handling structural reform litigation. The traditional conception of courts calls for two litigants, representing narrow, personal interests, who come before a neutral and generalist arbiter to -present “proofs and arguments.”⁸⁹ The suit has high stakes for the relationship between the two parties—their “rights and obligations”—but fewer universal consequences.⁹⁰ The adjudication occupies a limited, and fairly predictable, amount of time, as one party pushes for a winner-take-all remedy narrowly tailored to the right at issue.⁹¹ And all of the proceedings are dictated by the wills and wishes of the litigants.⁹²

From this conception emerges a series of reasons why courts lack the institutional competence to wade into complex structural problems. To begin, there exists a belief that proper reform of complex institutions demands an institution that “can hold hearings, authorize wide-ranging investigations, freely obtain advice from recognized prison experts and allocate resources”—a task most often associated with legislatures, though also potentially assigned to administrative agencies.⁹³ Challenges in fact-finding aside, judges are said to lack the expertise necessary to synthesize many complex facts and to devise

88. *Id.* at 620.

89. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 392 (1978).

90. Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4 (1982).

91. *Id.* at 4-5.

92. *Id.*

93. Rubin & Feeley, *supra* note 76, at 630-31; *see also* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 32 (2003) (“Judges are ideally suited to resolve party-framed disputes, rather than to frame disputes themselves, because they lack the institutional capacity that other government officials have to initiate and conduct factual investigations.”).

sufficiently nuanced solutions.⁹⁴ And through the whole process, judges are asked to remain faithful to precedent; unlike politicians, they are purportedly prohibited from “mak[ing] normative choices and strik[ing] political compromises.”⁹⁵ Additionally, courts are said to lack the capacity to engage long-term with a troubled institution; they can craft a remedy, but ensuring compliance is more difficult.⁹⁶ Further, critics complain that because courts can typically only address constitutional violations,⁹⁷ they adjudicate a skewed range of problems; that is, there are other issues in need of fixing that escape oversight by federal courts.⁹⁸

Therein lies a more significant criticism. Critics complain that courts lack the ability to solve what Professor Fuller called “polycentric” problems.⁹⁹ Fuller analogized “many centered” problems to a spider web, in that “[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.”¹⁰⁰

Stated more concretely, the failure of a particular institution, such as the California prison system, is always but one problem in the state’s larger web of issues, including housing, education, crime prevention, and the like.¹⁰¹ The common criticism holds that judges do not have the capacity to solve the prison crisis while remaining mindful of the state’s many other problems.¹⁰² Faced with a crisis in the prisons, courts cannot weigh whether to demand drastic action on the part of the correctional department or whether instead to call for increased investments in education and crime prevention.¹⁰³ Therein lies the

94. See Roger A. Hanson, *Contending Perspectives on Federal Court Efforts to Reform State Institutions*, 59 U. COLO. L. REV. 289, 335 (1988).

95. Molot, *supra* note 93, at 62-63.

96. Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 315 (2008).

97. That is, courts can only address problems over which an inmate may file suit, and inmates usually can only file suit to challenge prison conditions that rise to the level of a constitutional violation.

98. Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 649-50 (2012) (“California, for example, has poured money into building medical facilities rather than redressing other areas of glaring problems, such as failure to house prisoners—healthy or ill—by classification, aggravating the criminogenic context of prison and the brutalities that nonviolent offenders may face.”).

99. Fuller, *supra* note 89, at 395.

100. *Id.*

101. See Rubin & Feeley, *supra* note 76, at 631.

102. See *id.*

103. See Hanson, *supra* note 94, at 335-36 (“Problem solving generally involves the examination of the gains and losses of alternatives, the amount of scarce resources consumed by each alternative, and the opportunity cost of not being able to use resources for other purposes. These factors are seldom central to the judicial assessment of constitutional rights.”). Professor Fuller offered another good example of how polycentric problem solving should work: “In allocating \$100 million for scientific research it is never a case of Project *A* v. Project *B*, but rather of Project *A* v. Project *B* v. Project *C* v. Project *D* . . . bearing in mind

crux of this final piece of criticism: courts cannot fully evaluate the costs associated with their decisions; they cannot craft a multifaceted state budget or a comprehensive plan for reforming all of a state's social institutions.¹⁰⁴ Courts, in a sense, typically work in a vacuum, occupied only by the relatively narrowly framed problem at hand. But what if all of this were not true?

III. FEELEY AND RUBIN'S CORE VIOLATIONS

Perhaps the seminal work on the intersection of prisons and courts belongs to Malcolm M. Feeley and Edward L. Rubin.¹⁰⁵ Feeley and Rubin argue that, along with fact finding and textual interpretation, policy making is a standard judicial task, one that should be regarded as ordinary and legitimate.¹⁰⁶ They analyze a series of prison reform cases, starting in the 1930s,¹⁰⁷ and explain that in fashioning creative, policy-oriented remedies, courts have "violated nearly every accepted principle for controlling the judicial branch."¹⁰⁸ More specifically, Feeley and Rubin argue that courts have abrogated principles of federalism, separation of powers, and the rule of law.¹⁰⁹ Feeley and Rubin posit that judges were, and should be, willing to do these things—actions thought to run afoul of the core values of judicial action and thus termed for the purpose of this Note "core violations"—because "there is something seriously wrong with all three principles."¹¹⁰ This Note takes those three core violations and argues slightly differently:¹¹¹ it argues that in violating principles of federalism,

that Project *Q* may be an alternative to Project *B*, while Project *M* supplements it, and that Project *R* may seek the same objective as Project *C* by a cheaper method, though one less certain to succeed, etc." Fuller, *supra* note 89, at 400-01.

104. Fuller, *supra* note 89, at 400. ("Generally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication.")

105. FEELEY & RUBIN, *supra* note 17.

106. *Id.* at 1-5. More recently, Feeley and Rubin have argued that judicial policy making has become a part of the judiciary's institutional DNA. See Rubin & Feeley, *supra* note 76, at 618 ("As virtually every political scientist who has studied the matter has asserted, and as even most legal scholars are willing to concede, policy making inheres in the basic structure of a modern judiciary. For the foreseeable future, therefore, any discussion of litigation against the government must incorporate the fact that such litigation will regularly induce the judiciary to make public policy.")

107. See, e.g., *Finney v. Mabry*, 546 F. Supp. 628, 642-43 (E.D. Ark. 1982); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980); *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976); *Holt v. Sarver* (Holt II), 309 F. Supp. 362 (E.D. Ark. 1970); *Holt v. Sarver* (Holt I), 300 F. Supp. 825, 831-32 (E.D. Ark. 1969); *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).

108. FEELEY & RUBIN, *supra* note 17, at 18.

109. *Id.*

110. *Id.* at 20.

111. That these core violations expand courts' institutional competences is perhaps implicit in FEELEY & RUBIN, see *id.* at 319 ("Real courts are also capable of acting as policy

separation of powers, and the rule of law, courts increase their institutional competence to craft structural remedies. In other words, because courts commit these “violations,” they are not as incompetent as Justice Scalia insists.

A. Violation of Federalism

It is axiomatic to students of American government that ours is a system founded upon principles of federalism, and that as a result, states are “separate sovereignties” with “general responsibility for the welfare of their citizens.”¹¹² Put another way, “[f]ederalism can be defined as a principle of political organization in which there is both a central government for a particular polity and separate governments for some or all the territorial sub-units of that polity—separate governments that can assert a claim of right against the central government.”¹¹³ Likewise in a federalist system, “certain powers, although not denied to government in general, are denied to the central government and granted only to the governments of some or all territorial sub-units.”¹¹⁴ Without question, there is much debate regarding the many contours of federalism,¹¹⁵ but suffice to say, the aforementioned definition is sufficiently general and mostly uncontroversial.

