

Judicially Created Uncertainty: The Past, Present, and Future of the California Writ of Administrative Mandamus

Sam Walker *

Perhaps nothing so typifies American law nor creates more difficulty for its consistent practice than the presence of many, varied, and often rival, adjudicatory systems. As the product of federalism, well-cared for judicial autonomy, and a burgeoning bureaucracy as independent as it is powerful, the struggle of these systems to collectively dispense consistent justice engenders exceedingly difficult problems of law and procedure.¹ The ability of courts to craft self-imposed procedural limitations is crucial in this area of converging jurisdictions;² yet it is often in this area that the predictability and consistency of the law breaks down. The search for predictability and consistency in judicial review of administrative adjudicatory decisions has resulted in the use of the writ of administrative mandamus.

This is perhaps why the California courts' use of the writ of administrative mandamus in review of administrative adjudicatory decisions is troublesome. Because the constitutional status of these agencies has remained unclear, the California Supreme Court has only very slowly and vaguely defined the parameters of the writ procedure. Indeed, it has remained so undefined that new rules are effectively established for each case.³ The court has tried time and again to define the scope of review for the writ, to

* B.A. 1981, M.A. 1986, University of Utah, J.D. 1989, Hastings College of the Law. Mr. Walker is an associate with the San Francisco law firm of Broad, Schulz, Larson & Wineberg.

¹ See *Bixby v. Pierno*, 4 Cal. 3d 130, 142, 481 P.2d 242, 250, 93 Cal. Rptr. 234, 242 (1971) (courts reacted with "suspicion" and "fear" to the powers given the "burgeoning bureaucracy" that grew with the twentieth century).

² See *id.* For a discussion of a court's attempt to restrain judicial review, see *infra* notes 151-63 and accompanying text.

³ See *infra* notes 121-22 and accompanying text.

afford petitioners predictable and consistent outcomes. Yet despite valiant efforts the procedure for the writ of administrative mandamus in California remains in large part a mystery.⁴

This Article examines the evolution of this writ, considers its current state, and reviews possible proposals for reform.⁵ Part I describes the historical development of the writ. The supreme court in effect created the writ from ordinary mandate to allow judicial review of administrative adjudicatory decisions that would otherwise have been unreviewable. Part II traces the meandering and futile efforts of the supreme court to define the appropriate standard of review. After the legislature codified the standard of review, the supreme court attempted to create a bright line test called the *Bixby-Strumsky* rule.⁶ Under this "rule," the court would independently review administrative actions by reweighing the evidence only if those actions implicated rights that were "fundamental" and "vested;" otherwise, it would apply a deferential "substantial evidence" review. Part III examines some of the supreme court's opinions after the so-called "seminal" *Bixby-Strumsky* rule, demonstrating the persisting fluidity of the stan-

⁴ California's administrative mandamus procedural rules remain unique; most other states have not chosen to follow California into this legal maze. Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1492-93 (1988) [hereafter Note, *Factual Determinations*] (noting that "most other states have declined to adopt California's broad scope-of-review requirement"); Note, *Strumsky v. San Diego County Employees Retirement Association: Determining the Scope of Judicial Review of Administrative Decisions in California*, 26 HASTINGS L.J. 1465, 1469 n.25 (1975) [hereafter Note, *Determining the Scope*] (noting that "California is exceptional in [its] use of the writ of mandamus");

⁵ This Article does not delve into the various theories of judicial review of administrative actions nor the general status of judicial review in other states and the federal courts. There are a number of good studies of these topics to which the reader may refer. *E.g.*, *Administrative Law Symposium: Question & Answer With Professors Elliott, Strauss, and Sunstein*, 1989 DUKE L.J. 551; Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537; Frohnmayer, *National Trends in Court Review of Agency Action: Some Reflection on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act*, 3 B.Y.U. J. PUB. L. 1 (1989); Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986); Sunstein, *On The Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522. For a broader treatment of the subject from an administrative law perspective, the reader should consult K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1978).

⁶ See *infra* notes 103-28 and accompanying text.

dard. This fluctuating standard precludes a definitive statement of any "rule," and weakens the role of precedent in imparting predictability to the administrative mandamus procedure. Following review of various legislative and judicial proposals in Part IV, this Article concludes that, notwithstanding the inconsistent judicial evolution of the writ, the dual standards of review that the court has refused to abandon⁷ do have benefits. These benefits can be preserved, however, only if the court finally posits a reliable test.

I. FUNCTION WITHOUT POWER: THE CREATION OF THE WRIT OF ADMINISTRATIVE MANDAMUS

The birth of the writ of administrative mandamus in California has already been well chronicled.⁸ Yet after half a century of continuing labor the supreme court is still trying to carve out an appropriate role for the judiciary relative to administrative agencies that do not have constitutional grants of judicial powers.⁹

Until 1936 the supreme court accepted the use of the writ of certiorari to challenge administrative findings.¹⁰ Then, in *Stan-*

⁷ See *infra* note 163 and accompanying text.

⁸ See, e.g., Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285 (1950) [hereafter Kleps, *Certiorarified Mandamus I*]; Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions—1949-1959*, 12 STAN. L. REV. 554 (1960) [hereafter Kleps, *Certiorarified Mandamus II*]; McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CALIF. L. REV. 110 (1941) [hereafter McGovney, *Administrative Decisions*]; McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies*, 15 S. CAL. L. REV. 391 (1942) [hereafter McGovney, *California Chaos*]; Note, *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board: Administrative Adjudications and the Substantial Evidence Standard of Judicial Review*, 68 CAL. L. REV. 618 (1980) [hereafter Note, *Administrative Adjudications*]; Note, *Determining the Scope*, *supra* note 4; Comment, *A Proposal for a Single Uniform Substantial Evidence Rule in Review of Administrative Decisions*, 12 PAC. L.J. 41 (1980) [hereafter Comment, *Proposal*]. These are by and large summary accounts. The present section of this Article will not replicate these discussions but will follow their lead into a more comprehensive examination of the development following *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 87 P.2d 848 (1939), *infra* notes 26-63 and accompanying text.

⁹ See *infra* notes 105-07 and accompanying text.

¹⁰ See, e.g., *Suckow v. Alderson*, 182 Cal. 247, 250, 187 P. 965, 966 (1920).

Standard Oil Co. v. State Board of Equalization,¹¹ the court determined that the writ of certiorari was inappropriate to review administrative adjudications.¹² A year later the court decided that the writ of prohibition was also inappropriate.¹³ Finally, in *Drummev v. State Board of Funeral Directors*,¹⁴ the court determined that the writ of mandate was the proper tool to seek judicial review of administrative decisions.¹⁵ The court settled on the writ of mandamus simply because there were no other writs available and if mandate did not serve, the administrative agencies would have the final word.¹⁶ Such a situation would be unacceptable because in California when jurisdiction is allegedly exceeded, the privilege of finality is reserved exclusively for the courts.¹⁷

Thus the difficulty in seeking review of administrative decisions was not in specifying the particular writ to be used, but rather in determining the rules that would govern its use for this new purpose. Because the writ of mandate justified the exercise of judicial power in situations where it was not otherwise available, it was essential to the writ's very applicability to determine its standard of review. The available options included a complete trial

¹¹ 6 Cal. 2d 557, 59 P.2d 119 (1936).

¹² The California Supreme Court declared itself without jurisdiction to review by writ of certiorari the decision of a state board if the board was not constitutionally authorized to exercise judicial power. *Id.* at 559, 59 P.2d at 119. Because the constitution specifically reserved judicial decisionmaking power to the courts, CAL. CONST. art. VI, unless specifically authorized elsewhere in the Constitution, administrative agencies were not making judicial decisions. *Standard Oil*, 6 Cal. 2d at 559, 59 P.2d at 119. The court found the writ of certiorari proper only to review decisions of lower courts exercising such judicial decision-making power. *Id.* The opinion applies only to state-wide agencies because it is only to those agencies that the limited constitutional delegation was relevant. *Id.* at 559-60, 59 P.2d at 119-20.

