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## A Government Branch of Its Own: Reining in the Power of the Regents of the University of California

Veronica Gray

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# A Government Branch of Its Own: Reining in the Power of the Regents of the University of California

VERONICA GRAY\*

## ABSTRACT

The University of California system is the crown jewel of American public universities. However, Californians have virtually no say over University of California policies. At the University of California's inception, the drafters of the 1879 California Constitution envisioned a school system controlled by a Board of Regents who are largely insulated from politics. The autonomy from elected officials and the public allows the Regents to have nearly full control over a public good. The Regents' autonomy and control over the University of California system has led to conflict between the Regents, the public, and state legislators regarding land use, labor, and tuition increases. The Regents benefit from a vague governmental status, placing them above a state agency but not exactly equal with the three branches of state government. The vague governmental status and outdated constitutional mandate of power allows the Regents to govern the University of California system largely without any checks. This note analyzes possible solutions to rein in the Regents' power and increase accountability to the public while maintain enough independence to properly govern an ever growing University system.

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INTRODUCTION

The state of California created the University of California (“UC”) and its governing board, the Regents of the University of California (“Regents”), as a result of receiving a federal land grant. The land grant encouraged states to open schools of higher education for agricultural and mechanical arts.<sup>1</sup> The UC system and the Regents were codified in the 1879 California Constitution (“CA Constitution”), where it outlined the Regents’ powers and structure of governance.<sup>2</sup> The Regents has sole control over the UC as a public trust, meaning the governing board’s twenty-six members control one of the largest public university systems in the country—but its powers are, by design, loosely checked.<sup>3</sup> Within a climate weary of corruption and undue political influence, the drafters of the 1879 CA Constitution opted for an highly autonomous UC.<sup>4</sup> Traditional California agencies derive power via statutes passed by the California State Legislature (“Legislature”) and are controlled by the California Executive Branch and the California Administrative Procedure Act (“California APA”); however, the Regents receives its power through the CA Constitution directly, circumventing delegation principles.

The lack of political checks and public accountability leaves students and employees of the UC clashing with the Regents over the breadth of power it wields. Over the years, students, staff, and faculty have opposed Regents’ actions on issues involving land use, unemployment, and tuition increases.<sup>5</sup> Greater transparency and public participation in the Regents’

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1. 7 U.S.C. § 301 (1862); An Act to Create and Organize the University of California, A.B. 583, 1868 Sess. (CA 1868), <https://bancroft.berkeley.edu/CalHistory/charter.html>; UNIVERSITY OF CALIFORNIA OFFICE OF THE PRESIDENT, BOARD OF REGENTS: ABOUT THE REGENTS, <https://regents.universityofcalifornia.edu/about/> (last visited Apr. 1, 2024).

2. CAL. CONST. art. IX, § 9.

3. *Id.*

4. John A. Douglass, *Creating a Fourth Branch of State Government: The University of California and the Constitutional Convention of 1879*, 32 HIST. EDUC. Q. 31, 63 (1992).

5. Nicholas Ibarra, *Regents to Decide Fate of UCSC Meadow Development*, SANTA CRUZ SENTINEL (Mar. 4, 2019), <https://www.santacruzsentinel.com/2019/03/04/regents-to-decide-fate-of-ucsc-meadow-development/>; Margot Roosevelt, *UC outsources thousands of jobs to private contractors. Is that a good idea?*, L.A. TIMES (Dec. 1, 2019), <https://www.latimes.com/business/story/2019-12-01/university-of-california-outsources-jobs>; Jill Cowan, *Why Graduate Students at UC Santa Cruz are Striking*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/us/ucsc-strike.html>; Melanie Mason, *As New Legislature Begins, Speaker*

decisions could likely mitigate such conflict. With little accountability, the question arises: if the UC is a public entity, can traditional administrative law ensure accountability, or will constitutional amendments be necessary to reign-in the Regents?

This note will analyze whether the Regents is, or whether we should consider it, an administrative agency, even though the CA Constitution mandates the Regents while statutes create other agencies. It will also explore whether oversight by the California APA would ensure more transparency and accountability to the people of California. The first portion of the note explains the powers of the Regents and the checks on those powers. The next portion examines if the Regents is a state agency because of its almost complete independence from the legislative and Executive Branches. Lastly, it will analyze whether the California APA can ensure accountability and transparency or if a constitutional amendment is necessary to restrain the Regents.

## I. HISTORY OF UC AND THE REGENTS

Before looking into the current practical issues of the Regents' power, we must understand the historical circumstances that created the Regents and the expansion of the UC system over time.

### A. The Birth of the University

The UC was created by two acts: the Land Grant Aid of Colleges Act of 1862, commonly known as the Morrill Act of 1862, and the Organic Act of 1868.<sup>6</sup> The Morrill Act is a federal land grant law that provided every state in the union with 30,000 acres per U.S. Senator and House Representative.<sup>7</sup> Each state could then sell the land received from the Federal Government and use the profits to create at least one university.<sup>8</sup> The Federal Government wanted states to create schools focused on agricultural and mechanical arts.<sup>9</sup> The Organic Act of 1868 officially created the UC from the College of California, a private college preparatory school in Oakland,

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*Atkins Takes Aim at UC Tuition*, L.A. TIMES (Dec. 1, 2014), <https://www.latimes.com/local/political/la-me-pc-atkins-uc-tuition-20141201-story.html>.

6. 7 U.S.C. § 301; An Act to Create and Organize the University of California, A.B. 583, 1868 Sess. (CA 1868), <https://bancroft.berkeley.edu/CalHistory/charter.html>.

7. 7 U.S.C. § 301.

8. *Id.*

9. Douglass, *supra* note 4, at 35.

California.<sup>10</sup> In 1869, the UC had its first class of students; ten instructors taught forty students.<sup>11</sup>

#### B. The 1878 Constitutional Convention and the Creation of the Regents

During the first two decades of California's statehood, the state government was plagued with corruption, scandals, and public dissatisfaction, which ultimately forced a new constitutional convention in 1878.<sup>12</sup> Dissatisfaction with the Regents made it a target for reform.<sup>13</sup> The California Constitutional Convention of 1878 had three main factions: the Grange, the Workingmen, and the nonpartisan delegates.<sup>14</sup> The three groups had different goals for the UC, which aligned with their overall goals for the state. The Grange consisted of farmers and landlords who wanted the UC to teach more hands-on, apprenticeship-type programs in agriculture and mechanics and wanted to abolish the Regents.<sup>15</sup> The Workingmen wanted the Legislature to have more control over the Regents and place more accountability for the people.<sup>16</sup> The nonpartisan delegates were mostly lawyers who represented corporate interests and did not want to change the UC structure.<sup>17</sup> They wanted to give the Regents autonomy to protect against corruption in the Legislature.<sup>18</sup> They were also inspired by the University of Michigan model which had an autonomous board and was very successful.<sup>19</sup>

During the convention, the Grange and Workingmen introduced an article curtailing the Regents' power. Their proposed article would make the UC subject to legislative control, narrow the UC curriculum to only subjects related to agriculture and mechanics, and prevent the Regents from receiving money or land grants until the public was satisfied with the UC.<sup>20</sup> Other amendments to the proposal were introduced like having students perform manual labor for at least two hours a day as a program requirement, making

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10. An Act to Create and Organize the University of California, A.B. 583, 1868 Sess. (CA 1868), <https://bancroft.berkeley.edu/CalHistory/charter.html>.

11. THE UNIVERSITY OF CALIFORNIA IS BORN, <https://www.universityofcalifornia.edu/news/university-california-born> (Last visited Apr. 12, 2021).

12. Judson A. Grenier, "Officialdom": *California State Government, 1849-1879*, in TAMING THE ELEPHANT: POLITICS, GOVERNMENT, & LAW IN PIONEER CALIFORNIA 147 (John F. Burns et al. eds., 2003).

13. Douglass, *supra* note 4, at 45.

14. *Id.* at 53.

15. *Id.* at 41, 45.

16. *Id.* at 53.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 54.

the Regents elected positions, and reserving land grants and funds from the Morrill Act exclusively for agricultural and mechanical arts.<sup>21</sup>

After extensive lobbying and multiple drafts, the resulting constitutional article included four significant provisions that reflected a compromise by the three stakeholder groups:

- (1) The UC would not be held in a public trust;
- (2) The Legislature could change the job responsibilities and term lengths of the Regents;
- (3) The UC's primary purpose would be training in agriculture, metallurgy, mechanical arts, and applied science;
- (4) The use of land grants would remain flexible to allow each University to develop other curriculum areas<sup>22</sup>

At the last minute, a staunch supporter of an autonomous Regents called for an amendment to the agreed upon proposal. The supporter's article retained the provision for flexible land grant usage, but added a requirement that money lost through misappropriation, neglect, or other reasons must be replaced by the state.<sup>23</sup> The last-minute amendment also changed the language to ensure that the UC would be held in a public trust controlled by the Regents.<sup>24</sup> This proposal is ultimately what passed and became Article 9 of the 1879 CA Constitution.