Feeley and Rubin call the prison cases “a direct attack on state institutions”¹¹⁶ and “a complete rejection of federalism.”¹¹⁷ They reason that the American constitutional system typically leaves the punishment of state prisoners to states.¹¹⁸ In fact, Feeley and Rubin explain that as of the middle of the twentieth century when the prison cases started arising, “corrections was widely recognized as one of the fields most unambiguously assigned to state authority.”¹¹⁹ Nevertheless, in holding that state institutions have violated the

makers, that is, they can create new legal rules in open-ended situations to achieve broadly defined social purposes. When doing so . . . they can resolve polycentric problems just like any other policymaker.”), but not explicitly stated.

112. *Id.* at 171.

113. Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1012 (1997).

114. *Id.*

115. See, e.g., Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766 (2006); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994).

116. FEELEY & RUBIN, *supra* note 17 at 149.

117. *Id.* at 175.

118. See *id.* at 171.

119. *Id.* at 18; see also *id.* at 171 (“In the American system, the federal government is granted important but delimited powers; one of these, of course, is the power to punish violators of the laws it promulgates, and it has established an extensive prison system, the Bureau of Prisons, to do so. But the federal government is not granted authority to control the punishment imposed on violators of state laws.”).

federal constitution, and in imposing remedies designed to bring the state into compliance with federal law, courts require state institutions to meet federal standards and conform to “national norms.”¹²⁰ Thus, when federal courts take control of state prisons, or at least demand that state prisons follow certain rules, courts squarely reject the core federalist principle that states may set their own prison administration standards.¹²¹

That federal courts have the jurisdiction, whether pursuant to 42 U.S.C. Section 1983 or the PLRA,¹²² to reform state institutions is in and of itself a rejection of these principles. An unyielding conception of federalism would simply not allow federal courts to adjudicate state prison conditions. From an institutional competence perspective, that American courts have not been so inflexible is critical. The ability to apply federal constitutional law, without regard for the state’s prison regulations, affords courts more leeway to construct a pragmatic solution. All of this can, of course, be seen in the *Brown v. Plata* litigation. The district courts, in both *Coleman* and *Plata*, found a violation of the federal constitution.¹²³ The three-judge panel relied upon myriad sources in determining the proper remedy, but never suggested that it felt bound by the state’s policies.¹²⁴

The *Plata* litigation does not eschew federalism principles any differently than other prison litigation does. That prison reform cases violate principles of federalism is a general observation true of all similar cases. But it is nevertheless worth outlining as an antecedent point about institutional competence: federal courts could not have any competence at all—because they could not exercise jurisdiction—if they lacked the authority to regulate state institutions.

B. Violation of Separation of Powers

Feeley and Rubin open their discussion of separation of powers principles by noting that while courts may not have run prisons outright, “they certainly supervised prisons, often with the vigilant intensity of an administrator who has lost faith in the competence of her subordinates.”¹²⁵ Courts earlier in the twentieth century took more traditional approaches, such as, most passively,

120. *Id.* at 149 (“The prison cases were a direct attack on state institutions, a series of decisions holding that the state could not operate these institutions according to its own established policies, but was required to follow national norms identified and imposed by the national judiciary.”).

121. *See id.* at 175.

122. 18 U.S.C. § 3626 (2012).

123. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005); *Coleman v. Wilson*, 912 F. Supp. 1282, 1323 (E.D. Cal. 1995).

124. *See Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P., 2009 WL 2430820 (E.D. Cal. & N.D. Cal. Aug. 4, 2009).

125. FEELEY & RUBIN, *supra* note 17, at 297.

simply declaring prisoners' rights, but stubborn prison administrators would make active court intervention, and more structurally oriented remedies, increasingly necessary.¹²⁶ Consequently, courts began to play a more dynamic role in the day-to-day management of prisons.¹²⁷ Feeley and Rubin argue that when courts assume this role in the implementation of their prescribed remedies, they violate separation of powers principles.¹²⁸ They go on to outline both a functional critique of this violation¹²⁹ and a formalist version,¹³⁰ neither of which is as relevant to the present discussion as is the simple insight that courts have started to carry out tasks normally assigned to one of the political branches.¹³¹

Feeley and Rubin point to the use of special masters as the "most drastic manifestation of this general trend" of courts taking on a role of managing correctional institutions.¹³² The *Plata* litigation saw a receiver appointed in *Plata v. Schwarzenegger*¹³³ and a special master designated in *Coleman v. Wilson*.¹³⁴ In the latter case, the special master was appointed in 1995 to (1) "consult with the court concerning the appointment of experts; (2) monitor compliance with court-ordered injunctive relief; (3) report to the court in twelve months on the adequacy of suicide prevention; and (4) perform such additional tasks as the court may deem necessary."¹³⁵ Over the next fourteen years the special master helped to create and implement a remedial scheme, ultimately filing more than seventy reports with the court.¹³⁶ In response, the

126. *Id.* at 301-02.

127. *See id.* at 18, 309.

128. *Id.* at 311.

129. *See id.* at 330 ("The best interpretation of the functionalist argument is that one branch might disable another branch from functioning effectively, either generally or in one specific area, and thereby deny the people the particular voice, or source of access, that the dominated branch would otherwise provide.").

130. *Id.* at 323 ("Traditionally, the linguistic or formal argument conceives the Constitution's reference to 'executive,' 'legislative,' and 'judicial' power as archetypes, preexisting categories of government authority that are assigned to the president, Congress, and the federal courts."); *see also* Fan, *supra* note 98, at 650 ("The Supreme Court has repeatedly reiterated that penal choices are a question for the political branches rather than a court—particularly a federal court not subject to democratic election. Penal law, policy, and theory reflect normative, moral, and prudential judgments about competing alternatives that courts are particularly unsuited to make for the people.").

131. FEELEY & RUBIN, *supra* note 17, at 325 (arguing that courts have "compel[led] significant expenditures, a legislative function, and significant administrative changes, an executive prerogative").

132. *Id.* at 18. For more on the role of special masters in institutional reform litigation, see Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1298 (1983).

133. No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

134. 912 F. Supp. at 1297, 1324 (E.D. Cal. 1995).

135. *Id.*

136. *Coleman*, 2009 WL 2430820, at *15.

court issued over seventy orders seeking to remedy the violations at issue.¹³⁷ Those orders sought to properly forecast inmate capacity in mental health units, lessen delays, and improve staffing.¹³⁸ The special master also filed two reports in 2006—which documented “a troubling reversal in the progress of the remedial efforts of the preceding decade and demonstrated the profound impact of population growth on the state’s ability to meet its constitutional obligations to seriously mentally ill inmates”¹³⁹—that helped to bring about the convention of the three-judge district court.

On that score, the three-judge court’s order to decrease prison population to 137.5 percent of capacity in-and-of-itself represented an administrative action far beyond the scope of the traditional court order.¹⁴⁰ The court relied upon the reports from the *Plata* receiver and the *Coleman* special master,¹⁴¹ as well as a bevy of additional experts to determine the cause of the constitutional violations—specifically whether crowding was the cause—and to craft an appropriate remedy. Rather than simply focusing on a prisoner release order, it weighed alternative solutions.¹⁴² Finally, the court expressly stated that it would maintain jurisdiction “to ensure compliance with the population reduction plan and to consider any subsequent modifications made necessary by changed circumstances.”¹⁴³

This sort of policy making is precisely the role traditionally conceived of for administrative agencies and, to a lesser degree, legislatures. As Feeley and Rubin explain in depth:

Operationally, the techniques of judicial policy making resemble the operational techniques of any other governmental agency. Administrative policy makers initiate programs, impose rules, negotiate regarding the compliance with those rules, appoint inspectors to monitor compliance, bedevil recalcitrant parties with sanctions or onerous requirements, oscillate between confrontation and conciliation, and mobilize support from a variety of outside forces. Judicial policy makers rely on similar techniques. They too initiate programs, although we generally regard them as more passive; one of the striking features of the case studies is the proactive role of judges adopted in initiating and directing the cases they ultimately adjudicated. They try one solution and, if it proves unsuccessful, they switch to another. They impose rules, negotiate with parties, appoint monitors, mobilize support, and use intervention to push recalcitrant parties.¹⁴⁴

Put succinctly, in prison reform cases, courts have assumed a role

137. *Id.*

138. *Id.*

139. *Id.* at *17.

140. *Id.* at *75.