¹³ *Whitten v. California State Bd. of Optometry*, 8 Cal. 2d 444, 65 P.2d 1296 (1937) (indicating that without constitutional grant of judicial power, agencies cannot exercise judicial functions, and legislature cannot confer that power upon agencies).

¹⁴ 13 Cal. 2d 75, 87 P.2d 848 (1939).

¹⁵ The court declared that the writ of mandamus could be used to do what certiorari and prohibition could not. *Id.* at 82, 87 P.2d at 852.

¹⁶ After acknowledging that following *Standard Oil* and *Whitten* there was no other remedy for review of administrative decisions, the Court concluded that the writ of mandate must serve this purpose because it historically did so in the absence of other judicial or statutory procedures. *Id.*

¹⁷ CAL. CODE CIV. PROC. § 1068 (West 1980).

de novo,¹⁸ reweighing of the evidence,¹⁹ and a mere review of the prior proceeding to determine that there was substantial evidence to support the agency's findings.²⁰ Agencies in other jurisdictions performed what were considered to be quasi-judicial functions, so their decisions could be reviewed on petition for either writs of certiorari or prohibition, using the substantial evidence test.²¹ Because the California Supreme Court had found in *Standard Oil* that statewide administrative agencies do not exercise such quasi-judicial powers,²² however, defining the courts' scope of review of nonjudicial fact-finders became necessary.

A. *The Shifting Ground For Independent Judgment Review*

From its first efforts to determine the standard of review, the supreme court could see neither wisdom nor constitutionality in a single standard.²³ After first considering complete trial de novo review,²⁴ the court settled on reweighing of the evidence and the substantial evidence test as the proper standards in appropriate cases.²⁵ The problem came in determining what those appropriate cases were. In cases decided soon after *Standard Oil* the court rested the separate standards on viable theories of constitutional law. In a series of opinions beginning with *Drummey v. State Board of Funeral Directors*,²⁶ and followed by legislative codification of the writ and the dual standards, the supreme court explained why the separation of powers doctrine and the due process clauses of the federal and California constitutions mandated independent judg-

¹⁸ See *infra* notes 35-38 and accompanying text.

¹⁹ See *infra* note 39 and accompanying text.

²⁰ See *infra* note 46 and accompanying text.

²¹ *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 83, 87 P.2d 848, 852-53 (1939).

²² *Standard Oil Co. v. State Bd. of Equalization*, 6 Cal. 2d 557, 559-60, 59 P.2d 119, 118-20 (1936).

²³ See *Drummey*, 13 Cal. 2d 75, 87 P.2d 848. For a discussion of the court's rejection of the single standard, see *infra* notes 39-41 and accompanying text. The benefits the court saw in the availability of a stricter standard outlasted its view that it was constitutionally mandated. Yet it was not until 1979, in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979), that the court expressly acknowledged that a separate standard was not constitutionally required.

²⁴ See *infra* notes 33-38 and accompanying text.

²⁵ See *infra* notes 39-40 and accompanying text.

²⁶ 13 Cal.2d 75, 87 P.2d 848 (1939).

ment review of some administrative adjudicative decisions. Exactly which administrative decisions those are neither the court nor the legislature has yet decided.

1. The Separation of Powers Rationale

The independent judgment standard was ostensibly the product of the supreme court's view that administrative adjudication contravened the California Constitution's separation of judicial power from all other powers.²⁷ First in *Drummey*, then in *Laisne v. California State Board of Optometry*,²⁸ the court concentrated on the separation of powers doctrine, as opposed to the due process rationale, for requiring independent review.²⁹

In *Drummey*, the court reasoned that if the same deference were paid to findings by administrative agencies as was given those of lower courts,³⁰ then the administrative agencies would be exercising at least quasi-judicial powers.³¹ Because these agencies were not part of the judiciary, the reviewing courts must not be limited in the same manner that they would be if they were reviewing the decision of another court.³²

Exploring another facet of independent review in *Laisne*, the supreme court considered whether the trial court had properly denied the petitioner the opportunity to introduce new evidence in court.³³ The trial court had rendered its decision based wholly on the record of evidence heard by the Board.³⁴ The petitioner

²⁷ CAL. CONST. art. III, § 3.

²⁸ 19 Cal. 2d 831, 123 P.2d 457 (1942).

²⁹ In both *Drummey* and *Laisne* the court considered both separation of powers and due process concerns. Both cases, however, addressed the due process contentions only briefly. In *Laisne*, the discussion consisted of a citation to a series of cases finding due process violations, interspersed throughout the general separation of powers discussion. *Laisne*, 19 Cal. 2d at 845, 123 P.2d at 465. Likewise, *Drummey* began with a short discussion of due process concerns, quickly concluding that such concerns were unfounded. *Drummey*, 13 Cal. 2d at 80-81, 87 P.2d at 851. The balance of the discussion was devoted to separation of powers.

³⁰ Such appellate deference to lower courts required that the reviewing court was bound by a lower court's factual findings if based on substantial, although conflicting, evidence.

³¹ *Drummey*, 13 Cal. 2d at 84, 87 P.2d at 853. The court noted that "it is the essence of judicial action that finality is given to findings based on conflicting evidence." *Id.*

³² *Id.*

³³ *Laisne*, 19 Cal. 2d at 833, 123 P.2d at 459.

³⁴ *Id.*

contended that *Drumme*y required the court to hold, in effect, a trial de novo,³⁵ and a majority of the supreme court agreed.

The reasoning of the *Laisne* majority and the dissent's response to it reflected the court's struggle to determine exactly what type of power administrative agencies possessed.³⁶ Refusing to recognize the agencies' power as a hybrid of legislative or executive and judicial, the court concluded again in *Laisne* that the procedures accorded parties appearing before the Board would effectively constitute the exercise of judicial power if the resulting decision were given the finality due a trial court decision.³⁷ Therefore, administrative decisions must not be entitled to such finality; courts were not bound by them, but must instead hold a trial de novo and hear any new evidence offered.³⁸

Yet even while espousing this separation of powers rationale the court suggested a qualification that would complicate the procedure and confuse those searching for precedent for the next fifty years. The finality factor notwithstanding, the court implied that independent review was only available for some administrative decisions. While suggesting that only those decisions involving vested property rights would qualify for de novo review,³⁹ the court nevertheless expanded the permissible field of rights for

³⁵ *Id.* As the dissent pointed out, the petitioner in *Laisne* actually asked the court to go beyond *Drumme*y. *Drumme*y provided for the reviewing court's independent review and judgment on the evidence introduced in the administrative hearing, but apparently did not allow the introduction of new evidence, or in other words did not require a new trial in the superior court proceeding. *Id.* at 851, 123 P.2d at 468 (Gibson, C.J., dissenting).

³⁶ In essence, the majority limited agency adjudicatory power by recognizing that the separation of powers doctrine allows administrative agencies only to *administer* the law, while *final adjudicatory* power must remain with the courts. *Id.* at 838, 123 P.2d at 461-62. The dissent, on the other hand, argued that the separation of powers doctrine should be liberally construed to allow "inferior" adjudicatory (*quasi-judicial*) functions to be vested in agencies. *Id.* at 859, 123 P.2d at 472-73.