Placing the UC as a public trust was a core issue in determining the structure of the UC as the public trust insulated the Regents from outside control. Many people, disillusioned with the current UC, wanted the Regents held accountable to the people and elected officials. The opposing side was concerned with corruption in the Legislature and wanted to protect the Regents from corruption and political influence. The delegates passed the last minute amendment providing the Regents incredible autonomy from the people and elected representatives.

### C. The Development of the University from 1868 to 2024

Once the UC was established, it did not take long to grow. From 1868 to 1872, the school grew from forty to 151 students.<sup>25</sup> Of the 151 students, twenty-eight were women.<sup>26</sup> In those four years, the school almost quadrupled in size, foreshadowing the development of the University in the future.

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21. *Id.* at 54, 55, 59.

22. *Id.* at 60.

23. *Id.* at 61.

24. *Id.*

25. *Id.* at 40.

26. *Id.*

In the decades after the Legislature passed the 1879 CA Constitution, the UC system grew into an international entity. In 1962, the UC system had over 100 locations, including campuses, labs, and agricultural and urban extension centers; offered almost 10,000 courses; and developed relationships with nearly every industry and every level of governance.<sup>27</sup> The UC partnered with over fifty countries.<sup>28</sup> Between 1954 to 1964, the Regents added six UC campuses, rapidly expanding from two to eight.<sup>29</sup> Enrollment also more than doubled. In 1954, the UC had 35,000 students enrolled, and by 1964, there were 71,000 students.<sup>30</sup> Between 1868 and 1964, the UC enrollment increased by almost 1,800%.

Today the UC system has continued to increase its size and status globally. As of March 2024, the UC system has 295,573 students enrolled; 62,301 of whom are graduate students.<sup>31</sup> The UC system employs 246,300 people, making it the third-largest employer in California, behind only the federal and state governments.<sup>32</sup> Its 2024 operating budget exceeded \$51 billion.<sup>33</sup> The UC receives more than \$7.4 billion in research grants.<sup>34</sup> Over half of the research grants are awarded by the federal government.<sup>35</sup>

The UC system has blossomed since its first class of students in 1868. It went from a school meant to provide farmers and laborers education in their trade, to a massive academic institution with a budget in the tens of billions of dollars. The UC system transformed into something unrecognizable from what it was in 1879. Although, on paper, the power of the Regents is the same, in practice, its power increases along with the development of the UC system.

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27. Caitlin M. Scully, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927, 935 (1987) (citing to Clark Kerr, THE USES OF THE UNIVERSITY (Harvard University Press ed., 5th ed. 2001)).

28. *Id.*

29. REGENTS OF THE UNIVERSITY OF CALIFORNIA, UNITY AND DIVERSITY: THE ACADEMIC PLAN OF THE UNIVERSITY OF CALIFORNIA 1965-1975, 21, OFFICE OF THE PRESIDENT, [https://www.ucop.edu/institutional-research-academic-planning/\\_files/1965\\_75UCAcademicPlan.pdf](https://www.ucop.edu/institutional-research-academic-planning/_files/1965_75UCAcademicPlan.pdf).

30. *Id.*

31. REGENTS OF THE UNIVERSITY OF CALIFORNIA, UNIVERSITY OF CALIFORNIA AT A GLANCE, 1 (Mar. 2024), [https://ucop.edu/institutional-research-academic-planning/\\_files/uc-facts-at-a-glance.pdf](https://ucop.edu/institutional-research-academic-planning/_files/uc-facts-at-a-glance.pdf) (last visited Apr. 1, 2024).

32. *Id.*; THE UNIVERSITY OF CALIFORNIA'S ECONOMIC CONTRIBUTION TO THE STATE OF CALIFORNIA, 15 (2011), <https://regents.universityofcalifornia.edu/regmeet/sept11/17attach.pdf>.

33. UNIVERSITY OF CALIFORNIA AT A GLANCE, *supra* note 31, at 2.

34. *Id.*

35. Federal government's research awards total \$4.08 billion, accounting for more than 55% of the UC's grant budget. *Id.*



## II. THE CHECKS AND POWERS OF THE REGENTS

### A. 1879 CA Constitution: Article 9, Section 9: University of California

Because enough delegates of the 1878 CA Constitutional Convention wanted to keep the Regents as independent from the Legislature as possible, the constitutional provision gave virtual autonomy to the Regents. Article 9, section 9 of the CA Constitution states:

The University of California shall constitute a public trust, to be administered by the existing corporation known as “The Regents of the University of California,” with full powers of organization and government, subject only to such legislative control as may be necessary to insure [sic] the security of its funds... The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its Regents and in the administration of its affairs.<sup>36</sup>

As both sentences make clear, the delegates chose this language to insulate the Regents from legislative control and allow it full control over the UC.

### B. The Regent’s Constitutional Powers

The most important clause relating to the Regents’ powers is the constitutional grant of “full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds. . . .”<sup>37</sup> The courts have interpreted the phrase to include broad powers with only three areas of legislative control. Examples of “full powers of organization and governments” include: controlling the curriculum,<sup>38</sup> deciding faculty qualifications,<sup>39</sup> enforcing student conduct,<sup>40</sup> ignoring local prevailing wages when creating salaries,<sup>41</sup> and being exempt from local land-use regulations.<sup>42</sup> In sum, the Regents have full autonomy over “exclusively university affairs,” but this phrase has not been defined by the courts and its application is decided on a case-by-case basis.<sup>43</sup>

The courts have deemed the Regents fully autonomous. In *Oregon State University v. Superior Court*, the court referred to the Regents as a

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36. CAL. CONST. art. IX, § 9.

37. *Id.*

38. *Searle v. Regents of Univ. of Cal.*, 23 Cal. App. 3d 448, 451 (1972).

39. *Wall v. Bd. of Regents*, 38 Cal. App. 2d 698, 699-700 (1940).

40. *Hamilton v. Regents of Univ. of Cal.*, 219 Cal. 663, 664 (1934).

41. *S.F. Lab. Couns. v. Regents of the Univ. of Cal.*, 26 Cal. 3d 785, 789 (1980).

42. *Oakland Raiders v. City of Berkeley*, 65 Cal. App. 3d 623, 626 (1976).

43. *Tolman v. Underhill*, 39 Cal. 2d 708, 712 (1952).

“constitutionally created arm of the state”<sup>44</sup> and stated that the Regents have “virtual autonomy in self-governance.”<sup>45</sup> This means that the Regents can make decisions affecting every part of the UC as if it is a private entity instead of a public school. In addition to the Regents having almost total independence, it also has general immunity from most legislation.<sup>46</sup>

### C. Legislative Checks on the Regents

Although the Regents have general immunity from state laws, some laws do apply. There are three areas where the Regents are subject to legislative regulation: first, power of appropriation; second, general police powers governing private persons and corporations; and finally, legislation regulating public agency activity of a statewide concern, not internal university affairs.<sup>47</sup>

#### *i. The Power of Appropriation*

The first check the Legislature has over the Regents is the power of appropriation. When making the budget, the Legislature can condition or withhold funds from public entities, like the Regents.<sup>48</sup> The Legislature can threaten to withhold money from the Regents as leverage to pursue or not pursue a certain policy. The Legislature can condition funds for certain programs, like funds for childcare specifically for student parents.<sup>49</sup> Lawmakers can also restrict funds for certain programs, such as limiting how much agencies can spend on modernizing buildings.<sup>50</sup> In 2014, then-Assembly Speaker Toni Atkins threatened to use this power when the Regents enacted policy to raise tuition over the course of five years.<sup>51</sup>

However, there are limits. Using the power of appropriation is not popular because the Governor would also have to agree.<sup>52</sup> If the Governor disagrees with the issues raised by the Legislature or the proposed solutions, the

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44. 223 Cal. Rptr. 3d 687, 692, n.6 (2017), *vacated by* Oregon State Univ. v. Superior Ct., 16 Cal.App.5th 1180, n.7 (2017).

45. *Id.*

46. *S.F. Lab. Couns.*, 26 Cal. 3d at 788.

47. *People v. Lofchie*, 229 Cal. App. 4th 240, 250 (2014).

48. CAL. CONST. art. IX, § 12(c).

49. Caitlin M. Scully, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L. J. 927, 933–34 (1987).

50. *Id.*

51. Melanie Mason, *As New Legislature Begins, Speaker Atkins takes aim at UC tuition*, L.A. TIMES (Dec. 1, 2014), <https://www.latimes.com/local/political/la-me-pc-atkins-uc-tuition-20141201-story.html>.

52. CALIFORNIA STATE SENATE, LEGISLATIVE PROCESS: A CITIZEN’S GUIDE TO PARTICIPATION, 6, 23 (Dec., 2022), [https://www.senate.ca.gov/sites/senate.ca.gov/files/publications/legislative\\_process\\_guide.pdf](https://www.senate.ca.gov/sites/senate.ca.gov/files/publications/legislative_process_guide.pdf).

Governor can veto the change in appropriation. Additionally, the state is not the only entity providing money; students pay tuition. So, budget changes would likely impact the students. Nevertheless, even with these limits, fiscal control is one of the restraints the Legislature can place on the Regents.