141. *See, e.g., id.* at *76.

142. *See Coleman*, 2009 WL 2430820, at *102.

143. *Id.* at *116.

144. FEELEY & RUBIN, *supra* note 17, at 356.

ordinarily designed for other branches of the government.

Yet, in undertaking this relatively clear violation of the separation of powers and acting in a quasi-executive, quasi-legislative capacity, the court increased its institutional competence. The *Plata* courts were able to maintain day-to-day supervision of the prisons and adapt their rulings to fit the system's ongoing needs.¹⁴⁵ By bringing on a receiver, the court was able to create its continuing role without forcing the members of the three-judge court to literally make prison management their day job. Furthermore, they were able to step outside of their traditional role of generalist—a descriptive label that is frequently used to explain why courts are ill-equipped to manage prisons, a role thought better left to experts—and bring into their control an expert in prison management. Moreover, courts were able to extend their involvement in the system beyond the normal course of litigation so as to ensure that state administrators could not shirk their constitutional duties once the trial concluded. In these ways, while they may have run afoul of traditional notions of separation of power, courts grew more competent to handle the crisis in California prisons.¹⁴⁶

C. Violation of the Rule of Law

As Feeley and Rubin note, one of the traditional roles of judges and courts is that of interpreting extant law.¹⁴⁷ Courts stray from this role, however, in most prison reform cases. Most prison cases, including the *Plata* litigation, are rooted in the Eighth Amendment prohibition of cruel and unusual punishment.¹⁴⁸ The text of the amendment, however, lacks any real specificity: it states only that “[e]xcessive bail shall not be required, nor excessive fines

145. For a glimpse of an argument to the contrary, see Fan, *supra* note 98, at 649 (2012) (“But judicial intervention and supervision should be the last resort rather than the first instinct because courts are clumsy overseers of penal law and policy with limited power to ensure and enforce implementation. In determining whether to intervene, the likelihood of redress by the political branches should be a relevant factor.”).

146. Chemerinsky argues that the particular panel in *Coleman v. Schwarzenegger* may have been uniquely competent, arguing:

The current three-judge court overseeing the order to improve medical care in California's prisons—Judges Reinhardt, Henderson, and Karlton — were selected randomly, but no one would deny that these are not typical federal judges in their views about the role of the judiciary or in their ideology. If any judges would have the inclination and ability to make a difference in California's prisons, it is these individuals. It is unlikely, though, that there will always be judges like these overseeing prison litigation. Prison reform through the courts is essential, but rarely will be forthcoming in a manner to solve the enormous problems in California prisons.

Chemerinsky, *supra* note 96, at 316.

147. See FEELEY & RUBIN, *supra* note 17, at 205 (“[W]e traditionally view judges as interpreters of preexisting law or as finders of facts, not as policy makers and law creators.”).

148. See *id.* at 206.

imposed, nor cruel and unusual punishments inflicted.”¹⁴⁹ Thus when courts began requiring that prison conditions conform to Eighth Amendment standards, they drew neither from the constitutional text, nor from any statutory clarifications, but instead from public policy.¹⁵⁰ The Eighth Amendment, Feeley and Rubin argue, amounts only to a “grant of jurisdiction, a mandate that courts should somehow concern themselves with prisons because prisons are a form of punishment.”¹⁵¹

Consequently, whenever courts fashion Eighth Amendment standards, they become lawmakers. The rule of law dictates that there must be “substantive constraints” on government lawmakers.¹⁵² Feeley and Rubin posit that elections constrain legislators, and enabling statutes and supervision from the legislature, president, and courts constrain administrative officials.¹⁵³ The substantive constraint on judges, however, is commonly thought to be legal doctrine—their decisions must be based in precedent.¹⁵⁴ But when judges make policy, they create new standards and, in turn, new legal doctrine without rigidly abiding by case law.¹⁵⁵ They are totally unconstrained and therefore in violation of the rule of law.¹⁵⁶

The *Plata* litigation is a prime example of judicial action unconstrained by the rule of law. The original *Plata* case dealt with prison healthcare systems; *Coleman* related to mental health treatment in prisons. In determining that California’s existing structures were inadequate, the court cast those specific issues in Eighth Amendment terms.¹⁵⁷ Yet when, for example, the *Plata* court

149. U.S. CONST. amend. VIII.

150. See FEELEY & RUBIN, *supra* note 17, at 207 (“Thus, the prison cases are permissible under the cruel and unusual punishment clause, contrary to Justice Thomas’s textual exegesis [in *Helling v. McKinney*, 509 U.S. 25 (1993)]. The problem is that they are not an interpretation of that clause; they are public policy promulgated by the courts under the grant of jurisdiction that the clause provides.”).

151. *Id.* at 206.

152. FEELEY & RUBIN, *supra* note 17, at 207.

153. *Id.* at 207-08.

154. *Id.* at 208.

155. *Id.*

156. *Id.*

157. See *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *19 (N.D. Cal. Oct. 3, 2005) (“Defendants entered into a Stipulation for Injunctive Relief which required CDCR to implement specified remedial medical policies and procedures designed to meet ‘the minimum level of care necessary to fulfill the Defendants’ obligation to Plaintiffs under the Eighth Amendment of the Constitution.”); *Coleman v. Wilson*, 912 F. Supp. 1282, 1296 (E.D. Cal. 1995) (“Undergirding the magistrate judge’s recommendations were a series of legal conclusions. First he concluded that the Eighth Amendment requires the state to provide inmates with access to adequate mental health care. Second, he concluded that there are six components required for a mental health care system to meet minimum constitutional requirements. Third, he determined that an Eighth Amendment claim based on inadequate medical care in prison is comprised of both an objective and a subjective component. The objective component focuses on the degree of seriousness of the

took the drastic step of appointing a receiver,¹⁵⁸ and when the *Coleman* court adopted the magistrate's recommendations that the state's prison mental healthcare systems fell short of Eighth Amendment standards, as well as when the three-judge district court held that a prisoner release order was necessary to remedy the ongoing violations, the courts relied on case law only for the most general legal conclusions.¹⁵⁹ For example, when the *Coleman v. Wilson* court defined "serious mental disorder,"¹⁶⁰ and when it assessed the magistrate's findings that the prison system lacked adequate screening procedures,¹⁶¹ the court used a general statement of the constitutional requirements as a starting point,¹⁶² but then undertook a common-sense, logic-driven analysis of whether the prison system was fulfilling constitutional requirements.¹⁶³ The court did not examine the facts out of which prior court decisions arose and then attempt to characterize the current case as either sufficiently analogous or distinguishable, as lower federal courts typically do when explaining their holdings.¹⁶⁴ So, too, when the *Plata v. Schwarzenegger* court determined that

deprivation of medical care, while the subjective component focuses on whether defendants acted with 'deliberate indifference' to serious medical needs." (citations omitted)).

158. *Plata v. Schwarzenegger*, 2005 WL 2932253, at *1.

159. See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P., 2009 WL 2430820, at *28-31 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (explaining the PLRA's framework for prisoner release orders); *Plata v. Schwarzenegger*, 2005 WL 2932253, at *22-33 (outlining the legal standard dictating when a receiver may be appointed); *Coleman v. Wilson*, 912 F. Supp. at 1297-99 (outlining the Supreme Court's Eighth Amendment doctrine as it pertains to prison medical care).

160. *Coleman v. Wilson*, 912 F. Supp. at 1300-01.

161. *Id.* at 1305. ("Under the Eighth Amendment the defendants are required to maintain a system in which inmates are able to make their need for mental health care known to staff competent to provide such care before inmates suffer unnecessary and wanton infliction of pain. . . . For that reason it has been held that correctional systems are required by the Constitution to put in place a 'systematic program for screening and evaluating inmates in order to identify those who require mental health treatment.'" (quoting *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp 1558, 1577 (D. Idaho 1984)).

162. See *supra* notes 158-161.

163. Commentators have noted that constitutional requirements for prison conditions have long been almost laughably disconnected from constitutional text. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 49-50 (1979) ("For some, these specifics are baffling: how can it be that the Constitution requires a report on September 15, or showers at 110°F, or a thirty-day limitation on confinement in an isolation cell?").