³⁷ *Id.* at 835, 123 P.2d at 460. Though the court recognized that some overlap in functions could not be avoided, it stated that only by access to a court of law could the petitioner be guaranteed the protection of the constitution. *Id.*

³⁸ *Id.* Confining the trial court's evidence to that which was on record before the agency would preclude a true independent judgment on the facts. *Id.*

³⁹ *Id.* at 843-44, 123 P.2d at 464-65. The court distinguished initial applications for permits to appropriate property from revocations of those permits, implying that only in the later case may a right be "vested." The court then stated that "depriving a person of [such a vested] property right

which independent review was appropriate. The *Drumme*y court indicated that the separation of powers requirement mandated independent review when *rights protected by the constitution* were threatened by the decision.⁴⁰ The court also indicated that due process required this standard of review when constitutional rights were involved.⁴¹

2. The Due Process Rationale

The due process clause of the United States Constitution provided the second constitutional ground upon which the court found a rationale for requiring independent judgment review of some cases. More specifically, the court looked to the doctrine which held that governmental actions seeking to deprive a person of a life, liberty, or property interest must adhere to prescribed standards of procedural fairness — the doctrine of procedural due process.⁴² The principal focus of this doctrine, and the point at which it initially became relevant to administrative mandamus, is the determination of which rights or interests qualify for heightened procedural protection, an inquiry that is especially problematic for would-be property interests.⁴³

The court in *Drumme*y noted that, according to several recent United States Supreme Court decisions, due process required judicial review of legislative agencies' decisions when those decisions involved "rights either of person or of property [that] are protected by constitutional restrictions."⁴⁴ According finality to a

. . . is the full exercise of judicial power." That exercise requires a trial de novo. *Id.* at 844, 123 P.2d at 465.

⁴⁰ *Drumme*y v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 85, 87 P.2d 848, 854 (1939).

⁴¹ See *infra* notes 42-63 and accompanying text.

⁴² For an overview of procedural due process generally, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 663-77 (2d ed. 1988). For a discussion of procedural due process as it affects the decision-making of administrative agencies, see Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984).

⁴³ The extent to which possession of, or entitlement to, government licenses or benefits constitutes property interests falling within the ambit of the procedural due process doctrine remains the subject of much discussion. See generally, Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146 (1983); Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

⁴⁴ *Drumme*y, 13 Cal. 2d at 85, 87 P.2d at 854 (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936)) (courts must determine

decision by an administrative agency without independent review by a court of law would thus violate the due process clause of the United States Constitution.⁴⁵

The *Drumme* court, however, did not expressly acknowledge that agencies' findings would only bind the reviewing court when they threatened constitutionally protected rights. Instead the court merely stated that a reviewing court's independent judgment on the facts would only be proper if the application for mandate was "made to secure the restoration of a professional license."⁴⁶

What was left implicit in *Drumme* was expressly recognized later in the year in *McDonough v. Goodcell*.⁴⁷ In *McDonough* the court found that the Insurance Commissioner's denial of the petitioner's application to conduct a bail bond business did not involve a constitutional right,⁴⁸ and therefore the appropriate standard of review was the substantial evidence test.⁴⁹ Once the

whether rates are unconstitutionally confiscatory). The court also cited *Crowell v. Benson*, 285 U.S. 22 (1932) (facts determining limits of agency's constitutional power must be subject to independent judicial review) and *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (courts must determine whether rates are unconstitutionally confiscatory) for this proposition. These cases were, however, exceptions to the general rule. *Laisne v. State Bd. of Optometry*, 19 Cal. 2d 831, 858, 123 P.2d 457, 472 (1942) (Gibson, C.J., dissenting). The cases were "limited to . . . specific situations where the particular factual determination involved the constitutional jurisdiction of the particular agency." *Id.* For a discussion of these cases see Note, *Administrative Adjudications*, *supra* note 8, at 621.

⁴⁵ *Drumme*, 13 Cal. 2d at 84-85, 87 P.2d at 853-54.

⁴⁶ *Id.* at 85, 87 P.2d at 854. Having determined that the trial court did in fact employ the correct scope of review by essentially reweighing the evidence that had been heard by the Board, the supreme court applied the substantial evidence test to the trial court's decision. *Drumme* thus established that the scope of review to be used on appeal for administrative mandamus petitions was the same as that used generally for appellate court review of a trial court's factual findings. *Id.* at 88, 87 P.2d at 855.

⁴⁷ 13 Cal. 2d 741, 91 P.2d 1035 (1939). The *Drumme* decision was announced after oral argument in *McDonough*. *Id.* at 752, 91 P.2d at 1041.

⁴⁸ The petitioner had argued that because they had conducted their bail bonds business for years before the statute regulating it was enacted, the statute denied them property without due process of law. *Id.* at 750-51, 91 P.2d at 1041. The court responded that the fact that the petitioners had an unregulated business for years did not prevent the legislature from enacting an immediately effective regulating statute. *Id.*

⁴⁹ The petitioner asserted that *Drumme* required the court to reweigh the evidence and exercise its independent judgment upon it. *Id.* at 752, 91 P.2d at 1041. The court responded by explaining that *Drumme* was limited to

court accepted that the evidence presented in the hearing was truly conflicting, it accepted the Commissioner's findings as binding.⁵⁰

The court continued grasping for a due process ground in *Laisne*, refining its position to meet the criticism of its earlier vague pronouncements.⁵¹ Alluding to severely criticized federal cases cited in *Drummey*,⁵² the *Laisne* court shifted its reasoning to focus on the distinction between the federal constitution's provision for courts that Congress may establish and the California constitution's specific list of judicial bodies.⁵³ Due process in the federal context could be accomplished by administrative agencies to which the Congress had granted at least quasi-judicial powers.⁵⁴ Due process in California, however, required de novo review by one of the courts enumerated in the constitution, apparently at least when a vested property right was involved.⁵⁵ The *Laisne* court's combination of constitutional doctrines would prove to be loose footing for future administrative mandamus decisions.

Despite the broad language, the scope of circumstances in

cases involving the deprivation of a constitutional right, and that in the absence of such a right, the court would not "substitute its discretion for that of the commissioner and thus to that extent take over the administrative functions of the commissioner." *Id.*

⁵⁰ *Id.* at 749, 91 P.2d at 1040.

⁵¹ For a discussion of this criticism, see *supra* note 46 and accompanying text.

⁵² *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 87 P.2d 848 (1939); see *supra* note 44 and accompanying text.

⁵³ *Laisne v. State Bd. of Optometry*, 19 Cal. 2d 831, 846-48, 123 P.2d 457, 466-67 (1942). California's constitution, unlike the federal constitution, sets forth certain enumerated courts which alone may exercise judicial power. CAL. CONST. art. VI, § 1. Therefore, if an agency in California issues a final order denying a person a property right, then such action denies the person due process of law. Due process can only be guaranteed in such a context by appeal to a court of law. *Laisne*, 19 Cal. 2d at 846-48, 123 P.2d at 466-67.

⁵⁴ The federal constitution vests the judicial power in one Supreme Court and in other "inferior" courts as the Congress shall establish. *Id.* at 846, 123 P.2d at 466. Thus, unlike the California Constitution, the federal constitution does not limit judicial authority to specific courts. If an "inferior body" is acting judicially, it simply becomes one of those "inferior courts" Congress established. *Id.* Of course, this rationale only applies to "legislative" agencies, as opposed to the more numerous "executive" ones.

⁵⁵ *Id.* (finding that full judicial powers over property rights can only be exercised by the courts).

which de novo review would be required was left quite unsettled. The court did not clarify whether the de novo standard of review was to be used only when vested property rights were abridged or, rather, whenever any constitutional rights were violated. While *Laisne* involved a vested property right,⁵⁶ the court did not make it clear that such a right must be at issue before a petitioner was entitled to de novo review.⁵⁷ As the dissent concluded, the new rules posed a serious practical problem due, in part, to the majority's framing of the rule in constitutional law principles that were "not limited to the revocation of professional licenses."⁵⁸

⁵⁶ The court stated that "[t]he appellant's right to practice optometry was a vested property right." *Id.* at 835, 123 P.2d at 460.