*ii. General Police Power Regarding Private Parties*

The Legislature's general police power regarding private persons and corporations is broad and applies to the Regents as well.<sup>53</sup> The general police powers allows the state to enforce laws for the "public safety, public health, morality, ... [and] law and order."<sup>54</sup> However, this does not mean that all state laws under the general police powers apply to the Regents, only a subset of laws that regulate private persons and corporations. An example of this subset is workers' compensation laws that apply to private entities.<sup>55</sup> But not every law meant to regulate private parties applies to the Regents; the Regents still have the constitutionally mandated power of self-governance. If a law meant to regulate private entities would regulate within the zone of "exclusively university affairs," then the Regents are exempt from the law.<sup>56</sup> The Legislature has only a narrow zone of laws that apply to both private entities and the Regents.

*iii. Laws Regarding Statewide Concern and its Applicability to Public Agencies*

In addition to laws related to the private sector, some laws regulating public agency activity apply to the Regents as well. These laws must be of a "statewide concern" and not about "exclusively university affairs," and it must show intent to include the Regents.<sup>57</sup> These two zones of "statewide concern" and "exclusive university affairs" are mutually exclusive when applied to the Regents.<sup>58</sup> If a law relates to matters that are within the zone of "exclusively university affairs," it does not apply to the Regents even if the matters are arguably of a statewide concern because only the Regents can enact policy within the zone of "exclusively university affairs."<sup>59</sup>

The courts have never provided a definition of "exclusively university affairs" nor have they identified how it differs from "statewide concern." It

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53. U.S. CONST. amend. X.

54. *State Police Power*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* *Berman v. Parker*, 348 U.S. 26, 32 (1954).

55. *S.F. Lab. Couns.*, 23 Cal. 3d at 798.

56. *Tolman*, 39 Cal. 2d at 712 (Laws passed through police power can only apply to the Regents if they are of a statewide concern).

57. *Lofchie*, 229 Cal. App. 4th at 250; *California State Employees Assn' v. Regents of Univ. of Cal.*, 267 Cal. App. 2d 667, 670 (1968).

58. *Id.* at 258 (holding that matters of statewide concern cannot include matters of exclusively university affairs, making it two separate zones).

59. *Id.* at 258–59.

is determined on a case-by-case basis.<sup>60</sup> Even if a law covers a statewide concern, it is only applicable to the Regents if the Legislature intended to include the Regents in the statute.<sup>61</sup> When passing laws, the Legislature would have to show its intent to include the Regents either through legislative intent or in the text of the statute. For a law regulating public agency activity to apply to the Regents, it must be a matter of statewide concern and show intent to regulate the Regents through the relevant statute.<sup>62</sup>

Courts continue to narrow the control of the Legislature. While the Legislature has the power of appropriation, it likely will be hesitant to use it because of the practical implications it has on students and families. Laws regulating public agency action and private entities are only applicable to the Regents if the laws are of statewide concern. The Legislature's control is further diminished because the Legislature has to show intent to regulate the Regents as well.

#### D. The Regents in Conflict over Labor, Land, and Power

The broad power of the Regents has caused rifts between the Regents, the students and staff, and the Legislature. These conflicts include labor disputes with staff and graduate students, unpopular plans to resolve the student housing crisis, and controversial tuition increases, which have triggered negative reactions by the Legislature. In this section, I explore these labor, land use, and tuition conflicts.

##### *i. Labor Conflicts with the Graduate Students*

Although graduate students study at their universities, they also perform valuable labor. While the professors teach the class, the graduate students provide vital support for the undergraduate students and faculty.<sup>63</sup> Graduate students often serve as teaching assistants, who provide academic support for undergraduate students.<sup>64</sup> They help professors with research and class management, which may include evaluating key assignments, tracking student process, and even assigning final grades.<sup>65</sup> Some graduate students lead their own classes to supplement lectures.<sup>66</sup>

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60. *Id.* at 257.

61. *California State Emps. Ass'n*, 267 Cal. App. 2d at 670.

62. *Id.*

63. Robbie Bruens, *Graduate Teaching Assistant: Job Description, Pay*, RESILIENT EDUCATOR (Oct. 4, 2012) <https://resilienteducator.com/teaching-careers/graduate-teaching-assistant/>.

64. *Id.*

65. *Id.*

66. *Id.*

UC graduate students made national news for going on strike in late 2019. The graduate student strike started at University of California, Santa Cruz (“UCSC”) in the Fall of 2019 over dissatisfaction about the new employment contract. The employment contract was ratified in 2018 by a majority of UC graduate students systemwide but was rejected by over 82% of UCSC graduate students.<sup>67</sup> They argued that the pay policy was insufficient because it would pay all graduate students the same stipend and, therefore, ignored the cost of living differences between campuses.<sup>68</sup> As a result, the policy benefited students in lower cost of living areas, who could, for example, easily cover their housing costs with the stipend, while forcing students in higher costs areas to get a second job or go into debt to cover their living expenses.<sup>69</sup> The strikers demanded the Regents to provide a cost-of-living adjustment that specifically accounted for the cost of living when determining graduate student salaries at each campus.<sup>70</sup>

The strike started by the graduate students withholding 12,000 grades for the Fall quarter.<sup>71</sup> It then escalated when the graduate students began to withhold other labor, like not hosting academic support classes for the students or doing research. Pickets at the entrance of the UCSC campus happened often. The strike then spread to other UC campuses, where students either joined in solidarity or agreed that a cost-of-living adjustment was necessary.<sup>72</sup> As the strike received more media attention, support began coming in nationwide; students at Notre Dame, University of North Carolina at Chapel Hill, and other schools voiced support and encouragement.<sup>73</sup>

In March of 2020, fifty-four of the striking graduate students were formally fired and dozens more were told they were not getting teaching

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67. DOCUMENTATION OF UCSC GRADUATE STUDENTS’ ATTEMPTS TO ENGAGE ADMINISTRATION THROUGH OFFICIAL CHANNELS (Dec. 12, 2019) <https://payusmoreucsc.com/wp-content/uploads/2019/12/UCSC-Graduate-Student-Attempts-to-Engage-Administration-Around-COLA.pdf>.

68. *Id.*

69. PAY US MORE UCSC, *January 6<sup>th</sup> – Grad Life Before COLA #7: Juggling Four Part-Time Jobs to Afford Rent* (Jan. 6, 2020), <https://payusmoreucsc.com/january-6th-grad-life-before-cola-7-juggling-four-part-time-jobs-to-afford-rent/> (last visited July 11, 2022).

70. UCSC GRADUATE STUDENTS’ ATTEMPTS, *supra* note 68.

71. *Id.*

72. Vivian Ho, *UC Santa Cruz Fires 54 Graduate Students Participating in Months-Long Strike*, THE GUARDIAN (Feb. 28, 2020, 9:45 PM) <https://www.theguardian.com/us-news/2020/feb/28/university-of-california-student-strike-fired> (noting that UC Santa Barbara and UC Davis fired graduate students as well).

73. Nina Agrawal, *UC Graduate Students Threaten More Strikes as Movement Grows*, L.A. TIMES (Mar. 7, 2020, 7:00 PM), <https://www.latimes.com/california/story/2020-03-07/graduate-student-movement-at-uc-gains-momentum-with-faculty-support-demonstrations-and-pledges-to-strike>.

assistant position offers for the Spring.<sup>74</sup> After months of negotiating and pressure from elected officials, forty-one of the formally fired graduate students were reinstated.<sup>75</sup> Although the strike ended and the graduate students are back at work, the handling of the conflict by the Regents and UC administrators shortened students' tolerance for what they perceive as unfair treatment.

*ii. Labor Conflict with the American Federation of State, County, and Municipal Employees Union*

Another labor conflict is between the Regents and the American Federation of State, County, and Municipal Employees Local 3299 labor union (“AFSCME 3299”). AFSCME 3299 currently represents 27,000 UC workers.<sup>76</sup> On November 13, 2019, AFSCME began a UC system-wide Unfair Labor Practice (“ULP”) strike, which was its sixth strike in two years.<sup>77</sup> The November 13<sup>th</sup> strike was against the six ULP complaints AFSCME 3299 filed against the Regents a couple of weeks prior, but the main issue was the UC’s outsourcing policy.<sup>78</sup> State and internal audits discovered troubling

74. Coleen Flaherty, *Santa Cruz Fires Striking TAs*, INSIDE HIGHER ED. (Mar. 2, 2020), <https://www.insidehighered.com/news/2020/03/02/university-california-santa-cruz-fires-striking-tas>.

75. Lauren Kaori Gurley, *UC Santa Cruz Reinstates 41 Graduate Students After Months-Long Strike*, VICE (Aug. 11, 2020, 12:26 PM) <https://www.vice.com/en/article/xg8mdn/uc-santa-cruz-reinstates-41-graduate-students-after-months-long-strike>.

76. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (“AFSCME”) LOCAL 3299, WHO WE ARE, <https://afscme3299.org/who-we-are/> (last visited Apr. 1, 2024).