164. See, e.g., Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1455 (2010) ("Under that standard model, we know that, with limited exceptions, (a) lower courts within a geographical jurisdiction are bound by relevant precedent announced by higher courts within that jurisdiction ('vertical' or 'hierarchical' precedent), and (b) courts are somewhat more loosely bound by prior relevant decisions issued by their own court ('horizontal' precedent or 'stare decisis')." (footnote omitted)); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 653 (1999) ("Stare decisis is also thought to preserve the Court's legitimacy. Under this view, public respect depends on a perception that the Court's decisions are governed by the rule of law, and not by the vagaries of the political process.").

the seven requirements that must be met for the appointment of a receiver had been satisfied¹⁶⁵ and when the three-judge *Coleman v. Schwarzenegger* court found that crowding was the primary cause of the constitutional violations.¹⁶⁶

The salient point is that the courts reached these decisions unmoored from precedent. To be sure, they used prior prison reform cases to frame the general legal requirements, but in determining whether certain standards were met, the courts reached their conclusions without relying on case or statutory law. The courts had a wealth of information before them from which to draw their conclusions—for example, in determining that overcrowding was the primary cause of the constitutional violations, the *Coleman v. Schwarzenegger* court looked to a Corrections Independent Review Panel and its review of policies promulgated by the Commission on Accreditation and the American Correctional Association,¹⁶⁷ testimony from a long-time former Executive Director of the Texas Department of Criminal Justice,¹⁶⁸ as well as testimony from several former prison administrators¹⁶⁹ and “medical and mental health experts.”¹⁷⁰ But these sources were policy advocacy, not legal doctrine.

In short, judges took “vague” legal texts and crafted “comprehensive” and “precise” holdings and solutions—an undertaking far more robust than the “interpretation” typically engaged in by courts.¹⁷¹ As Feeley and Rubin outline at length, this style of judicial policy making violates the rule of law. But it also increases courts’ institutional competence. Courts are not bound by what has happened in the past nor required to contort their rulings to fit within rigid doctrinal strictures. Further, that courts openly and primarily base their rulings on policy implications and on the effect that their legal rules will have on prisoners’ everyday lives increases the likelihood that courts will reach a

165. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *23 (N.D. Cal. Oct. 3, 2005) (citing *Dixon v. Barry*, 967 F. Supp. 535, 550 (D.D.C. 1997)).

166. The *Coleman v. Schwarzenegger* Court wrote:

[I]n the context of prison conditions litigation “crowding” refers to the presence in a facility or prison system of a prisoner population exceeding that facility or system’s capacity. *See, e.g., Doty v. County of Lassen*, 37 F.3d 540, 543 (9th Cir. 1994) (finding overcrowding where a jail’s actual population exceeded its design capacity by an average of approximately fifty percent); *Hoptowit v. Ray*, 682 F.2d 1237, 1248-49 (9th Cir. 1982) (finding a penitentiary overcrowded where its population exceeded its design capacity); *see also Lareau v. Manson*, 651 F.2d 96, 99-100 (2d Cir. 1981); *cf. Random House Webster’s Unabridged Dictionary* 482 (2d ed.1998) (defining “crowded” as “filled to excess”). In other contexts, the term “overcrowding” would ordinarily be used. Here, the words crowding and overcrowding have the same meaning, and we use them interchangeably.

No. CIV S-90-0520 LKK JFM P., 2009 WL 2430820, at *32 (E.D. Cal. & N.D. Cal. Aug. 4, 2009).

167. *Id.* at *20-21.

168. *Id.* at *33.

169. *Id.*

170. *Id.* at *28.

171. *See FEELEY & RUBIN, supra* note 17, at 206.

socially desirable outcome.¹⁷²

D. Why the Violations Matter

In Part II.B, *supra*, this Note explained that courts are commonly said to lack the institutional competence to handle structural reform because they cannot hold hearings or undertake involved fact-finding, because they lack the expertise to synthesize the facts before them, because they must hold tightly to precedent, and because they struggle to engage long-term with the institutions at issue.¹⁷³ I also noted that courts are said to handle only a skewed range of problems and that they struggle to handle polycentric problems.¹⁷⁴

What this Part should have shown, however, is that because courts committed the core violations, they were able to overcome most of these purported shortcomings. They undertook lengthy trials, read numerous reports, examined many experts so as to bring forward a nuanced factual picture of what was taking place in the prisons; they were able to supplement their own generalist perspectives with those of experts. Courts used special masters and receivers to build a long-term relationship with the prison system.

In short, the core violations make courts far more competent than they would otherwise be. Whether this makes courts the *most competent* branch, however, is the more critical question. And using the comparative institutional choice framework outline in Part II A, *supra*, the salient question is whether the political branches are prepared to act.

IV. COURTS AS MOST COMPETENT

As outlined in the last Part, courts have greatly increased their institutional competence beyond what is generally attributed to them. If it is in fact the case that we cannot realistically expect the legislature and the executive branches to step in, this should be sufficient to justify judicial action. In this Part, I make the case that the political branches could not reasonably be expected to take bold action, and argue that courts are at least adequate when it comes to improving unconstitutional prison conditions. Here, I argue that courts occupy this position not only because of their increased institutional competence, but also because of political roadblocks that prevent the executive and legislative branches from acting. Indeed, an institutional choice analysis cannot ignore the

172. It is equally likely that what is dressed up as a constitutional rule represents in truth the judge's own policy preferences, "peculiarly reflecting their social background, their squeamishness." See Fiss, *supra* note 163, at 12 ("[I]t is also possible, indeed, I would say eminently probable, that these judges had given a true account of the constitutional ban on cruel and unusual punishment.").

173. See *supra* notes 93-98 and accompanying text.

174. See *supra* notes 99-104 and accompanying text.

most basic element of competence: an institutional will to take any action at all.¹⁷⁵

A. Political Failure

A full accounting of the failures of California's executive and legislative bodies to adequately supervise the state's prison system could fill many volumes, but it is important to at least sketch the political failures in order to demonstrate why courts are the most competent to remedy the ongoing violations. Indeed, there are systemic forces at work that have caused the political crisis that resulted in overcrowded prisons and anemic legislators. Most simply, in the current political climate, and since at least the 1970s, anything that makes the state seem weak on crime, or more hospitable to prisoners, is politically unpalatable.¹⁷⁶ Relatedly, it is political pressure to increase prison sentences that helped to cause the crowding crisis in the first place and that makes it harder to ameliorate the system going forward.¹⁷⁷

A consequence of tough-on-crime politics is the reality that prisoners, those with the greatest stake in a well-functioning prison system, have the least say in the political process.¹⁷⁸ As Chemerinsky notes, prisoners cannot vote, are rarely in the position to contribute to political campaigns, and more often than not come from disadvantaged backgrounds such that their families are not capable of wielding political clout either.¹⁷⁹ Chemerinsky goes so far as to argue that prisoners represent a "discrete and insular minority," to borrow the parlance of Footnote Four,¹⁸⁰ and while Rubin and Feeley dispute the notion

175. See Chemerinsky, *supra* note 96, at 311-12 ("[I]n some instances the courts are the only entity with the will to enforce the Constitution. The political branches have inadequate incentives to comply with the Constitution when the rights of prisoners are violated. Unless judges act, constitutional violations in prisons will go unremedied.").

176. *Id.* at 310 ("No politician wants to be seen as soft on crime. Elected officials—both Democrat and Republican—have an incentive to vote for any bill that increases the punishment for a crime. To do otherwise, is to risk giving political opponents a powerful tool at the time of the next election."); Alexander Scott Jester, Note, Coleman V. Schwarzenegger: *Liberal Activism Run Amok or Measured Response to a System in Crisis?*, 20 S. CAL. REV. L. & SOC. JUST. 535, 571-72 (2011) ("A prisoner release order is not a politically popular decision. Political candidates consistently run as 'tough on crime,' and supporting the rights of incarcerated prisoners is often seen as political suicide.").