⁵⁷ As part of its due process rationale, the court did state that deprivation of a "valuable property right" by a body not given judicial power by the California Constitution would constitute a due process violation if not independently reviewable by a court. *Id.* at 846, 123 P.2d at 466. The court did not say, however, that the rule applied exclusively to such rights.

⁵⁸ *Id.* at 866, 123 P.2d at 476 (Gibson, C.J., dissenting). Chief Justice Gibson suggested that the potential ramifications of this language were far-reaching indeed:

Courts will be required to try questions of fact in countless situations heretofore settled by administrative agencies. In many such cases those facts may be determined by jurors, certainly no better qualified than trained administrators to weigh evidence in cases that frequently involve technical subjects. We must also consider that the administrative agency will be stripped of the prestige and authority necessary to enable it to perform its functions efficiently if the courts will neither rely upon the record made before it nor accord its findings any finality whatsoever.

Id. Gibson's dissent not only attacked the majority holding in *Laisne*, but called for the overruling of *Standard Oil*, *Whitten*, and *Drummey* as well. *Id.* at 869, 123 P.2d at 478 (Gibson, C.J., dissenting). Gibson noted that both federal law and the law of many other jurisdictions treated administrative agency fact determinations as at least quasi-judicial. *Id.* at 860-62, 123 P.2d at 473-74 (Gibson, C.J., dissenting). These determinations were binding upon any court reviewing them if they were based upon substantial evidence and, the dissent argued, the federal due process clause did not require otherwise. *Id.* The cases cited in *Drummey*, and tacitly accepted by the majority in *Laisne*, were merely exceptions to this general rule. *See supra* note 44. As to the California Constitution's specific enumeration of powers, the dissent noted the long line of cases predating *Standard Oil* which had accepted administrative agencies' power to find the facts upon which performance of their functions depended. *Laisne*, 19 Cal. 2d at 862-63, 123 P.2d at 474-75 (Gibson, C.J., dissenting). This was a quasi-judicial power, according to Chief Justice Gibson, because it "part[ook] of the judicial function," but did "not constitute 'the judicial power' within the meaning of the constitutional provision." *Id.* at 861, 123 P.2d at 473-74 (Gibson, C.J., dis-

A year after *Laisne*, the court reformulated the rule by which the propriety of independent judgment review could be determined.⁵⁹ Courts could exercise independent judgment “on all of the competent evidence before it,”⁶⁰ when deciding a petition for a writ of mandamus brought by a citizen who was “feeling aggrieved”⁶¹ because of the action of a board with statewide jurisdiction,⁶² “which if undisturbed would have the affect of depriving him of a constitutional right either of liberty or of property.”⁶³ While

sentencing). This distinction between judicial and quasi-judicial power was recognized in the cases prior to *Standard Oil*. *Id.* at 863-66, 123 P.2d at 475-76 (Gibson, C.J., dissenting). See *supra* note 36 and accompanying text.

⁵⁹ See *Dare v. Board of Examiners*, 21 Cal. 2d 790, 795, 136 P.2d 304, 307 (1943).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Prior to issuing its *Dare* opinion, the court exhibited its lack of concern for logical consistency on this point in *Walker v. City of San Gabriel*, 20 Cal. 2d 879, 129 P.2d 349 (1942). In *Walker* the court reversed a superior court grant of nonsuit to a petition for a writ of mandamus in a case involving a local city council that had revoked the petitioner’s license to conduct an automobile wrecking business. Stating that either certiorari or mandamus would be the appropriate remedy for testing a local board’s exercise of discretion, the majority reaffirmed the distinction drawn earlier between the function performed by such local boards and that performed by state-wide agencies. *Id.* at 881, 129 P.2d at 350-51.

As Justice Traynor, concurring, pointed out, the distinction revealed the weakness of the rationale behind the new mandamus scope of review rules: local boards performed essentially the same type of function as statewide agencies in their respective fact-finding and order-issuing roles. Yet the former’s decisions were reviewable only by a substantial evidence test, while review of the latter entailed a complete trial de novo. *Id.* at 884, 129 P.2d at 352. (Traynor, J., concurring).

⁶³ *Dare*, 21 Cal. 2d at 795, 136 P.2d at 307 (emphasis added). *Dare* involved an appeal from a litigant who had refused to introduce the record of the hearing before the Board of Medical Examiners into the superior court proceeding because he believed that neither he nor the court were bound by the Board’s decision or the record of the Board’s hearing. *Id.* at 793-94, 136 P.2d at 306. He based his belief on his understanding of *Drumme*y and *Laisne*. *Id.* at 794, 136 P.2d at 306. Petitioner contended that the record of the Board’s hearing was immaterial because he was entitled literally to a new trial in his mandamus proceeding. *Id.* Because such a conclusion would strip administrative agencies of any authority, the supreme court sought to dispel the idea that the Board’s findings were meaningless. Calling mandamus a proceeding controlled by equitable principles, the court explained in some detail the procedures involved when a court makes a so-called de novo review of an administrative decision through the writ of mandamus. In essence, the court stated that this de

the court alluded to due process, it did not expressly mention it, a sign that the standard was in the end a product neither of separation of powers nor due process, but an expansive procedural creature with its own unique and fluid form.

B. Codification Without Clarification

The court's craftsmanship drew a response from the legislature. A study by the Judicial Council of California produced the Administrative Procedure Act (APA)⁶⁴ and Code of Civil Procedure section 1094.5,⁶⁵ both enacted by the legislature in 1945. These provisions were intended to clarify the somewhat muddled procedural system wrought by the advent of mandamus's new

novo review did not mean "de novo in an unlimited sense." *Id.* at 799, 136 P.2d at 309. Petitioner could not present a "skeleton" case at the administrative hearing, while reserving his real showing for the trial court hearing. *Id.* "[A]ppropriate consideration of the evidence upon which the administrative body based its action," *id.* at 801, 136 P.2d at 310, required that additional evidence would be heard if the agency had refused to admit admissible evidence or if petitioner's due diligence could not have produced the additional evidence at the agency hearing. *Id.* The petitioner should also be allowed to make objections and examinations if incompetent evidence was admitted by the agency or the credibility of the witnesses appearing before it was questioned. *Id.* at 799-800, 136 P.2d at 309.

⁶⁴ 1945 Cal. Stat. ch. 867, § 1, at 1626. The APA specifically enumerated some 37 agencies subject to its regulations. *Id.* The Act guarantees in adjudications the right to notice, *id.* at 1630, hearing, *id.* at 1629, to present evidence in that hearing (including witnesses and cross-examination of witnesses), *id.* at 1632-33, and the right to receive written findings of fact, *id.* at 1634. *See also*, Note, *Determining the Scope*, *supra* note 4, at 1472.