77. AFSCME LOCAL 3299, UC WORKERS WILL STRIKE NOVEMBER 13TH OVER NEW CHARGES OF ILLEGAL OUTSOURCING (Nov. 1, 2019), [https://afscme3299.org/media/press\\_releases/release-uc-workers-will-strike-november-13th-over-new-charges-of-illegal-outsourcing/](https://afscme3299.org/media/press_releases/release-uc-workers-will-strike-november-13th-over-new-charges-of-illegal-outsourcing/) [hereinafter “AFSCME LOCAL 3299, NEW CHARGES OF ILLEGAL OUTSOURCING,”]; *see also* Steve Stein & Jennifer Schiffne, INFORMATION AND RESOURCES ABOUT STRIKE ACTIVITIES ON NOV. 13, 2019, REGENTS OF THE UNIVERSITY OF CALIFORNIA (Nov. 13, 2019), <https://news.ucsc.edu/2019/10/info-about-strike-november-13-2019.html> (modified Nov. 15, 2019); Justin Jung, *AFSCME Strikes for the 6th Time in 2 Years After New Labor Charges Filed Against the UC*, DAILY BRUIN (Nov. 14, 2019, 12:43 AM), <https://dailybruin.com/2019/11/13/afscme-strikes-for-6th-time-in-2-years-after-new-labor-charges-filed-against-the-uc/>; Aditya Katewa, *AFSCME Local 3299 Organizes Strike Against UC*, DAILY CALIFORNIAN (Nov. 13, 2019), <https://www.dailycal.org/2019/11/12/afscme-local-3299-organizes-strike-against-uc/>; Madeline Leon, *AFSCME Local 3299 Strikes to Protest UC Outsourcing*, UCSD GUARDIAN (Nov. 13, 2019), <https://ucsdguardian.org/2019/11/13/afscme-local-3299-strikes-protest-uc-outsourcing/>; Christopher Story, *Students Strike with UC Workers Over Alleged Illegal Outsourcing*, NEW UNIV. (Jan. 12, 2020), <https://www.newuniversity.org/2020/01/12/students-strike-with-uc-workers-over-alleged-illegal-outsourcing/>; Ally Russell, *AFSCME Local 3299 Strikes in Protest of Alleged Job Outsourcing, Unfair Labor Complaints*, THE CALIFORNIA AGGIE (Nov. 27, 2019), <https://theaggie.org/2019/11/27/afscme-local-3299-strikes-in-protest-of-alleged-job-outsourcing-unfair-labor-complaints/>; Laura Anaya-Morga, *AFSCME Holds Strike Against UC Outsourcing and Unfair Labor Practices*, HIGHLANDER NEWS (Nov. 19, 2019), <https://www.highlander-news.org/36839/afscme-holds-strike-against-uc-outsourcing-and-unfair-labor-practices/>.

78. AFSCME LOCAL 3299, NEW CHARGES OF ILLEGAL OUTSOURCING, *supra* note 80.

outsourcing practices.<sup>79</sup> The audit reports found that the Regents were ignoring its own rules by failing to enforce its own minimum wage policy, imposing unjustified wage cuts to contracted laborers, paying workers under different names to avoid overtime pay, favoring contracted labor over union labor, and other violations.<sup>80</sup> The Regents were undercutting their own employees and dodging state labor laws for cheaper labor.

The November 13<sup>th</sup> strike was not the first strike in protest of the UC's outsourcing practices. On May 16, 2019, AFSCME 3299 went on strike after filing three ULP complaints in April about contracted labor.<sup>81</sup> In April of 2019, AFSCME 3299 went on a one-day strike for a ULP complaint filed in March about worker intimidation and attempted strike breaking.<sup>82</sup> In 2018, AFSCME 3299 led two labor strikes that focused on the Regents' outsourcing practices.<sup>83</sup> During the same time as these labor conflicts and starting years before, the Regents and AFSCME 3299 were negotiating a labor contract.<sup>84</sup> The issues central to the negotiations were increased wages and benefits and the cessation of outsourcing labor, showing that the practice of hiring contracted labor instead of union labor has been a major problem for many years before the November 2019 strike.<sup>85</sup>

*iii. Land Use Conflict Regarding the UCSC East Meadow Project*

Many areas in which UC campuses are located are experiencing growing housing crisis issues, including UCSC. The Chancellor of UCSC wanted to alleviate the need for off-campus housing by building more beds on campus. In 2017, the Chancellor proposed to build on two 13-acre plots of land on the 6,088-acre campus.<sup>86</sup> The proposed construction site is known as the

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79. *Id.*

80. *Id.*

81. Ethan Edward Coston, *AFSCME Announces Strike Against The UC System For Unfair Labor Practices*, THE TRITON (May 13, 2019), <https://triton.news/2019/05/afscme-announces-strike-against-the-uc-system-for-unfair-labor-practices/> (updated on March 4, 2023).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. OFFICE OF THE CHANCELLOR, PRESS RELEASE: RESPONSE OF THE EAST MEADOW ACTION COMMITTEE (EMAC) TO TODAY'S ANNOUNCEMENT BY THE UNIVERSITY OF CALIFORNIA SANTA CRUZ (UCSC) REGARDING THE STUDENT HOUSING WEST PROPOSAL (Sept. 17, 2018), <https://static1.squarespace.com/static/5aa8064bb98a7807c929fbed/t/5bc444e0104c7b44f2eff07d/1539589344738/PRESS+RELEASE+%28EMAC%29.pdf>; OFF. OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA ANNUAL FINANCIAL REPORT 19/20, 11 (2020), <https://ucop.edu/uc-controller/financial-reports/systemwide-reports/annual-financial-reports/19-20/annual-financial-report-2020.pdf> [hereinafter, "OFFICE OF THE CHANCELLOR, RESPONSE OF THE EAST MEADOW ACTION COMMITTEE"].

“East Meadow.”<sup>87</sup> UCSC plans to construct the 150-bed building on a pristine meadow, which is a sanctuary for the wild and domesticated animals that live in the forests of Santa Cruz.<sup>88</sup> Although the plots are the same size, the number of beds is unequal with 95% of the beds being built on one plot and 5%, only 150 beds, on the other.<sup>89</sup> The natural undeveloped land is a part of the UCSC identity and a welcomed source of tranquility for the students, staff, and animals. Students, staff, and faculty created the East Meadow Action Committee to show their opposition to the destruction of the meadow in exchange for 150 beds.

Opposition is also fueled by the UC’s partnership with a private housing company.<sup>90</sup> The UC plans to use a private company to build, operate, and own the housing buildings for the next thirty to forty years.<sup>91</sup> The developers will receive rent and provide maintenance until the cost of construction is paid.<sup>92</sup> The placement of the East Meadow in relation to other infrastructure, like roads, keeps the cost of development low for the developers, which is why the East Meadow was chosen as the development location.<sup>93</sup> Many students and staff are opposed to the partnership because of the notion that a corporation would be profiting off of students who do not necessarily have a choice to live there. They also have an issue with the partnership because the corporation would want to keep building costs down by building in an area that is cheaper and easier instead of what is less environmentally harmful.

Many organizations sent letters in opposition of the development of the meadow by responding to the draft of the Environmental Impact Report, including the Sierra Club.<sup>94</sup> The Sierra Club stated that the UC did not perform adequate biological surveys of the land to fully assess the environmental impact of the building such as: how construction would affect burrowing owls, barn owls, many other species of birds because the meadow is located in the

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87. See generally EAST MEADOW ACTION COMMITTEE, <https://www.eastmeadowaction.org/> (last visited Apr. 12, 2024).

88. *Id.*

89. OFF. OF THE CHANCELLOR, RESPONSE OF THE EAST MEADOW ACTION COMMITTEE, *supra* note 88.

90. Paul Schoellhamer, *Assault on the East Meadow: How We Got Here*, East Meadow Action Committee (Mar. 11, 2018), <https://www.eastmeadowaction.org/how-we-got-here>. Interestingly, I was unable to find the name of the private housing company.

91. *Id.*

92. *Id.*

93. *Id.*

94. Gillian Greensite, *Regarding: Revised DEIR, Comments on Student Housing West Project*, SCH No. 2017092007, Sierra Club, Santa Cruz County Group Ventana Chapter, 2–3 (Oct. 29, 2018), <https://www.sierraclub.org/sites/default/files/sce-authors/u14072/2019-10-29%20UCSC%20Housing%20DEIR%20Comments.pdf>.



Pacific Flyway; how the lights would affect nocturnal fauna; and how the site would degrade surface water and groundwater quality.<sup>95</sup>

Distinguished Trustees, former Regents, Alumni Council members, and professors of UCSC also submitted a joint opposition letter.<sup>96</sup> This letter emphasized the importance of keeping the east meadow undeveloped and provided alternatives that the Regents should consider before approving the project.<sup>97</sup> News about the development of the East Meadow quickly spread beyond the UC system, and soon environmental groups and Santa Cruz residents joined the opposition.<sup>98</sup> But UCSC seemed to ignore both these internal and external pressures.

With great haste, UCSC sent the proposal to the Regents for its approval. The housing development projects were approved by the Regents on March 13, 2019, even with mounting opposition.<sup>99</sup> In October of 2020, the Santa Cruz Superior Court issued a writ of mandamus directing the Regents to rescind its approval of the housing project.<sup>100</sup> The Court found that the Regents did not meet the procedures required in the California Environmental Quality Act (“CEQA”) because the Regents rejected the alternative housing projects as economically infeasible when the economic reports were not available to the Regents or the public at that time.<sup>101</sup> In short, the Regents

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95. REVISED DIER, COMMENTS ON STUDENT HOUSING WEST PROJECT, SCH NO. 2017092007 (2018), <https://static1.squarespace.com/static/5aa8064bb98a7807c929fbed/t/5be016b6758d46ea7a444364/1541412534968/15-RDEIR-Sierra+Club-UCSC+Housing.pdf>; see Greensite, *supra* note 95.