177. See Chemerinsky, *supra* note 96, at 309.

178. For one thing, felons are disenfranchised. For a general, if slightly dated, overview of felon disenfranchisement, see Note, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002).

179. Chemerinsky, *supra* note 96, at 310; see also Lauren Handelsman, Note, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1875 (2005) ("While African-Americans comprise approximately 12% of the United States population, they comprise 36% of the population that has lost the right to vote due to a criminal conviction." (footnote omitted)).

180. See Chemerinsky, *supra* note 96, at 310 (citing *United States v. Carolene Prods.*

that prisoners fall within the ambit of Footnote Four, mostly for formalistic reasons,¹⁸¹ they agree that political institutions are often disinclined to address the concerns of prisoners.¹⁸²

Indeed, as explained by William J. Stuntz in his 2011 magnum opus chronicling the criminal justice system's many afflictions, over the last century crime has concentrated in urban centers, suburban populations have exploded, and power has shifted from local politicians to their state and federal counterparts.¹⁸³ The result has been to place power over the criminal justice system in the hands of those least affected by it. As Stuntz has written elsewhere, police officers, prosecutors, and jury members once upon a time, 100 years ago or so, lived amongst the men and women being tried for crimes and sent to jail.¹⁸⁴ Stuntz has explained that "[e]veryone knew everyone else: criminals, crime victims, cops, and jurors all lived side by side. Anger at crime was tempered by empathy toward criminal defendants. They weren't abstractions; they were neighbors. You hesitate before you send your neighbor's kid to the state penitentiary. Not surprisingly, state penitentiaries had fewer inmates."¹⁸⁵

That neighborhood-centric model is no more. In stark contrast, "[c]riminal justice is no longer something crime-ridden neighborhoods do for themselves; rather, it's something other neighborhoods do to them."¹⁸⁶ It follows, then, that if those who are being sent to jail have no political power, and those that do wield the power are not personally touched by the prison crisis, there will be little pressure to change.

Stuntz sets forth a series of potential explanations for the late twentieth century's "massive punishment wave,"¹⁸⁷ all of which must be taken

Co., 304 U.S. 144, 152 n.4 (1938)).

181. See Rubin & Feeley, *supra* note 76, at 631. In Rubin's and Feeley's view: [P]risoners are not a discrete and insular minority. They have not acquired their identity by birth or some other factor beyond their control. They are prisoners because they violated duly promulgated laws, and were convicted in accordance with the dictates of due process. Nor are the rights that they are claiming, and were ultimately granted, fundamental rights. Certain rights that prisoners claim, such as the right of access to a lawyer or a law library have this character, but these rights, although sometimes violated, were not the ones at issue in the prison conditions cases.

182. *Id.*; see also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1 (1997) ("Criminals are not popular. No politician in recent memory has lost an election for being too tough on crime.").

183. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 6-7 (2011) [hereinafter STUNTZ, *COLLAPSE*].

184. William J. Stuntz, *Law and Grace*, 98 VA. L. REV. 367, 380 (2012) [hereinafter Stuntz, *Law and Grace*].

185. *Id.* at 381 (footnote omitted).

186. *Id.*

187. STUNTZ, *COLLAPSE*, *supra* note 183, at 244.

together.¹⁸⁸ One, however, bears special emphasis: budget politics. It has become the case that state and federal officials determine prison budgets and local officials govern policing outlays.¹⁸⁹ Put another way, “[s]tates pay for those penitentiaries, but local officials—chiefly prosecutors and trial judges—make the decisions that fill them.”¹⁹⁰ As a result, “prison sentences are nearly a free good,” whereas policing, which localities pay for themselves, is quite expensive.¹⁹¹ As Stuntz explains it, “[p]olicing and imprisonment are substitutes,” but the latter is subsidized by the state.¹⁹² The system does not incentivize preventing crime; it incentivizes locking away the criminals.¹⁹³

Stuntz notes that it is not this incentive structure alone that caused mass incarceration; indeed, similar systems were in place during eras of more lenient punishment.¹⁹⁴ Likewise, the budget allocation method by itself cannot explain the obstinacy that has made California’s political branches powerless to ameliorate prison conditions. Rather, the added piece is this: “[O]nce political pressure was brought to bear on local prosecutors to ramp up criminal punishment, as happened in the mid-1970s, no force pushed in the opposite direction. Once the punitive turn got rolling, it kept rolling; there was nothing to stop it.”¹⁹⁵ So, there was pressure to get tough on crime and the existing incentive structure made it such that ramping up punishment made far more sense than ramping up policing. Not only that, but at the state level, when political pressure grew to get tough on crime, legislators were able to impose harsher punishments “without having to pay for it, by raising nominal sentences but not building the prisons needed to house more inmates.”¹⁹⁶ It should be no surprise that under such a regime, prison conditions would deteriorate.

Of course, there are also explanations for political process failure specific to California. The state’s budgetary crisis, and an accompanying or antecedent

188. *Id.* at 253. Stuntz points to at least six potential explanations for the extremity of the punishment boom: political pressure to appear tough on crime, an increase in Supreme Court criminal procedure doctrine, a lengthy crime wave that spurred the punishment boom, a willingness to grant state and federal officials budget-making authority, a change in law governing guilty pleas, and a broadening of substantive criminal law. *Id.*

189. *Id.*

190. *Id.* at 254.

191. *Id.*

192. *Id.* at 254-55.

193. Stuntz is not shy about pointing out the wrongheadedness of this approach, noting that “[h]ad Congress and state legislatures spent some of what they lavished on prisons on local police instead, crime would have dropped even more [during the 1990s decrease in crime].” William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 802-14 (2006).

194. See STUNTZ, *COLLAPSE*, *supra* note 183, at 255.

195. *Id.*

196. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 526 (2001).

failure to properly raise revenue through taxes,¹⁹⁷ is an oft-cited explanation for a lack of executive action.¹⁹⁸ Time and again, politicians have failed to take bold steps necessary to bring about change¹⁹⁹ and to make the investment necessary to improve conditions,²⁰⁰ both due at least in part to the outsized role in state politics played by the prison guards union, the California Correctional Peace Officer's Association.²⁰¹ The CCPOA takes an active role in the legislative process—it maintains robust lobbying and advertising presences and exerts a powerful influence on the state legislature—and typically lobbies for policies that increase, rather than decrease, the number of inmates.²⁰² Other likeminded groups, chief among them Crime Victims United of California, have become major political powers in large part because of assistance from the CCPOA.²⁰³

In short, the increase in the number of prisoners and the accompanying deterioration of prison conditions is but a piece in a significantly larger puzzle, one that requires far more study to fully understand. What should be clear, however, is that because of political trends, structural realities, and California's own peculiarities, before *Brown v. Plata* was decided once and for all, the odds that the state's political branches would address prison conditions were exceedingly low.

197. See Chemerinsky, *supra* note 96, at 311.

198. See Chantale Fiebig, Note, *Legislating from the Bench: Judicial Activism in California and Its Increasing Impact on Adult Prison Reform*, 3 STAN. J. C.R. & C.L. 131, 152 (2007) (“The executive branch’s inability to establish and maintain a fiscally sound budget, the financial scandals surrounding pension funds in Southern California and individual politicians from across the state, and the energy crises have left Californians, judges and otherwise, wary of the competence and reliability of the executive branch.”).

199. See *id.* (“[Schwarzenegger] shunned the advice of his own blue-ribbon committee, which insisted that outside civilian control would be necessary to assure change, and instead vested more authority in his corrections secretary.”).

200. See *id.* (“Governor Schwarzenegger also announced his intention to cut \$95 million worth of inmate rehabilitation programs, and proposed adding 1500 new employees and \$250 million in spending to the corrections system. By doing so, the California prison budget would expand to \$7 billion—more than twice the amount that the state spends on higher education.”) (footnote omitted).

201. See *id.* (explaining failures of both Governors Schwarzenegger and Davis to resist the demands of the prison guard’s union).