⁶⁵ CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1991); *see* Kelps, *Certiorarified Mandamus I*, *supra* note 8, at 288 (noting that § 1094.5 resulted from legislature acting on Judicial Council's recommendations to clarify new procedure's uncertainties); Note, *Determining The Scope*, *supra* note 4, at 1472; Comment, *Proposal*, *supra* note 8, at 52-53 (suggesting that § 1094.5 represented the Council's attempt to codify the case law of the *Standard Oil* progeny). The relevant portions of Code of Civil Procedure § 1094.5 provide:

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with

role.⁶⁶ The APA established uniform procedural requirements for administrative decision-making for many, though not all, agencies,⁶⁷ while section 1094.5 merely codified the confusion now endemic to the use of mandamus for judicial review of agency decisions.⁶⁸ Thus section 1094.5 officially recognized the writ of administrative mandamus, and in doing so also codified the dual standard of review the court had been unable to escape. Henceforth when a petitioner sought review of administrative findings on the grounds that they were “not supported by the evidence,” the court was to “exercise its independent judgment on the evidence” whenever it was “authorized by law” to do so.⁶⁹ Otherwise, the court would merely look for substantial evidence supporting the decision.⁷⁰ This is the statutory dual standard today.⁷¹ Codification, therefore, succeeded only in begging the question the court had been, and is still, trying to answer.

respondent’s points and authorities, or may be ordered to be filed by the court. . . .

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

CAL. CIV. PROC. CODE § 1094.5 (WEST SUPP. 1991).

⁶⁶ See Kleps, *Certiorarified Mandamus I*, *supra* note 8, at 288.

⁶⁷ See Note, *Determining the Scope*, *supra* note 4, at 1472 n.35.

⁶⁸ See Note, *Administrative Adjudications*, *supra* note 8, at 624 (stating that “[b]y not specifying those cases in which the courts are ‘authorized by law’ to reweigh the evidence, the legislature left the management of that complexity to the judiciary that had created it”).

⁶⁹ CAL. CIV. PROC. CODE § 1094.5(c) (West Supp. 1991).

⁷⁰ *Id.*

⁷¹ *Id.*

II. CASE-BY-CASE PROCEDURE: THE ELUSIVE SEARCH FOR CONSISTENCY

Codification was nothing more than a legislative imprimatur on the writ of administrative mandamus as created by the supreme court. The language of section 1094.5 was tantamount to a directive to the court to continue as before, to impose its independent judgment on the evidence whenever it authorized itself to do so. Therefore the court still had to determine the criteria that characterized those cases wherein independent judgment was "authorized by law."

For almost twenty-five years the court reacted to the cases virtually ad hoc, trying to find in them links to the few precedents available, without purporting to formulate rules that might be applied prospectively.⁷² Then, beginning in 1969, the court looked at what it had done and attempted to crystallize the precedents into a workable rule. The product of this effort, the *Bixby-Strumsky* rule, provided useful language, but was as difficult to apply to specific situations as had been the jumble of precedents that preceded it.⁷³ The "rule" required little more than the categorization of types of rights on a case-by-case basis.⁷⁴ The court could use its independent judgment in considering the evidence whenever the right at stake was categorized as "vested" and "fundamental."⁷⁵ Each case that followed thus would turn on whether the court believed the particular right at issue should be included in that category. The outcome could only be predicted with any certainty if the particular right was identical to one that the supreme court had previously deemed to be a member of the category. Yet throughout the court's attempts to find a workable rule was a steadfast adherence to the importance of independent judgment review. As the theories and rationales shifted, and as the

⁷² Commentators, in looking at the historical development of the administrative mandamus standard of review problem, have focused on the period ushered in by *Bixby v. Pierno*, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971), thus leaving the opinions announced between enactment of § 1094.5 and *Bixby* largely unexplored. See, e.g., Note, *Administrative Adjudications*, *supra* note 8, at 624-27; Note, *Determining the Scope*, *supra* note 4, at 1472-74; Comment, *Proposal*, *supra* note 8, at 53-55.

⁷³ See *infra* notes 99-163 and accompanying text.

⁷⁴ *Id.*

⁷⁵ See *infra* notes 164-212 and accompanying text. There remains considerable debate whether these elements are separate and distinct, or one and the same. *Id.*

court repeatedly reformulated the rule for determining which rights qualified for de novo review, the need for such review never lessened in the eyes of the court. The energy it spent trying to preserve it is evidence enough of that.

A. *Vested Rights*

In the first several cases following codification, the court recognized that it had previously allowed independent judgment review only when a “vested property right” was at stake.⁷⁶ The

⁷⁶ The scope of appellate review of the trial court’s decision on a petition for mandamus to correct an agency determination was elaborated in the court’s 1948 decision in *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 196 P.2d 20 (1948). The Board had found Moran in violation of statutes precluding the prescribing of narcotics and had on that basis suspended his license to practice medicine. *Id.* at 302, 196 P.2d at 22. Moran’s petition for a writ of mandamus was successful in the trial court, which exercised its independent judgment on the evidence, but did not entertain any evidence not previously introduced before the Board. *Id.* at 303, 196 P.2d at 22. The trial court followed the procedure mandated by the newly enacted Code of Civil Procedure § 1094.5. The trial court found that the Board’s findings were not supported by the weight of the evidence and thus constituted the abuse of discretion requisite to the granting of the writ under the new section. *Id.* at 309, 196 P.2d at 25-26. The supreme court then treated the appeal no differently than it would any other appeal from a factual finding by a superior court. *Id.* at 308-09, 196 P.2d at 25. Proceeding on the assumption that the only question before it was whether the evidence, viewed in the light most favorable to petitioner, “sustained[ed] the findings of the trial court to the effect that the charges against petitioner were not supported by the weight of the evidence,” the court found the trial court’s finding and conclusion “abundantly supported by the evidence.” *Id.* at 308-09, 196 P.2d at 25-26.

Justice Traynor once again dissented. He castigated the majority for abdicating responsibility for insuring that the trial court carried out its duty to properly weigh the evidence. *Id.* at 316-17, 196 P.2d at 30 (Traynor, J., dissenting). He argued that the court should not have contented itself merely to look at the evidence in the light most favorable to the petitioner and then accept the trial court’s conclusion regarding its relative weight; according to Traynor, it should have reviewed the entire record “to see where the *weight* of the evidence” lay. *Id.* at 317, 196 P.2d at 30 (Traynor, J., dissenting).

The problem stemmed once again, Traynor asserted, from the majority’s failure to follow the logical dictates of its holdings. The procedure utilized by the majority meant disregarding the trial court’s function as a reviewing court vis-à-vis the administrative board and treating the trial court proceeding as the literal trial de novo posited in *Laisne* and qualified in *Dare*. *Id.* at 318, 196 P.2d at 31 (Traynor, J., dissenting). The announced rules regarding presumptions in favor of the administrative record and burdens

first of these opinions, *Southern California Jockey Club v. California Horse Racing Board*,⁷⁷ distinguished between the denial of an application for a license and the revocation of a license previously granted. Only in the latter situation could the court review the decision with its independent judgment. The case involved “the denial of an application for a license for a business whose regulation [was] a proper subject of the police power as distinguished from the revocation or suspension of a license.”⁷⁸ The court affirmed the lower court’s refusal to issue a writ of mandate to the Racing Board, which had denied an application for a permit to build and operate a horse racing track. The court held that decisions of administrative officers vested with power to determine facts upon which fitness to engage in a particular business depended would only be checked by a reviewing court if it found an abuse of the officers’ discretion.⁷⁹ The reviewing trial court would only examine the record to see if sufficient evidence existed to sustain the decision.⁸⁰

upon the petitioner challenging it now had “only such force as the superior court wish[ed] to give them.” *Id.* at 319, 196 P.2d at 31 (Traynor, J., dissenting).

⁷⁷ 36 Cal. 2d 167, 223 P.2d 1 (1950).

⁷⁸ *Id.* at 174, 223 P.2d at 5-6.

⁷⁹ *Id.* at 175, 223 P.2d at 6.