96. COMMENTS ON DRAFT ENVIRONMENTAL IMPACT REPORT FOR “STUDENT HOUSING WEST” (2018), <https://static1.squarespace.com/static/5aa8064bb98a7807c929fbed/t/5af920da03ce64f8a7982240/1526276316939/DEIR1+Webster+et+al+letter.pdf>.

97. *Id.*

98. E.g. Chris Connery, et al., *Guest Commentary: East Meadow: time and money*, UC Santa Cruz, SANTA CRUZ SENTINEL (Mar. 5, 2024) (“Family housing and child care are, of course, desperately needed. But the rushed, careless decision to build on the Meadow is a sign the university has abandoned the careful construction and site sensitivity that made its campus a world-famous model of environmentally sensitive planning.”) <https://www.santacruzsentinel.com/2024/03/05/guest-commentary-east-meadow-uc-santa-cruz-time-and-money/#:~:text=Family%20housing%20and%20child%20care,model%20of%20environmentally%20sensitive%20planning>.

99. Scott Hernandez-Jason & Dan White, *Regents Approve Student Housing West*, *Kresge Renewal*, UC SANTA CRUZ NEWS CTR. (Apr. 1, 2019), <https://news.ucsc.edu/2019/04/kresge-shw-approval.html>.

100. Ryan Stuart, *Superior Court Rescinds UCSC Student Housing Project Approval*, SANTA CRUZ SENTINEL (Nov. 2, 2020, 4:36 PM), <https://www.santacruzsentinel.com/2020/11/01/superior-court-rescinds-ucsc-student-housing-project-approval/>.

101. EAST MEADOW ACTION COMMITTEE, STATEMENT: COURT ORDERS UC REGENTS TO RESCIND THEIR APPROVAL OF UCSC’S STUDENT HOUSING WEST PROJECT (Oct. 30, 2020), <https://static1.squarespace.com/static/5aa8064bb98a7807c929fbed/t/5f9f32960991472cc5339984/1604268694990/EMAC+statement+103020.pdf>.

were not transparent to the public of why it made its decision to build on the East Meadow instead of other alternatives and did not provide sufficient evidence as to why the alternatives were economically infeasible.<sup>102</sup> The Regents also broke its own policies of requiring nine votes to reject alternatives; the decision was made by three Regent members.<sup>103</sup> This small win for the East Meadow Action Committee did not end the fight to save the East Meadow. UCSC and the Regents can still build on the East Meadow by following the required procedure. In March of 2024, the Chancellor of UCSC announced that UCSC will ask the Regents for a third approval of a virtually unchanged housing plan and construction is scheduled to begin in Spring or Summer of 2024.<sup>104</sup>

*iv. Conflict with the Legislature*

The Legislature has introduced legislation and a constitutional amendment aimed at changing the structure and powers of the Regents. In the 2015-2016 Legislature term, Senator Lara and Senator Cannella sponsored a constitutional amendment that limits the Regents' terms from 12 years to 10 years and establishes term limits of a max of two terms.<sup>105</sup> The proposed amendment states that the Regents have little oversight from the Legislature and limiting their terms is a way for the Legislature to hold the Regents more accountable.<sup>106</sup> The amendment cites ways the Regents have taken advantage of its independence, namely: by not accepting as many in-state applicants and raising tuition without support from the students, public, or their representatives.<sup>107</sup>

In the same legislative session, Senator Lara sponsored SB 376, which proposed changes to the UC contracting policy. SB 376 prohibited the Regents from hiring contracted labor that undercuts the wages and benefits of its unionized workers.<sup>108</sup> It also declared that the UC Regents squandered public money by contracting out to for-profit companies.<sup>109</sup> SB 376 was

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102. Stuart, *supra* note 101.

103. *Id.*

104. EAST MEADOW ACTION COMMITTEE, EAST MEADOW UPDATE (Mar. 2024), <https://static1.squarespace.com/static/5aa8064bb98a7807c929fbed/t/65fa219e9b65ac566b31a777/1710891422137/East-Meadow-Update-3-18-24.pdf>.

105. SCA 1, 2015-2016 Leg., Reg. Sess. (Cal. 2014).

106. For examples of vetoed legislation, see the following: *e.g.* Senate 2015-2016-SCA 1, at 20 (Cal. 2016) (describing AB-801, which would have annual reporting about sexual assault); *id.* at 21 (describing AB-1653, which would have required new student safety policies and procedures); *id.* at 28 (describing AB-2732, which would have added cyberbullying as a mandatory topic for new orientation), [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160SCA1#:~:text=05/28/16%2D%20Senate%20Floor%20Analyses](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SCA1#:~:text=05/28/16%2D%20Senate%20Floor%20Analyses).

107. *Id.*

108. S.B. 376, 2015-2016 Leg., Reg. Sess. (Cal. 2015).

109. *Id.*

meant to provide UC unionized workers and temporary workers protection and save public resources.<sup>110</sup> SB 376 passed the Assembly and the Senate but was vetoed by Governor Jerry Brown.<sup>111</sup> In Governor Brown's veto comment, he said he was "not prepared to embrace the provisions in this bill."<sup>112</sup> He then urged the University to audit itself and publish a report of its contracts and explain how contracted laborers are being protected.<sup>113</sup> SB 376 attempted to prevent the main issues AFSCME 3299 has with its labor contract and treatment by the Regents, which shows that the Regents' outsourcing practices have been an issue for, at least, the past nine years.

In the same year, other legislators spoke out against the Regents' proposed tuition hike.<sup>114</sup> The Regents proposed gradual tuition increases over the course of five years.<sup>115</sup> Even though the tuition would increase by around 5% per year, the total increase by the end of the five years was a 28% tuition increase.<sup>116</sup> The increase was unpopular with representatives and Governor Brown, but the Regents still approved the policy.<sup>117</sup> In response to the approval, the Legislature threatened to use its power of appropriation to prevent the tuition increase.<sup>118</sup>

Subsequently, Assembly Speaker Toni Atkins announced that the Assembly would look at restructuring the UC's budget to hopefully prevent the tuition hikes.<sup>119</sup> Atkins stated that the Legislature will "build the institution's budget from zero," which means it would look at each line-item appropriation with heightened scrutiny.<sup>120</sup> The goal was to reappropriate money from programs that the Assembly thinks is not being used efficiently or are unnecessary.<sup>121</sup> The restructuring of the budget could prevent the tuition hikes by either reallocating money or the Regents backtracking on the planned increases to prevent the Legislature from combing through its budget.

### III. THE REGENTS AS A STATE AGENCY

The Regents have almost complete independence to manage one of the largest public school systems in the world and are only subject to limited

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Mason, *supra* note 51.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

checks by the Legislature. Although state money goes to the UC, the Regents have almost complete authority over the school system. This differs greatly from other government agencies in California. The UC cannot be considered a state agency because the Regents control a public trust. The origin of power to control a public trust is different from statutorily created state agencies, and therefore the delegation doctrine does not apply. Although we should not consider the Regents a state agency, it is an entity that oversees large amounts of land, employs hundreds of thousands of people, and controls one of the most important higher education systems and research institutions in the state. The Regents must be more accountable and transparent than it is now. The California APA might ensure the Regents are subject to adequate accountability and transparency.

#### A. Previous Classifications of UC Regents

In previous cases, courts have made their own classifications of what the Regents should be. The courts have described the Regents' power in different ways. Over time the label given by the courts elevated the Regents to a status beyond a state agency.

Courts considered the distinctive powers the Regents have and the origin of its power when describing the Regents. In the California Supreme Court case, *In re Royer's Estate* (1899), the court described the Regents as an "institution of the state," a "public corporation," and a "government agency."<sup>122</sup> The court grappled with how the Regents are a part of the government and a public entity but have incredible sovereignty. The court's definition of "agency," in this case, was also broader than the definition now. In the late 1800s to early 1900s, "agency" was the practice of allowing someone to execute or manage something on your behalf.<sup>123</sup> The court's label of the Regents as an "agency" is accurate because the Regents are managing the UC on the behalf of the public. But the definition of "agency" has changed since then. The current definition of a state agency is an "executive or regulatory body of a state."<sup>124</sup> With the current definition, the Regents are not under the Executive Branch and do not regulate an industry; the Regents only manage the University of California system. When the court in *In re Royer's Estate* described the Regents, the 1879 CA Constitution was recently enacted, and the Regents oversaw a university system with a handful of students and faculty. The difference in the definition of agency is key when describing the Regents as an "agency."

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122. 123 Cal. 614, 619–20 (1899).

123. Henry Campbell Black, BLACK'S LAW DICTIONARY (1st ed. 1891), [https://archive.org/details/dictionaryof\\_blac\\_1891\\_00\\_20160211/page/n63/mode/2up?q=agency](https://archive.org/details/dictionaryof_blac_1891_00_20160211/page/n63/mode/2up?q=agency).