202. See Chemerinsky, *supra* note 96, at 310-11 (“Prison guards and their unions, especially in California, can be very powerful. But their advocacy has been for longer sentences, not for better prison conditions. . . . By all accounts they are tremendously successful in their advocacy. But never have they used their influence to improve the conditions of prisons or the services provided to prisoners.”); Fiebig, *supra* note 198, at 152-53; see also JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* 53 (2011).

203. PAGE, *supra* note 202, at 108-09.

B. Courts as Most Adequate

That courts have increased their institutional competence, coupled with the fact that the state executive and legislative branches were unlikely to be the sources of meaningful change, should convince us that courts are adequate to drive the structural reform. While this conclusion sidesteps a more nuanced comparison of courts to well-functioning administrative bodies or legislative committees, such an analysis would likely amount to no more than idle speculation, at least as long as the political branches remain unresponsive to prisoners' needs. The analysis thus far, however, has failed to take into account any sort of real inquiry into whether the *Plata* court's order actually worked. This Note has thus far made the case that the court reached an informed decision, but it does not necessarily follow that the court's order actually ameliorated prison conditions. The true efficacy of the *Plata* litigation is examined in the next Part, but as should become clear, more time and better analytical tools are necessary to fully explore the order's efficacy.

V. CALIFORNIA'S NEW ORDER

The more things have changed in California, the more they have stayed the same. On January 8, 2013, with prisons at 150 percent capacity and the June 2013 deadline to get down to 137 percent looming, Governor Brown declared, "[T]he prison crisis is over in California."²⁰⁴ Deeming the underlying constitutional violations cured, the State argued that "[t]he further prison population reductions that would be needed to satisfy the Court's population cap cannot be achieved unless the Court alters state law, dictates the adoption of risky prison policies, and orders the early release of inmates serving prison terms for serious and violent felonies."²⁰⁵ In separate filings, the Governor declared the prisons' state of emergency officially over,²⁰⁶ asked the court to vacate its population reduction order,²⁰⁷ requested an end to court supervision of the state's mental health system,²⁰⁸ and in response to an October order

204. Paige St. John, *Gov. Jerry Brown Calls on Feds to Give Up Oversight of Prisons*, L.A. TIMES (Jan. 8, 2013), <http://www.latimes.com/news/local/la-me-prisons-brown-20130109%2C0%2C1068148.story>.

205. Defendants' Response to Order of Oct. 11, 2012, *Plata v. Brown*, No. 01 Civ. 1351 TEH, (N.D. Cal. Jan. 7, 2013), available at <http://www.cdcr.ca.gov/News/docs/3JP-docs-01-07-13/Plata-Response-to-Oct-11-Order.pdf>.

206. Cal. Proclamation (Jan. 8, 2013), <http://www.cdcr.ca.gov/News/docs/3JP-docs-01-07-13/Terminating-Prison-Overcrowding-Emergency-Proclamation-10-4-06.pdf>.

207. Defendants' Motion to Vacate, *Plata v. Brown*, No. 01 Civ. 1351 TEH, (N.D. Cal. Jan. 7, 2013), available at <http://www.cdcr.ca.gov/News/docs/3JP-docs-01-07-13/PLATA-COLEMAN-ECF-MOT-TO-VACATE.PDF>.

208. Defendants' Motion to Terminate, *Coleman v. Brown*, No. 2:90-cv-00520 LKK JFM P (E.D. Cal. Feb. 11, 2013), available at <http://www.cdcr.ca.gov/News/docs/3JP-docs-01-07-13/P-and-A-In%20Supp-of-Mot-Terminate-1-7-13.pdf>.

asking how the State would continue to reduce the prison population, essentially asked to be relieved of those obligations.²⁰⁹

The *Coleman* and *Plata* plaintiffs balked at all of it. In their filing, they contended that “[d]efendants ha[d] intentionally dragged their feet and refused to take the actions they knew were necessary to timely and fully comply with this Court’s Crowding Reduction Order.”²¹⁰ Further, the plaintiffs argued that “California’s prisons remain vastly overcrowded . . . and the medical and mental health care systems in California prisons remain well below constitutional standards.”²¹¹ An agreement between the two sides seems unlikely.²¹²

But whether or not the State has turned things around as markedly as it wanted the court believe, much has happened since the three-judge district court first ruled in favor of the plaintiffs. In fact, California began to plot Realignment before the Supreme Court handed down its decision in *Brown v. Plata*.²¹³ Before even officially taking office, Governor Jerry Brown began to formulate a plan “to lower [the] prison population, spend less money, and avoid wholesale prisoner releases” immediately upon taking office.²¹⁴ That plan, however—one which was signed into law six weeks before the Supreme Court’s decision—was unquestionably designed, at least in part, to respond to the three-judge district court’s prisoner release order.²¹⁵

Thus the question remains: how much of Realignment’s ultimate success, or failure, can be attributed to the courts? After all, while the courts mandated that the prison population be reduced, they did not require a singular plan for doing so. The State could simply have unlocked 40,000 prison cells and would still have complied with the court order. As Professor Schlanger has sketched, Realignment was very much the product of political negotiations—between the governor, legislature, and interest groups.²¹⁶

Consequently, using Realignment’s efficacy as the sole measure of the court’s institutional competence would be a mistake, especially at this juncture. Yet, by the same token, it would be unfair to completely ignore whether the court’s order had the desired effect, which was not simply to alleviate prison

209. Defendants’ Response, *supra* note 205.

210. Plaintiffs’ Statement at 4, *Plata v. Brown*, No. 01 Civ. 1351 TEH, (N.D. Cal. Jan. 7, 2013), available at <http://www.prisonlaw.com/pdfs/PlaintiffsBrief,Jan2013.pdf>.

211. *Id.*

212. While this Note was being prepared for publication, the three-judge court denied all of defendant’s motions and ordered the state to comply with the original 2011 order “to reduce the overall prison population to 137.5% design capacity by December 31, 2013.” *Coleman v. Brown*, No. 2:90 Civ. 0520 LKK JFM, 2013 WL 1500989, at *37 (E.D. Cal. Apr. 11, 2013).

213. Schlanger, *supra* note 47, at 20.

214. *Id.*

215. *Id.*

216. *Id.* at 14.

overcrowding, but to do so in order to improve medical and mental health services for California prisoners.

This Part seeks to: (1) summarize the State's purported Realignment successes and the plaintiffs' contentions to the contrary as of early February 2013; (2) discuss a common critique of the realignment process and offer one reason why that criticism may be unwarranted; (3) argue that what has transpired since the three-judge court's order only reinforces its competence to act and bolsters the conclusion that it was the most adequate branch to do so.

A. Changes on the Ground

California's plan was attractive in many ways. It did not require that the State make significant new expenditures. Rather, as a result of Realignment, the CDCR's budget is expected to become a smaller percentage of the State's overall spending, allowing California to focus its limited resources elsewhere.²¹⁷ Outlays for prison construction should drop from \$6 billion to just under \$2 billion.²¹⁸ The plan would allow California to close one of its oldest and least efficient prisons and to move almost 10,000 prisoners housed out-of-state back to California, thereby annually saving \$160 million and \$318 million, respectively.²¹⁹ The State is also constructing a 1722-bed health care facility in Stockton to accommodate the prisoners most in need of comprehensive medical care.²²⁰ Finally, California has at least nominally sought to implement programs to improve existing medical and dental care delivery systems, increase rehabilitation services to try to reduce recidivism, improve staffing formulas, improve inmate classification systems, and better handle gang management.²²¹ Thus, Realignment, at least on its face, appears to cut costs and to improve services.

How has the State fared? California certainly seems content with its own efforts. First, the State attributes a decline in overcrowding to the twin influences of "increased capacity and decreased prison population."²²² The State touts significant population reductions, noting that overall prison population "has been reduced by over 24,000 inmates since October 2011 when public safety realignment went into effect, by more than 36,000 inmates compared to the 2008 population in the record at the evidentiary hearing, and

217. Chris Megerian, *California Prisons Detail Plan to Downsize, Cut Costs*, L.A. TIMES, Apr. 23, 2012, <http://latimesblogs.latimes.com/california-politics/2012/04/california-prisons-unveil-plan-downsize.html>.