⁸⁰ *Id.* The court implicitly recognized the significance of following a dual standard: if the review of the board’s decision were made under the trial de novo or independent judgment standard, the propriety of admission of evidence in the administrative hearing would be an important factor. *Id.* at 177, 223 P.2d at 7. If the reviewing court proceeded with a substantial evidence standard, however, the admission by the agency or board of evidence that would not be properly admitted in a court would not be grounds to annul the decision if the properly admitted evidence were sufficient to sustain it. *Id.* at 176, 223 P.2d at 7. Under the substantial evidence standard, witness credibility could not be considered, and the administrative fact finder would be accorded “wide discretion” in any determinations based upon opinion evidence. *See id.* at 177, 223 P.2d at 7-8.

Justice Traynor took yet another opportunity to criticize the developing rules. In this instance he focused on what he saw as the inconsistency in holding that statewide administrative agencies could make no final fact determinations when revocation of a license or permit was involved, but could make such determinations when the license or permit had not been previously granted. *Id.* at 179, 223 P.2d at 9 (Traynor, J., dissenting). He called this “a double standard for a single problem.” *Id.* at 180, 223 P.2d at 9 (Traynor, J., dissenting). Traynor suggested that practical application of this “abstract” distinction would produce inequitable results where, for example, applications for permits or licenses had to be made anew each year. *Id.* (Traynor, J., dissenting). If a board revoked the license or permit

Unlike mere denials of business licenses, however, disqualification for unemployment benefits for which a person is entitled may be reviewed by the independent judgment of a trial court. In *Thomas v. California Employment Stabilization Commission*,⁸¹ the court found that a claimant who had met the requirements for benefits had a property right. The claimant was entitled to independent judgment review because an administrative agency without constitutional power to make final findings of fact deprived the claimant of that property right.⁸² When a property right was at issue, the sole function of the agency was a mechanical one; its discretion ended "once it [was] determined that the facts support[ed]" the claimant and when "the condition of the fund permit[ted] payment."⁸³ These claims, the court concluded, were dissimilar to applications for business or professional licenses.⁸⁴

Where the existence of such a vested property right had been, through the first decades of development, a prerequisite to independent judgment review, in 1968 the court recognized that

during the calendar year the affected party could apply for a writ and the reviewing court would reweigh the evidence the board had based its decision upon before rendering its independent judgment upon that evidence, as well as entertaining new evidence if the circumstances permitted. *Id.* (Traynor, J., dissenting). On the other hand, if the contested decision were a denial of the required annual application, the writ would be refused if there was any substantial evidence supporting the decision. *Id.* (Traynor, J., dissenting). Thus markedly different results would be achieved, "[n]otwithstanding that in either instance the result of the administrative action [was] to deprive the petitioner of the opportunity to carry on a lawful business, profession, or occupation." *Id.* at 179, 223 P.2d at 9.

⁸¹ 39 Cal. 2d 501, 247 P.2d 561 (1952).

⁸² *Id.* at 504, 247 P.2d at 562. The court distinguished this claimant from the claimant in *Jockey Club*. Denial of business and professional licenses, according to *Jockey Club*, did not interfere with property rights, *id.*, over which administrative officers have broad discretionary powers. Benefit claims, however, are property rights subject to independent review because, once having satisfied the implementing act's requirements, the claimant has a "statutory right to a fixed or definitely ascertainable sum of money." *Id.*

⁸³ *Id.*

⁸⁴ *Id.* How the claimant's right to the benefits could have been determined by the Board without some discretionary finding of the facts supporting it the court did not explain. Indeed, the court found that there was no substantial evidence to support the trial court's decision because the evidence was essentially undisputed in favor of the Board's initial determination that the unemployment resulted from a trade dispute. *Id.* at 506, 247 P.2d at 563.

the lack of a vested property right did not, of itself, block independent judgment review.⁸⁵ In *Yakov v. Board of Medical Examiners*⁸⁶ the court affirmed a trial court decision that the Board of Medical Examiners' finding of a physician's moral turpitude was not supported by the weight of the evidence. While *Yakov* involved revocation of a medical certificate (ostensibly a "vested" property right) rather than denial of an application for one, the court presaged a broader approach to administrative review:

[O]f course the justification for the *de novo* review . . . is particularly strong where, as in the present case, the various proceedings will determine so vital a question as a doctor's right to practice his profession . . . [T]he right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection.⁸⁷

⁸⁵ In the interim between *Thomas* and *Yakov*, the court, in *Temescal Water Co. v. Dept. of Public Works*, 44 Cal. 2d 90, 280 P.2d 1 (1955), greatly exacerbated the confusion its decisions had wrought, particularly in those decisions attempting to choose between the two standards of review based on whether a vested property right was involved. In *Temescal*, the petitioners challenged, under the ordinary mandate procedures of Code of Civil Procedure § 1085, the appropriation of unappropriated water which they claimed did not exist. *Id.* at 93-95, 280 P.2d at 3-4. After finding that the Department did exercise adjudicative factfinding powers and that its decisions should be judicially reviewed by writ of administrative mandamus, the court concluded that a cause of action had not been stated for that writ. *Id.* at 104, 280 P.2d at 9-10. In explaining the scope of judicial review that § 1094.5 prescribed, however, the court inexplicably stated that decisions of state-wide agencies in general were subject to *de novo* review, so that a decision such as that at issue in the case — the granting of an application which was challenged by a third party — would be independently reviewed. *Id.* at 105, 280 P.2d at 10. A valiant attempt to account for this opinion appears in Kleps, *Certiorarified Mandamus II*, *supra* note 8, at 566-567.

⁸⁶ 68 Cal. 2d 67, 435 P.2d 553, 64 Cal. Rptr. 785 (1968).

⁸⁷ *Id.* at 72 n.3, 72-75, 435 P.2d at 557 n.3, 557-59, 64 Cal. Rptr. at 789 n.3, 789-91.

The facts of *Yakov* demonstrate the significance of a judicial trial *de novo*. The medical board revoked Dr. Yakov's certificate after being presented with evidence that he had sold, in successive weeks, amphetamines to state agents posing as patients. Each sale contained a quantity of amphetamines sufficient for up to 15 months. He had not examined the agents prior to selling them the pills, and had sold pills to one of the agents for "friends" whom he also had not examined. *Id.* at 68-70, 435 P.2d at 554-55, 64 Cal. Rptr. at 786-87. Upon application for a writ of mandate, the trial court weighed this evidence against that introduced by Dr. Yakov showing that he did not regard the pills as dangerous, that they were not habit forming, that none of his other patients had ever received more than a one month supply, and that his conduct was provoked by the agents. The trial court found that

Thus, implicit in the decision was the proposition that some rights may be so fundamental ("precious") as to deserve independent judicial review even though they were not technically vested property rights. The court hinted that de novo review might apply to any stage in the administrative adjudication of the right to earn a livelihood. This emphasis on the value of administrative mandamus for protecting a means of earning a livelihood would soon predominate in the court's opinions, although without being explicitly acknowledged.

One year later the court again backtracked. Upon extensive examination of its precedents, the court in *Merrill v. Department of Motor Vehicles*⁸⁸ finally expressly held that vestedness was the requisite element in independent judgment review.⁸⁹ Nonetheless, the court also acknowledged, at least obliquely, how problematic

the evidence favored Dr. Yakov. *Id.* at 70-71, 435 P.2d at 555, 64 Cal. Rptr. at 787.