124. BLACK'S LAW DICTIONARY, AGENCY (11th ed. 2019), <https://thelawdictionary.org/agency/#:~:text=1.,principal%2C%20constituent%2C%20or%20employer>.

Just ten years later, in *City Street Improvement Corporation v. Regents of University of California*, the Supreme Court of California did not describe the Regents as a “government agency.”<sup>125</sup> The court described the Regents as a “private corporation charged with the public trust of the general government and superintendence of the University of California.”<sup>126</sup> The court thus saw the Regents as exactly what the CA Constitution intended, a public trust. However, the court is still trying to understand how exactly to categorize the Regents because—even though no particular branch controls it—this entity provides a public good, managing the UC.

In 1913, the District Court of Appeal for the First District of California created its own definition, which changed the way courts characterize the Regents.<sup>127</sup> The court labeled the Regents as a “constitutional department or function of the state government.”<sup>128</sup> The independence given to the Regents elevated the Regents above agencies, offices, or commissions due to the constitutional mandated independence from the Legislature, the Governor, and the public.<sup>129</sup> The court believed that the delegates intended for the Regents to have such high status because of its independence.<sup>130</sup>

Shortly after in two back-to-back cases, *Davie v. Board of Regents* (1924) and *In re Purington* (1926), the court used the previous label when making their own. The court in *Davie* held the Regents are a “government function,”<sup>131</sup> while the court in *Purington* held the Regents are a “state institution.”<sup>132</sup> In 1936, the court in *Pennington v. Bonelli* elevated the Regents even more. It labeled the Regents as a “branch of the state itself” and cited *Williams v. Wheeler*.<sup>133</sup> Calling the Regents a “branch of the state itself” implies that the Regents have such great power that it is equal with the legislative, executive, and judiciary branches. This would categorize the Regents as the fourth branch of the California government.

In a more modern view, courts have stated that the Regents are a state administrative agency, for a narrow application, bringing the Regents back down to the 1899 categorization.<sup>134</sup> The California Court of Appeal cited to California Government Code section 11000, which defines a state agency as

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125. 153 Cal. 776 (1908).

126. *Id.* at 777.

127. *See generally* *Williams v. Wheeler*, 23 Cal. App 619 (1913).

128. *Id.* at 622.

129. *Id.* at 623.

130. *Id.*

131. 66 Cal. App 693, 696 (1924).

132. 199 Cal. 661, 666 (1926).

133. *Pennington v. Bonelli*, 15 Cal. App. 2d 316, 321 (1936) (citing to *Williams*, 23 Cal. App. at 922–23).

134. *Ishimatsu v. Regents of Univ. of Cal.*, 266 Cal. App. 2d 854, 863 (1968).

any state “office, officer, department, bureau, board, and commission” but does not include the California State University system.<sup>135</sup> When determining the label, the court referred to a California Attorney General’s legal opinion stating that because of the Regents’ autonomy, it “constitute[s] a branch of the state government equal and coordinate with the legislative, the judiciary, and the executive branches.”<sup>136</sup> The court then qualifies their label of the Regents by explaining that the Regents have so much power it might be beyond a state agency, but for the purposes of adjudicating issues about employees, it is an agency.<sup>137</sup> The definition is vague enough to include any government worker or entity that are not legislators, the governor, and possibly state court judges. This categorization is not very helpful when determining if the Regents are an agency because of how vague the definition is and the court qualifying their label.

Over the course of seventy years, courts tried to determine the relationship between the state of California and the Regents. In the beginning, they recognized the Regents as a public corporation or government agency; they considered the Regents’ unique organization and the amount of power the CA Constitution provided. Then, courts began to see the true independence of the Regents by calling it a private corporation of a public trust or a constitutional department. The Courts and the Attorney General went further to recognize the Regents as a separate branch of the government because of its incredible power and autonomy over the UC system.

#### B. Differences Between the Regents and Other Agencies

There is no perfect label for the Regents. It is the custodian of the UC. It controls the curriculum, student conduct, employment, land use, tuition, and much more. We don’t vote for the individual Regents, so they are not elected officials; they are not judges, nor are they legislators. But they are executors; the Regents execute the law tasked to it in the CA Constitution. This is similar to state administrative agencies because agencies execute the laws tasked to it by statute. But the differences in title, scope and origin of power, and purpose make the Regents an entity beyond state agencies.

##### i. *Differences Between a Public Trust and an Administrative Agency*

One of the fundamental differences between the Regents and a California public agency is that the Regents are in charge of a public trust.<sup>138</sup> Administrative agencies function within the Executive Branch and are tasked

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135. CAL. GOV’T CODE § 11000 (1945).

136. 30 Ops. Cal. Atty. Gen., 162, 166 (1957).

137. *Ishmatsu*, 266 Cal. App. 2d at 863.

138. CAL. CONST. art. IX, § 9.

with executing laws.<sup>139</sup> Typically, agencies are delegated power from the Legislature to make rules or adjudicate conflicts within its jurisdiction as the way to execute laws.<sup>140</sup> State agencies may be tasked to create binding rules that the Legislature cannot because the Legislature lacks expertise or time. An example of this is when a statute tells an agency to create a cap on carbon emissions for oil refineries. The Legislature might not have the resources to determine what a reasonable cap is because it does not have the capacity to meet with environmental experts, oil companies, or hear from the public who have opinions or a stake in the regulation. The Legislature also might not have staff who are experts about the environment. Agencies likely have adequate time and resources to make educated rules and regulations. Essentially, the Legislature provides agency direction, and the agency decides how to complete it.

In contrast, the CA Constitution created the UC as a public trust administered by the Regents. A public trust is an authority to manage the use of a resource.<sup>141</sup> Public trust doctrine originated in the Byzantine Empire, when Justinian declared that the air, water, sea, and the coast as common property of all the people.<sup>142</sup> Although the delegates in the 1879 Constitution did not set the Regents in charge of natural elements or resources, the delegates gave the Regents control of a public good: higher education. The Regents do not have a statute providing guidelines or limitations on how it should govern the University system. In fact, the CA Constitution explicitly states that the Legislature cannot tell the Regents how to manage university affairs.<sup>143</sup> The Regents can therefore create its own path.

Whereas the Legislature creates administrative agencies through statutes that delegate certain tasks, the CA Constitution created the Regents to supervise the UC as a public trust with virtually full powers of self-governance. The origin and scope of its power clearly distinguishes the Regents from any other state agencies and entities.

#### ii. *Effects of the Origin of Regents' Power*

The origin of power is incredibly important when determining the degree of legislative oversight. Statutes can create agencies, and subsequent statutes can change them.<sup>144</sup> The Legislature has almost full control over the

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139. *Att'y Gen. Final Rep. on Admin. Proced.* No. 7-11, at 19–20 (Jan. 22, 1941).

140. *Id.*

141. William D. Araiza, *Democracy, Distrust, and the Public Trust: Process Based Constitutional Theory, The Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 *UCLA L. REV.* 385, 387 (1997).

142. *Id.* at 395.

143. CAL. CONST. art. IX, § 9.

144. *Immigr. Naturalization Serv. v. Chadha*, 462 U.S. 919, 944–59 (1983).

powers, mission, and existence of administrative agencies.<sup>145</sup> If the agency is executing a rule in a way the Legislature does not agree with, it can pass a law preempting the rule.<sup>146</sup> But the Legislature does not have unilateral power to void agency rules. For a statute to invalidate an agency's rules, the statute must go through the constitutional requirements of enactment, which means passing both the Assembly and the Senate, and then signed by the Governor.<sup>147</sup> Therefore both the Legislature and the Governor must disagree with the agency's actions. This means that the Executive Branch—the branch housing the agency—must oppose the rule for the Legislature to preempt it.

Because the CA Constitution grants the Regents its powers, the Legislature cannot pass laws preempting a rule by the Regents. With the two-zone system of statewide concern and exclusively university affairs, the Legislature can only pass laws that are of a statewide concern,<sup>148</sup> and the Regents can only pass rules involving exclusively university affairs.<sup>149</sup> These two mutually exclusive zones means that the Legislature cannot preempt the Regents' regulations like it can with agency rules.

### iii. *Application of the Delegation Principle to the Regents*

The Delegation Principle preserves the separation of powers by limiting how the Legislature can transfer power to a different branch.<sup>150</sup> A valid delegation requires the Legislature to identify fundamental policy issues and “provide adequate direction for the implementation of that policy.”<sup>151</sup> Courts have applied very broad standards as valid delegations; some examples “promoting uniformity”<sup>152</sup> and “public convenience and necessity.”<sup>153</sup> As long as the Legislature provides some sort of guidelines, the delegation would likely be upheld by a court.

Delegation is required when the Legislature creates an agency because it is delegating its own legislative power, quasi-judicial power, or both to the

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145. *Id.*

146. *Id.*; see *Carmel Valley Fire Prot. Dist. v. State of Cal.*, 25 Cal. 4th 287, 298–308 (2001) (applying *Chadha* to California agencies).

147. *Chadha*, 462 U.S. at 944–59; CAL. CONST. art. IV, § 8(b)(3) (bicameralism requirement); CAL. CONST. art. IV, § 10(a) (governor's signature requirement).