218. *Id.*

219. *Id.*

220. CAL. DEP'T OF CORR. AND REHAB., HIGHLIGHTS, THE FUTURE OF CALIFORNIA CORRECTIONS 34 (2012).

221. *Id.* at 7-8, 16.

222. Motion to Vacate, *supra* note 207, at 12.

by nearly 42,000 inmates since 2006 when Plaintiffs moved to convene the three-judge court.²²³ The State's motion includes photos of the now empty gymnasium that the Supreme Court pictured, packed to the gills with inmates, in its 2011 decision.²²⁴

Likewise, the State boasts that the population reduction has in fact done what it was intended to do: improve the prison health care system. The State notes in its January filings that:

After inspecting the delivery of medical care at every prison, the independent state Inspector General has found that the system provides inmates with timely and effective medical care, and that there are no areas of systemic neglect to inmates' serious medical needs. In *Coleman*, nationally recognized experts have found California's prison mental health care system to be among the best in the nation.²²⁵

California claims that its mental health facilities are at least on par with their federal counterparts.²²⁶ It points to more than a billion dollars worth of new facilities, including an \$840 million facility in Stockton that will provide 1722 beds when it opens in July.²²⁷ The State also highlights improved facilities for women, prisoners with special security requirements, and inmates in need of substance abuse treatment.²²⁸

In addition to improving facilities, the State claims to have also improved services. In its *Coleman* motion to terminate, the State claims to be offering timely mental health treatment to 33,000 inmates, employing more than 1100 mental health professionals, distributing more than \$25 million of medicine per year, maintaining updated records, and identifying and aiding inmates deemed at risk of committing suicide.²²⁹ And the State claims that more improvements are yet to come.²³⁰ Among many arguments that these improved conditions satisfy the Constitution, the State declares that it "has virtually eliminated unnecessary deaths in its prisons."²³¹

The *Coleman* and *Plata* plaintiffs dispute many of the State's accomplishments. In its opposition to the State's motion to delay or avoid compliance with the population reduction order, the plaintiffs contend that

223. *Id.* at 2.

224. *Id.* at 11.

225. Defendants' Response, *supra* note 205, at 1.

226. Motion to Terminate, *supra* note 208, at 8 ("In fact, California has improved the timeliness and quality of mental health care provided to state inmates to a level that often exceeds the mental health care provided by United States correctional systems and few if any systems have the diligent provision and self-monitoring of mental health care that currently exists within CDCR." (internal quotation marks omitted)).

227. Motion to Vacate, *supra* note 207, at 9.

228. *Id.* at 9-10.

229. Motion to Terminate, *supra* note 208, at 1.

230. *Id.*

231. Motion to Vacate, *supra* note 207, at 18.

delaying or avoiding compliance would cause them “harm and suffering.”²³² Plaintiffs contend that much construction has been delayed or cancelled and that the mental health treatment beds the State claimed to have made available had not yet materialized.²³³ Directly addressing the State’s loftiest claims, the plaintiffs counter that “[p]risoners are continuing to die from inadequate medical care” and point to forty-three preventable deaths in 2011.²³⁴ The plaintiffs disputed that prisons are adequately staffed²³⁵ and that the State is doing enough to prevent suicides.²³⁶ Moreover, plaintiffs have sought to demonstrate that while the State may be able to show improvements on balance, there continue to exist glaring problem spots. For instance, the plaintiffs note that the Central California Women’s Facility is more than 180 percent over capacity²³⁷ and that the California Men’s Colony has generally failed to provide timely treatment to many of its inmates.²³⁸ And, critically, plaintiffs note that it is too soon to draw too many conclusions, as “the Court’s experts have yet to tour a single prison to verify the level of care being provided.”²³⁹

So what’s the truth? It is reasonable to conclude that conditions have almost certainly improved, perhaps significantly so, but likely not as fundamentally as the State contends. There is, though, one unmistakable and simple truth: the State’s political branches have responded to the three-judge court’s mandate that they take action.

B. The Shift to County Control

Early in Realignment, much of the criticism focused on the criminal justice system’s increased reliance on county jails. In a March 2012 report, the ACLU of California criticized the realignment plan for continuing the same unoriginal, incarceration-focused practices, only in county jails instead of state prisons.²⁴⁰

232. Brief of Plaintiffs, *supra* note 210, at 4.

233. *Id.* at 7.

234. *Id.* at 4.

235. *Id.* at 6 (noting “vacancies of psychiatrists increasing to 42%, and overall clinical vacancy rates increasing to 35%”).

236. *Id.*

237. *Id.* at 4.

238. *Id.* at 5.

239. *Id.* at 6.

240. See ACLU OF CALIFORNIA, PUBLIC SAFETY REALIGNMENT: CALIFORNIA AT A CROSSROADS 4 (2012) [hereinafter ACLU REPORT]; see also *id.* at 43 (“At worst, counties will react to realignment as a mere transfer of authority over bodies—and simply incarcerate people convicted of non-serious, non-violent offenses at the local level now that they cannot be shipped off to state prisons. Despite spending millions of taxpayer dollars on jail expansion, those counties will quickly see the same inexorable overcrowding and high recidivism rates that the state prison system has produced.”).

The report, as the ACLU noted in a press release, “finds massive new investment in jails with much less funding allocated to proven crime-prevention programs such as mental health services and drug treatment.”²⁴¹ Between the third quarter of 2011 and first quarter of 2012, the average number of inmates in county jails at any given time increased by approximately four percent from 71,293 to 73,957.²⁴²

Indeed, the shift of inmates from prisons to jails was the focus of an August 2012 *New York Times* feature. Anecdotally, the *Times* focused on one inmate who was so forlorn by the possibility of spending considerable time in jail instead of a prison that he said, “I’d go insane. . . . I would probably hang myself, seriously. I would probably do something stupid.”²⁴³ County jails, according to the *Times*, “do[] not offer the kind of activities, work programs and amenities found in most prisons.”²⁴⁴

Exacerbating this trend is the State’s choice to allocate resources to counties based on the particular county’s historical incarceration rates, therein further incentivizing incarceration.²⁴⁵ Therefore, the court order may ultimately just shuffle bodies without actually ameliorating the underlying constitutional crisis. In other words, the crisis may simply move from the prisons to the jails and from the state to the counties. So far, the State’s response has been that it “sends the money and then it’s up to the counties to decide how to spend it.”²⁴⁶ Not only is shifting decisionmaking authority to the county level likely to result in considerable variability across the state,²⁴⁷ it is likely to strain county resources and manpower, even with the help of additional state funds.²⁴⁸ Thus,

241. Press Release, ACLU of California, ACLU of California Releases Statewide Analysis of Realignment (Mar. 21, 2012), <http://www.aclu.org/criminal-law-reform/aclu-california-releases-statewide-analysis-realignment>.

242. Norimitsu Onishi, *In California, County Jails Face Bigger Load*, N.Y. TIMES, Aug. 5, 2012, at A8, available at <http://www.nytimes.com/2012/08/06/us/in-california-prison-overhaul-county-jails-face-bigger-load.html> (citing California Board of State and Community Corrections).

243. *Id.*

244. *Id.*

245. ACLU REPORT, *supra* note 240, at 10.

246. Chris Megerian, *ACLU Is Critical of State Prison Realignment*, L.A. TIMES (Mar. 22, 2012), <http://articles.latimes.com/2012/mar/22/local/la-me-realignment-20120322>.

247. Medina, *supra* note 9 (“‘There are no kind of guiding principles or oversight or monitoring,’ said Donald Specter, the director of the Prison Law Office, which argued for the prisoners in the Supreme Court case. ‘I think there will be extreme variations, where some counties just will use the money to lock them up with no support and others who really try to figure out real solutions.’”); see also Onishi, *supra* note 242, at A8 (“Liberal communities like San Francisco are using a greater share of the state money on programs and alternatives to incarceration. But most counties, particularly here in the conservative Central Valley, have focused on building jail capacity.”).