Perhaps the most peculiar aspect of the decision was the result mandated by *Moran*. The court noted that in selling pills to persons Dr. Yakov had not examined or even met personally, Dr. Yakov may have engaged in unprofessional conduct under § 2391.5 of the Business and Professions Code. *Yakov*, 68 Cal. 2d at 74, 435 P.2d at 558, 64 Cal. Rptr. at 785; *see also* CAL. BUS. & PROF. CODE § 2391.5, (current version at CAL. BUS. & PROF. CODE § 2238 (West 1990)), provided that violation of federal or state narcotic laws constituted unprofessional conduct. Nevertheless, the court was required, after *Moran*, to accept the trial court's view of the facts. *Yakov*, 68 Cal. 2d at 75, 435 P.2d at 559, 64 Cal. Rptr. at 791. It appears that the trial court had no more immediate access to the evidence than did the supreme court; the trial court apparently reviewed the evidence in the record of the hearing before the officer representing the Board, and the supreme court apparently did the same. Yet when the independent judgment test applied, the trial court was considered to have held a proceeding in the nature of a trial de novo and the appellate court then had to accept the trial court's findings unless not supported by substantial evidence. *Id.* at 74 & n.7, 435 P.2d at 558-59 & n.7, 64 Cal. Rptr. at 790-91 & n.7. Therefore, despite the fact that the supreme court could quite readily judge the record evidence for itself, the rule required that it accept the trial court's view and "hold as a matter of law that the doctor's conduct did not exhibit . . . moral turpitude." *Id.* at 74, 435 P.2d at 558-59, 64 Cal. Rptr. at 790-91.

⁸⁸ 71 Cal. 2d 907, 458 P.2d 33, 80 Cal. Rptr. 89 (1969).

⁸⁹ *Id.* at 914, 458 P.2d at 37, 80 Cal. Rptr. at 93. Stating that § 1094.5 "does not indicate those cases 'in which the court is authorized by law to exercise its independent judgment,'" the court held that "such determination depends on whether the right or interest affected by the administrative decision is a 'vested' one." *Id.* (emphasis added).

such a criterion could be.⁹⁰ This opinion was thus the first in a series of attempts by the court to find and impose on administrative mandamus some kind of rationality.

The plaintiff in *Merrill* had operated a vehicle merchandising scheme for some time before the Department of Motor Vehicles ordered it to cease operation unless it obtained a license to operate a motor vehicle dealership.⁹¹ The Department, however, denied the application when it was submitted.⁹² The facts of the case, then, fall somewhere between an original application and the revocation of an existing license.⁹³ The trial court issued a writ of mandate upon review of the administrative record, consideration of the parties' briefs, and oral argument.⁹⁴

On appeal, the supreme court reviewed the precedents. Those cases wherein the trial court was authorized to exercise its independent judgment on the evidence, the court noted, were those where the right or interest was "vested."⁹⁵ The court extrapolated from the cases the rule that the revocation of an existing license or permit was subject to independent judgment review but that denial of an initial one was not.⁹⁶

After laying out such a seemingly bright line rule, the court eviscerated it: "[T]he question whether or not the right affected is 'vested' is decided by the courts on a *case-by-case basis*."⁹⁷ Thus the

⁹⁰ See *id.* at 915, 458 P.2d at 38, 80 Cal. Rptr. at 94. Vestedness is problematic because it can only be determined on a case-by-case basis. See *infra* note 121 and accompanying text.

⁹¹ *Merrill*, 71 Cal. 2d at 910, 458 P.2d at 34, 80 Cal. Rptr. at 90.

⁹² *Id.* at 911, 458 P.2d at 35, 80 Cal. Rptr. at 91.

⁹³ Under our analysis, "original application" suggests that the applicant sought a permit for an activity in which the applicant had not before engaged. Here, the applicant had been in the business for some time prior to the formal application for the license. *Id.* at 910, 458 P.2d at 34, 80 Cal. Rptr. at 90. Similarly, "revocation" implies that the claimant had already been duly regulated, which this claimant had not. *Id.*

⁹⁴ *Id.* at 912, 458 P.2d at 36, 80 Cal. Rptr. at 92.

⁹⁵ *Id.* at 914, 458 P.2d at 37, 80 Cal. Rptr. at 93.

⁹⁶ In recognizing this "rule," the court cited *inter alia Laisne* and *Jockey Club* without explanation. *Id.* Perhaps, however, the holding should not be viewed as simply turning on the vestedness factor. Given the language from *Yakov* regarding the right to practice a profession, it may be observed that not only did Merrill not possess a license, he was not seeking to practice a profession for which he had received qualifying training. Presumably he had other comparable means of earning a living.

⁹⁷ *Id.* at 915, 458 P.2d at 38, 80 Cal. Rptr. at 94 (citation omitted) (emphasis added). In holding that the claimant's right was not "vested," the

court at once purported to establish a workable rule and virtually crippled its effectiveness by allowing it to be modified in effect with each set of facts.⁹⁸ The rule's dependence on case-by-case determinations meant that the practice of administrative mandamus was still seeking uniformity, consistency, and, most significantly, predictability.

B. "Fundamental" Vested Rights

In 1969, the court commenced its first earnest effort to give predictability to the rules for administrative mandamus. Marked by the "seminal" opinions of *Bixby v. Pierno*⁹⁹ and *Strumsky v. Board of Retirement*,¹⁰⁰ this series of decisions produced what has occasionally been termed the *Bixby-Strumsky* rule.¹⁰¹ This "rule" extended the class of affected rights to include more than vested property rights, at least as they were traditionally defined. Under their language, if not their holdings, these cases allowed independent judgment review of not only vested property rights, but of "fundamental" rights as well.¹⁰²

Yet this "rule" brought no more predictability than previous decisions had. While subsequent cases consistently cited *Bixby*

court implicitly recognized that the right was more akin to denial of an initial application than to revocation of an existing one. *Id.*

⁹⁸ An example of the unpredictability this vagueness engendered is the analysis used by the court in *Anton v. San Antonio Community Hospital*, 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977). In *Anton* the court declared that a physician who had to qualify anew for appointment to hospital privileges nevertheless had a vested "right to reappointment". See *infra* notes 141-49 accompanying text. Central to *Merrill's* analysis was the court's statement that "the denial of a license to a previously unlicensed person does not affect a 'vested' right." *Merrill*, 71 Cal. 2d at 915, 458 P.2d at 38, 80 Cal. Rptr. at 94. The court thus drew a fine line between a right to reappointment and the denial of a license to a previously unlicensed person who had nonetheless gone unregulated within the existing statutory scheme.

⁹⁹ 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

¹⁰⁰ 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

¹⁰¹ See, e.g., *Anton*, 19 Cal. 3d at 822-23, 567 P.2d at 1173-74, 140 Cal. Rptr. at 453-54 (specifically citing and applying "*Bixby-Strumsky*" rule); see also *Note, Administrative Adjudications*, *supra* note 8, at 625-27 (indicating rule limited applications of independent judgment review by requiring protected rights to be "fundamental," while expanding review by recognizing new rights such as employment and welfare benefits).

¹⁰² Under the "rule," a right that was fundamental but not necessarily vested might still require independent judgment review. See *infra* note 118.

and *Strumsky* as controlling precedent, these cases merely continued the fruitless quest for rules lending predictability to a writ procedure seemingly designed to avoid it.

1. The Bixby-Strumsky Rule

The court offered its most elaborate analysis to date of the rules governing administrative mandamus in *Bixby v. Pierno*¹⁰³ in 1971. At issue was the decision by the Commissioner of Corporations approving a recapitalization plan for a closely-held family corporation.¹⁰⁴ In examining the rationale underlying the development of the rules since *Standard Oil*, the court attempted to find some semblance of order in the prevailing reasoning in order to justify its refusal to apply the independent judgment test.