148. *Goldbaum v. Regents of Univ. of Cal.*, 119 Cal. Rptr. 3d 664, 706 (2011).

149. CAL. CONST. art. IX, § 9.

150. *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 530–31 (1935); see also MICHAEL ASIMOW ET AL., CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW: CH. 2-B DELEGATION OF LEGISLATIVE AND ADJUDICATORY POWER TO ADMINISTRATIVE AGENCIES (RUTTER GROUP, Nov. 2023).

151. *Sacramentans for Fair Plan. v. City of Sacramento*, 37 Cal. App. 5th 698, 716 (2019).

152. *Southern Pac. Transp. Co. v. Pub. Util. Comm'n*, 18 Cal. 3d 308, 313 (1976).

153. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 167–68 (1976).



Executive Branch. So, the Legislature must attach guiding principles to the statute establishing limits on the agency's scope.<sup>154</sup> The Legislature can change the delegation standards, the scope of the task, and the agency's power by amending the agency's authorizing statute.<sup>155</sup> This only applies when one branch grants its Constitutionally appointed powers—and only those explicitly given—to another.<sup>156</sup> For example, it is unconstitutional for the Executive Branch to enact rules because the Constitution attributed that power to the Legislature.<sup>157</sup> The usurpation of the Legislature's authority violates the principle of separation of powers.<sup>158</sup> It is constitutional, and not a violation of separation of powers, for the Legislature to delegate a subset of its power to the Executive Branch.<sup>159</sup>

The origin of power determines whether the delegation principle applies. Public entities created by the CA Constitution are not subject to the delegation principle because it received power from the document creating the state itself. If the CA Constitution creates and reserves a power to an entity, then the Legislature can no longer exercise that power. The Legislature cannot delegate power it does not have. Delegation is unnecessary, and, in fact, is unpermitted for constitutionally created agencies because the Legislature is not giving its powers to another branch and therefore, there isn't a separation of powers issue. Here, the Regents receive its power through the CA Constitution, so the Legislature cannot alter it, like statutory created agencies. The Constitution thus insulates and protects the Regents' power.

#### *iv. The Regents' Purpose Differ from State Agencies*

A major difference between the UC and state administrative agencies are the entities' purpose. Administrative agencies typically have regulatory powers or provide benefits.<sup>160</sup> Regulatory agencies enforce regulations created by either the Legislature or by the agency itself.<sup>161</sup> An example of a regulatory agency is if the Legislature delegates power to an agency to make reasonable greenhouse gas emission caps. The agency would then create a rule that curbs greenhouse gas emissions and enforce that rule. Welfare

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154. *Kulger v. Yocum*, 69 Cal. 2d 371, 376–77 (1968).

155. MICHAEL ASIMOW ET AL., CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW, *supra* note 151.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. MICHAEL ASIMOW ET AL., CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW, *supra* note 151, at CH. A-1:2 Delegation of Adjudicatory Power.

161. *Id.*

agencies typically execute laws by providing public benefits.<sup>162</sup> An example is an agency that provides unemployment payments. The Legislature typically tasks administrative agencies with either of those two purposes.

The Regents does not regulate, nor does it provide benefits. The Regents does not have regulatory powers over the industry of higher education; it only has power over the UC. If the Regents had regulatory power over the industry, its rules would affect the California State University system and all private universities in California. All of the rules created by the Regents only apply to the UC. The Regents does not provide benefits because higher education at a UC is not a public benefit in the same way unemployment is. Californians are entitled to unemployment assistance, but they are not entitled to an education from a UC campus. Because the Regents does not regulate industries or provide benefits, it does not have the same purpose as administrative agencies.

The Regents' purpose is to manage the UC, which is only one part of higher education in California. There are two public university systems and many private universities in the state. Because the UC is one part of higher education in California, the Regents is participating and competing in the industry of higher education. It is competing to attract students, professors, and researchers to increase its rankings. Although we don't typically consider universities as businesses, they are all competing over students to receive more money in tuition and competing over professors to attract more prestige. To analogize, California has the Public Utilities Commission ("PUC"), which regulates utility companies.<sup>163</sup> It is not involved in the market of utilities; it just makes rules and regulations.<sup>164</sup> The PUC does not control its utility providers and consumers cannot get utilities directly from the PUC.<sup>165</sup> Unlike the PUC, the Regents is more hands-on because it participates in its own industry, higher education.

Administrative agencies usually do not get involved in the market. It is completely separate as a regulator or executor of laws. The Regents do participate because it controls a competing entity of higher education. The Regents have an entirely different purpose than typical administrative agencies.

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162. *Id.*

163. CALIFORNIA PUBLIC UTILITIES COMMISSION, <https://www.cpuc.ca.gov> (last visited Apr. 1, 2024).

164. *See generally* CALIFORNIA PUBLIC UTILITIES COMMISSION, CPUC Overview <https://www.cpuc.ca.gov/about-cpuc/cpuc-overview> (last visited Apr. 12, 2024).

165. *E.g.* CALIFORNIA PUBLIC UTILITIES COMMISSION, Regulated Water and Sewer Utilities (Apr. 22, 2016), <https://www.cpuc.ca.gov/-/media/cpuc-website/files/legacyfiles/r/10498-regulated-list-03-22-2016-use-this-one.pdf> (last visited Apr. 12, 2024) (listing contact information for utility companies to assist its local consumers).

### C. Determining the Classification of the Regents

Because of the Regents' unique legal status, there is not a clear classification to place it in, but it is possible to rule out certain classifications. One of the labels the Regents do not fit into is an administrative agency. Courts have never ruled that the Regents, in its entirety, is an agency under the current definition.

Even if the Regents receive the label of an "agency" as defined in section 11000 of the Government Code, in practice, the Regents are materially different from agencies because of its title, its origin of power, the lack of delegation, and their purpose. Because of current caselaw and the differences from state agencies, we should not consider the Regents as a state administrative agency.

## IV. APPLYING ADMINISTRATIVE LAW TO THE REGENTS TO ENSURE ACCOUNTABILITY AND TRANSPARENCY

Although the Regents' classification is unknown, it still has incredible autonomy and faces little accountability by the public and elected officials. The Regents are unelected, so the public has little say over who controls the UC.<sup>166</sup> In order to place some accountability and transparency, the California APA is a possible solution.

### A. The Goals of the California Administrative Procedure Act

The California APA was enacted in 1945 to increase transparency of agency action and provide procedural directions for California state agencies.<sup>167</sup> The goals of the California APA are to provide the public with avenues to participate in the agency rulemaking process and for agencies to enact beneficial resolutions.<sup>168</sup> The public can participate by filing petitions to start an agency rule or commenting on pending rules.<sup>169</sup> The California APA sets procedures for the whole rulemaking process, starting from notice to judicial review.<sup>170</sup> It requires agencies to follow guidelines that provide more transparency and that agency decisions are based on expert advice and evidence.<sup>171</sup> The California APA is guiding law for state agencies and may help keep the Regents accountable.

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166. CAL. CONST. art. IX, § 9(e).

167. CAL. GOV'T CODE § 11340 et seq. (1993); ADMINISTRATIVE PROCEDURE ACT & OAL REGULATIONS, [https://oal.ca.gov/publications/administrative\\_procedure\\_act/](https://oal.ca.gov/publications/administrative_procedure_act/) (last visited Apr. 1, 2024).

168. *Id.*

169. CAL. GOV'T CODE § 11340.6 (1994); CAL. GOV'T CODE § 11346.45 (2000).

170. CAL. GOV'T CODE § 11343 (2012); CAL. GOV'T CODE § 11350 (2006).

171. CAL. GOV'T CODE § 11349 (2000).

## B. Exceptions to California Administrative Procedure Act that Might Apply to the Regents

There are nine exceptions outlined in the California APA, and two may be related to the Regents and its powers.<sup>172</sup> The two relevant exceptions are: “a regulation that related only to the internal management of the state agency” and “a regulation that is directed to a specifically named person or group of persons and does not apply generally throughout the state.”<sup>173</sup> If the Regents’ regulations fall under one of the two exceptions, then the California APA’s required procedures do not apply, and the California APA, as currently drafted, cannot be a method to ensure accountability and transparency.

### i. *If the Regents’ Regulations are Related to the Internal Management of the State Agency*

The internal management exception may apply because of the power given to the Regents from the CA Constitution. Because the CA Constitution gives “full powers of organization and governance” to the Regents,<sup>174</sup> the Regents have control over employees, student discipline, curriculum, and tuition.<sup>175</sup> While there is not a clear-cut test to determine what kind of regulations apply only to internal management to satisfy the exception, there is caselaw where courts determine whether, in specific examples, a regulation is related to internal management. Previous internal management regulations cases unsuccessfully challenged (1) a policy that prescribed how an agency tasked with evaluating pesticides prioritized its assessments<sup>176</sup> and (2) an investigatory method to determine if a licensee violated a regulation.<sup>177</sup> The two cases show that regulations outlining how information will be attained are exempted from the California APA. Although Courts have never defined “internal management,” it determined that this exception is narrowly applied and is unavailable when a rule has general application that affects people or entities outside of the agency.<sup>178</sup>

The Regents would argue that because its power only covers the organization and governance of the UC system, all of its rules relate to the internal management of the school system. There are some rules that easily fall

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172. CAL. GOV’T CODE § 11340.9 (2000).