248. Rina Palta, *California to Dish Out \$602 Million for Jail Construction*, KALW NEWS (Mar. 8, 2012), <http://informant.kalwnews.org/2012/03/california-to-dish-out-602-million-for-jail-construction>.

viewed through the lens of the polycentric problem, perhaps Realignment has improved state institutions at the expense of those at the county level.

Yet, keeping in mind the lessons outlined by Stuntz,²⁴⁹ there may be benefits to shifting power to localities. Stuntz made clear that one main reason why, as a result of the pressure to get tough on crime, politicians sought to increase prison populations rather than grow police forces was that power was shifted away from those acutely affected by crime.²⁵⁰ He explained that because of budget politics, sending an offender to prison was free for localities, but putting a law enforcement officer on the street was expensive.²⁵¹ With the shift of many offenders from state prisons to county jails, local politicians and prosecutors will have to think carefully about whether it makes sense to lock up yet another low-level drug offender. After all, the locality will be picking up the tab.²⁵² As jail populations begin to grow, there may be newly felt pressure to put policemen on the corners to ward off crime before it occurs. As Stuntz notes, such decisions may further decrease crime rates in the process.²⁵³ If Stuntz is correct, a shift of power from centralized bureaucrats back to localities is unambiguously a good thing.

C. Balancing the Ledger

Returning to the inquiry into courts' institutional competence, however, how much of Realignment's ultimate success or failure can be attributed to the courts? The three-judge district court identified a problem, mandated a solution at the most general level, and then allowed the State to craft a specific plan to comply with the mandate. The court avoided straying too far from its core competencies in that it did not seek to impose too many specific criminal justice policies. Realignment's success or failure is perhaps most fairly attributable to the legislative and executive response to the judiciary's involvement, more so than the prisoner release order itself. Yet, if one were intent on judging the courts by the ultimate effects of their decisions, there is compelling evidence that the courts have brought more good than harm to California.

1. *Forced Action.* The court's order forced the political branches to act. After decades of continually worsening conditions and despite a political

249. See *supra* notes 183-96.

250. See STUNTZ, COLLAPSE, *supra* note 183, at 7; See also Stuntz, *Law and Grace*, *supra* note 184, at 380 (describing how criminal justice was previously an "exercise in neighborhood level self-government").

251. See STUNTZ, COLLAPSE, *supra* note 183, at 244-45.

252. See Schlanger, *supra* note 47, at 187. Indeed, as Schlanger points out, the transfer of funds from the State to the counties offers almost total flexibility; the counties truly are free to spend the funds however they see fit.

253. See *supra* note 193.

climate that discouraged bold action, the legislative and executive branches finally began to respond to the crisis in prisons. Not only did they act, but also they spent significant sums of money—no small achievement in California—and at the same time, sought to return the prison system to long-term financial stability. For those who worry that the judiciary overseeing structural reform may force spending without any ability to put those outlays in the context of the bigger picture, this should be heartening. What is more, the court's order induced the political branches to act counter to trends long considered irreversible. In shifting control back to the counties, the state is doing precisely the opposite of what so profoundly troubled Stuntz, namely the shift of control from locality to state.

2. *Improved Conditions.* As discussed above, just how significantly the state's prison system has improved remains a matter of debate and the focus of ongoing litigation. But while the plaintiffs and the state may still disagree over whether the state has done *enough*, there is likely broad agreement that prison conditions are in fact better than they were two or five or ten years ago. At the most basic level, court intervention brought about an improvement in the facilities for and services offered to California's inmates. And that was the whole point of the suits in the first place.

3. *Continued Oversight.* In contravention to the classical notion that courts decide cases and then terminate their involvement, the *Plata* courts remain intimately involved. Indeed, the court will continue, at least through the end of the year, to oversee the political branches as they seek to improve prison conditions. If the court continues to thoroughly investigate conditions on the ground and properly utilizes its receiver and consults with experts—in short, if it continues to undertake the core violations—and ultimately determines that things are as the state claims them to be and that all ills are cured, then we should rejoice that the judicial involvement has fomented such profound change. If, however, the court determines that there is more yet to do, that would be an even stronger reflection of the court's institutional competence. In that case, because the executive branch has been clear about its readiness to stop as soon as possible, the court would be the only institution capable of mandating the changes necessary to force constitutional compliance. The court's continuing role would be validated.

There are two harder cases. The first would be if the prison system were in need of further improvement, but the court suddenly abdicated its responsibilities and did not order it. There, the prisoners would be worse off and the courts would be failing to serve as the one branch adequate enough to make a difference. The court has been so active to date, however, that I find this to be a remote possibility.

The other hard case would be for the prisons to in fact be constitutionally adequate, if not absolutely perfect, but for the court nevertheless to order the state to do more. While that would be a boon to prisoners, it would make it harder to ignore the potential federalism and separation of powers objections.

On one hand, the counterfactual is difficult to run; it is unlikely that observers would ever know that this scenario has come to pass, in light of the fact that judges get to say in the first instance what qualifies as constitutional. But the possibility that the courts could overstep and request significant action when doing so is unnecessary does speak to the difficulty in assessing the efficacy of courts as structural reformers.

On balance, while it certainly warrants mentioning that determining whether the courts have succeeded is difficult, the evidence put forth thus far should counsel in favor of optimism.

CONCLUSION

Courts, through undertaking the “core violations,” expanded their institutional competence to the extent that they could wisely issue the prisoner release order, but then crafted an injunction that was sufficiently open-ended so as to mostly avoid the concerns raised when courts adjudicate polycentric problems.²⁵⁴ The courts were perfectly adequate to issue the prisoner release order, and indeed because of political intransigence, the courts were the only institution with the will to get the ball rolling. But in a compromise that should set critics of courts’ institutional competence somewhat at ease, the court then stepped back and left it up to the political branches to further define the contours of what a prisoner release program would look like.

To some, the court’s decision to leave discretion in the hands of the very institutions that were so dysfunctional that the court had to step in in the first place may seem perverse.²⁵⁵ But viewed more optimistically, this compromise should signal that there are times, such as this, when the courts are the only

254. To be clear, though, the concerns raised by court adjudication of polycentric problems have not been avoided altogether. There are other examples, more surprising and subtle than the county-jail issues, of Realignment’s unintended consequences. For one, the State’s forest fire fighting apparatus may take a hit. As the *San Francisco Chronicle* recently noted, “[t]here are more than 4,000 prisoners statewide trained for the work now, but prison officials said they expect that number to shrink by 1,500 by June [2013] as inmates are sent to county jails instead of prison.” Wyatt Buchanan, *Cal Fire Losing Volunteer Inmates*, S.F. CHRONICLE (Aug. 1, 2012), <http://www.sfgate.com/news/article/Cal-Fire-losing-inmate-volunteers-3752179.php#ixzz22osqQSqg>. Still, that this is an unintended consequence of the legislature’s own decisions arguably places it on slightly different footing than direct results of *court-ordered* undertakings.

255. Indeed, a recent *New York Times* article on California’s county jails begins to highlight this problem. One reason that counties are resorting to tried-and-true traditional incarceration techniques rather than creative efforts at rehabilitation, such as “electronic monitoring and day reporting,” is that “in counties where elected officials are afraid of appearing soft on crime, such alternatives are particularly sensitive.” Onishi, *supra* note 242, at A8. “Everything is political,” Fresno County Sheriff Margaret Mims told the *Times*. *Id.* Thus, there is a case to be made that for all the same reasons the political branches never ameliorated the prison crisis prior to court intervention, they will fail to reap the benefits of the courts’ passive virtues.

viable actor, and that in such cases, the courts are at least adequate to take the first step and to bring the political branches back into the process.

Ultimately, the upshot of the court's order, at least based on what we know so far, should be that Justice Scalia's ominous predictions—the cries that the courts were woefully incompetent—were premature and overstated. But, there are also lessons that should resonate beyond the prison reform context. Indeed, the judiciary's role in the *Plata* litigation should signal that when called upon to take an ongoing role in the management of complex institutions, courts are capable of ably handling the task — they can do more than simply decide a straightforward dispute between two individual litigants. An equally important takeaway, however, should be that the courts' primary function should be to bring the political branches back into the fold. In the end, no branch can go it alone.