173. CAL. GOV’T CODE § 11340.9 (2000).

174. CAL. CONST. art. IX, § 9.

175. *Wall*, 38 Cal. App. 2d at 699–700; *S.F. Lab. Couns.*, 26 Cal. 3d at 789; *Hamilton*, 219 Cal at 664.

176. *Californians for Pesticide Reform v. Dep’t. of Pesticide Regul.*, 184 Cal. App. 4th 887, 907 (2010).

177. *Americana Termite Co. v. Structural Pest Control Bd.*, 199 Cal. App. 3d 228, 244 (1988).

178. *Californians for Pesticide Reform*, 184 Cal. App. at 907.

within the exception, like a rule dictating procedure for workplace misconduct hearings. Other regulations the Regents might claim as internal organization and governance are not so clear, like a rule limiting the student to professor ratio. The rule would not affect the ratio of private universities or other public school systems. It only directs the different UC campuses to hire more professors or lower its acceptance rate. Arguably, that rule is about the organization of the schools. Because UC rules only affect the UC, the rules are completely internal. However, this rule doesn't specifically relate to the internal management of the school, like personnel policies. It may also indirectly impact external entities because the UC participates in the market of higher education. The UC's rules affect the students, their families, educators and faculty, and the communities around the university campuses. A rule about the ratio of students to professors may affect graduation rates, which may affect the ranking of the UC. The ranking of the UC may affect the number of applicants, which may then impact the enrollment of other universities. The UC does not exist in a vacuum. This "internal" rule would likely affect external entities.

Three questions arise from this: first, can a rule still be internal if it affects external entities? Second, are students and professors considered to be outside the agency? And finally, if they are, then would the rule be ineligible for the exception? If the rule is ineligible for the exception, it would then be subject to California APA notice and comment requirements.

Another major question is whether we should consider students, faculty, or staff as part of the UC as an entity. They are individuals who purposely and intentionally joined the UC, but they are not UC staff, who perform duties directly for the Regents or engage in day-to-day governance. Although a majority of UC rules impact students, faculty, or staff, it is unclear who we should consider "outside" or "inside" the agency. The term "faculty" may be further complicated by the UC's use of adjunct professors, lecturers, and visiting professors. If they are "outside" of the UC, then its "internal" rules would become less internal as it would affect outsiders. Because the exception is supposed to be narrow, it is likely that students, faculty, and possibly faculty-adjacent would be considered "outside" of the UC.

There is an exception to the exception, which makes an "internal" rule subject to the California APA. Internal rules cannot (1) have general application or (2) affect people or entities outside of the agency.<sup>179</sup> The Regents would argue that the California APA only applies to an internal rule that fulfills both elements. Relatedly, it could argue that even if we categorize students and faculty as outside of the agency, UC rules are not generally applicable because those rules only directly affect the UC.

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179. *Id.*

That argument is likely unpersuasive because the internal management rule is meant to be narrow in scope. Courts will likely find that if they require both elements, more rules would be exempted from the California APA, broadening the exception. A court may easily decide that the “and” for the exception-within-the-exception was a semantic error and “or” should connect the two factors instead. That change would then make the rules affecting students or faculty subject to the California APA. With the current restriction of the exception requiring both parts, it is likely that the UC’s rules will be exempted from the California APA. But if challenged, it is possible the courts would amend the restriction requiring only one part, making the California APA apply to the rules affecting students or faculty.

*ii. If the Regents Direct Its Regulations to a Specifically Named Person or Group of Persons and Do Not Apply Generally Throughout the State*

The second possible exception is that the regulation specifically names a person or group of people and does not apply generally throughout the state. The rules created by the UC apply to people who intentionally and knowingly interact with the UC. Although the rules might not refer to people by name, many rules affect other portions of California’s population. For example, a rule limiting dorm rooms to two students in each room would likely impact landlords of communities neighboring UC campuses because there is less on-campus housing available to students. The students would then have to find housing elsewhere. So even though the rule doesn’t name the landlords or directly regulate off-campus housing, the rule certainly impacts the availability of housing on and off campus. Indirect impacts on individuals who are not a part of the group do not disqualify the rule from the exception.<sup>180</sup>

The main issue with this exception is that it does not define how large the group must be before the rule is considered to “apply generally” and fall outside the scope of the exception. However, it is possible for the UC to direct a rule towards a large group and not apply it generally throughout the state. The Regents would argue that limiting the amount students that can live in one dorm room only affects a certain group of people, UC students, and does not apply generally to the other colleges or universities throughout the state. Because it does not apply generally, the rule should fall under the exception even though the rule could affect hundreds of thousands of students. However, it is unlikely that a court would think a rule affecting thousands of people can be a part of the exception because, even if it does not apply generally throughout the state, it affects too many people to not go through the necessary procedure that ensures transparency and fairness.

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180. *Morales v. Cal. Dep’t of Corr. & Rehab.*, 168 Cal. App. 4th 729, 740 (2008).

### C. Making the California Administrative Procedure Act Applicable to the Regents

The two exceptions of the California APA, the internal management exception and the group exception, could make a majority of the UC's rules not subject to the California APA.<sup>181</sup> Although courts would likely hold that the UC's rules do not fall under the exceptions, the Legislature may ensure the California APA requirements apply to the Regents in three ways: first, the Legislature can exclude the UC from the California APA exceptions; second, the Legislature defines the Regents as an agency; or third, the Legislature can apply the California APA to certain UC rules.

First, the Legislature could explicitly exclude the UC from the California APA exceptions by amending § 11340.9 of the California Government Code. However, if the Legislature were to make all UC rules subject to the California APA, it would cause a major delay and unnecessary public scrutiny for any change or decision made by the Regents.

Second, the Legislature could enact a provision stating that for the purposes of the California APA, the Regents are an agency. But this solution may not solve the issues with the exceptions, because even if we classify the Regents as an agency and its rules fit under the exceptions, then its rules are still not subject to the procedural requirements. This amendment would only work if a court held that students, faculty, and faculty-adjacent are outside of the agency, the restriction is an "or" instead of an "and," and that "group" is not big enough to encompass thousands of people.

Third, the Legislature can amend the California APA to apply to certain rules by the Regents and not apply to other rules. This option would be incredibly tedious for the Legislature because the new law would have to expressly state every inclusion and exclusion; or they could focus only on specifying every exclusion and remain silent on inclusion, or vice versa. This solution is impractical because the Legislature would have to craft the law with extreme detail. Additionally, lawmakers would likely have to amend the provision often in response to the constant growth of the Regents' power.

The Regents could challenge these amendments on constitutional grounds unless a court holds that students, faculty, and faculty-adjacent are outside of the agency, the restriction is an "or" instead of an "and," and that "group" is not big enough to encompass thousands of people. The Regents would likely argue that having full powers of governance includes making its own procedure for its rules. The Regents would also likely argue that because the Legislature cannot enact legislation within the zone of exclusively university affairs, it cannot make the California APA applicable to the Regents because all its rules are exclusively university affairs, even

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181. CAL. GOV'T CODE § 11340.9 (2000).

procedure. Although the Legislature may try to expressly include the Regents in the California APA, the Regents will more than likely challenge any changes. The most effective way to hold the Regents more accountable is to amend the CA Constitution.

### CONCLUSION

The UC has greatly evolved from what it was in 1879. At that time, the main concern was preventing government corruption from affecting the UC. Because of that fear, the Regents have incredible autonomy with limited accountability. Although the historical circumstances do not apply now, the Regents have the same power. But the scope of that power increases as the UC grows. The UC has global influence due to its high-ranking programs and innovative research. Today the Regents exerts global influence—wielding far more power than when it was first created. While there is no doubt that the Regents played the main role in expanding the UC to what it is now, there are considerable issues with internal governance that can result in a scandal, harming the UC as a whole.

The CA Constitution gave the Regents full powers of organization and government of the UC. If the Legislature wants to change something in the UC, it must pass legislation within the three zones: appropriation, laws regulating private entities, and laws regulating public agency activity of a statewide concern. Because the Legislature has limited options to restrict the Regents, the California APA may serve as another useful tool to ensure accountability.

It's unlikely that the Regents are an administrative agency, however, that does not disqualify it from the procedural requirements set out in the California APA. It is unclear if the California APA would apply to the UC rules because of the internal management exception and the group exception. However, the size and influence of the UC system may influence a court to find that the impacts of the UC are too important for the exceptions to apply.

The Legislature may also amend the California APA to apply to the Regents. There are three possible ways to include it: exclude the Regents from the exceptions, define the Regents as an agency for the purposes of the California APA, or specifically say which UC rules must go through California APA procedure and which rules do not. But the enactment and enforcement would not be easy because of the vast constitutional power provided to the Regents.

The lack of accountability and transparency is because of the CA Constitution. The most impactful change would come from a constitutional amendment changing the scope of the Regents' powers.

The Regents have incredible power with very little checks from the public and elected officials because of a constitutional provision as old as the



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state itself. While the California APA may be able to ensure accountability, the most comprehensive change would be a constitutional amendment limiting the Regents' power.