The court first reviewed the development of administrative mandamus. It highlighted the dilemma that every administrative decision posed to courts on review: the relationship between courts and the proliferating administrative agencies that had not been assigned a constitutional place among the separated powers.¹⁰⁵ This "huge administrative bureaucracy" exercised both "quasi-legislative and quasi-adjudicative powers."¹⁰⁶ Jealously safeguarding their role as protector of "prevailing concepts of individual rights," courts nevertheless had to establish some ground between the threat this bureaucracy held for those individual rights, and the courts' recognition that "the new administrative tools were essential to cope with new complexities."¹⁰⁷

Yet the court failed to accomplish its goal. It noted that the judiciary had, since the 1930's, deferred to the other branches of government in the area of economic due process, assuming that groups with powerful economic forces could protect their own

¹⁰³ 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

¹⁰⁴ *Id.* at 134, 481 P.2d at 244, 93 Cal. Rptr. at 236.

¹⁰⁵ There is an inherent tension between the judiciary and the newer administrative agencies. These agencies encroach upon the domain historically reserved for the court — the application of law to fact. See CAL. CONST. art. III, § 3. This tension is regulated by expanding or contracting the courts' role in reviewing agency decisions. See Molinari, *California Administrative Process: A Synthesis Updated*, 10 SANTA CLARA L. REV. 274, 276-77 (1970).

¹⁰⁶ *Bixby*, 4 Cal. 3d at 142, 481 P.2d at 250, 93 Cal. Rptr. at 242.

¹⁰⁷ *Id.* See Molinari, *supra* note 109, at 274 (stating judiciary is unable to oversee the many governmental functions brought about by industrialization and urbanization of society).

interests.¹⁰⁸ Such groups, the court asserted, “do not impel the same kind of judicial protection as the minorities: the unpopular religions, the racial sub-groups, the criminal defendants, the politically weak and under-represented.”¹⁰⁹ The court indicated that administrative mandamus protected the rights of these weaker groups by declaring their rights “fundamental” and vested.¹¹⁰ Once declared fundamental and vested, those rights are protected by independent judgment review.¹¹¹ This language, however, still fell far short of a mechanical, easily applied rule. Only by “carefully scrutinizing” prior administrative decisions affecting these rights can the courts protect them.¹¹²

The court had thus created a broad, undefined category the particularized membership of which the court could only “decide on a case by case basis.”¹¹³ The court attempted to provide guidance by setting out factors to consider in determining vestedness and fundamentalness.¹¹⁴ Through such a case-by-case examination, courts would consider first whether the right impinged was fundamental. To determine this, the court considers not only the right’s economic weight, but also the “effect in human terms and the importance of it to the individual.”¹¹⁵ If the right were not deemed fundamental, no independent review would be granted. If the right were fundamental, however, the court would determine whether the right was “vested,” or merely anticipated.¹¹⁶ If merely anticipated, the court would “engage in the delicate task of determining whether the individual qualifies for the . . . right.” If the fundamental right were vested, the court

¹⁰⁸ *Bixby*, 4 Cal. 3d at 142, 481 P.2d at 250, 93 Cal. Rptr. at 242.

¹⁰⁹ *Id.* at 142-43, 481 P.2d at 250, 93 Cal. Rptr. at 242. According to the court, the “halls of the Legislature” protected economically advantaged groups. Courts would not intrude unless the legislation was unreasonable. *Id.* In further confusing the “fundamental and vested” dichotomy, the court took this a step farther when it declared that courts have “given less emphasis to outmoded rights of property.” *Id.* at 142, 481 P.2d at 250, 93 Cal. Rptr. at 242. The court did not indicate whether this devaluation of property interests applied to those less advantaged groups whose rights it declared were “fundamental and vested.”

¹¹⁰ *Id.* at 143, 481 P.2d at 251, 93 Cal. Rptr. at 243.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

must use its independent judgment in the review.¹¹⁷

This "procedure" necessarily involves subjective, abstract determinations at almost every turn. The court offered no guidelines with which to determine whether a merely anticipated right can be protected.¹¹⁸ The court's abstract guidelines could only exacerbate the "flexibility" of these procedures. Nevertheless, the court's extended analysis in *Bixby* evidences the importance it ascribed to the preservation of independent judgment review.

In attempting to give these procedures some concrete meaning, the court merely offered examples of what courts had done previously, focusing on the practice of a trade or profession as the primary manifestation of the concepts discussed.¹¹⁹ While apparently narrowing its field of view, however, the court recognized a wide range of fundamental rights requiring independent judgment review, including the right "to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [an individual's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free [people]."¹²⁰ Thus, the potential range of rights these "concrete" guidelines a court might call fundamental is quite broad.

The court acknowledged that this "rule" yields no fixed formula and may lead to no predictable ruling in each case."¹²¹ The court bolstered this acknowledgement by quoting from Professor Jaffe, who argued against the adoption of a single formula for reviewing administrative decisions and who noted that the courts had "responded variously from situation to situation rather than by evolving a coherent formula."¹²²

¹¹⁷ *Id.*

¹¹⁸ The court's "test" confounds precedents holding that vestedness is crucial to independent judgment review. *See supra* notes 89-98 and accompanying text (discussing *Merrill*). The court would apply independent judgement review to a right that was not vested, provided that it passed the court's "delicate task" of determining whether it qualifies. This simply begs the question.

¹¹⁹ *Bixby*, 4 Cal. 3d at 144-45, 481 P.2d at 252-53, 93 Cal. Rptr. at 244-45.

¹²⁰ *Id.* at 145 n.12, 481 P.2d at 252 n.12, 93 Cal. Rptr. at 244 n.12 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

¹²¹ *Id.* at 146, 481 P.2d at 254, 93 Cal. Rptr. at 246.

¹²² *Id.* at 146 n.18, 481 P.2d at 254 n.18, 93 Cal. Rptr. at 246 n.18 (quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 191-92

The concept of a right fundamental “in human terms” was amplified in *Strumsky v. San Diego County Employees’ Retirement Association*.¹²³ The petitioner in this case was the widow of a sergeant in the San Diego County Marshal’s office whose death was ruled not service-related by the Board of Retirement, despite evidence that job stress had contributed to cause it. The Board denied the petitioner’s application for a service-connected death allowance.¹²⁴

The court cited several precedents, including *Bixby*, establishing that the type of retirement benefits the petitioner sought was fundamental and vested.¹²⁵ In words that may ultimately presage a new threshold for rules determining the standard of review,¹²⁶ the court stated that the fundamentalness of an “impact in human terms” may exist where, above and beyond economic impacts, “the benefits sought might well mean . . . the difference between self-support and the necessity that [the petitioner] supplement pension income through employment or other means.”¹²⁷

Bixby and *Strumsky* added to the administrative mandamus “formula” a new layer of complexity and uncertainty. The decisions failed to adequately define vestedness and fundamentalness, and failed even to resolve whether *actual* vestedness was required for independent judgment review in the first place. Furthermore, in *Strumsky* the human impact of abrogating the right was “manifest,”¹²⁸ yet among the many circumstances subject to administrative control this may rarely be the case.

(1965)). Jaffe’s acceptance of case-by-case review seemed, at least in part, to stem from a distrust of the administrative officials initially responsible for protecting individual rights. According to Jaffe, officials lacking the time, training, or inclination to delve into difficult cases compromise those rights. *Id.*

¹²³ 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

¹²⁴ *Id.* at 32-34, 520 P.2d at 31-32, 112 Cal. Rptr. at 807-08.

¹²⁵ *Id.* at 45, 520 P.2d at 40, 112 Cal. Rptr. at 816.

¹²⁶ See *infra* notes 254-64 and accompanying text.

¹²⁷ *Strumsky*, 11 Cal.3d at 45, 520 P.2d at 40, 112 Cal. Rptr. at 816. It was suggested that though the right to the benefit may be fundamental and vested, the right to a particular amount was not. The court responded by explaining that the widow’s right to one of two statutory benefits absolutely vested upon the death of her husband. The question to be decided was whether the benefit to which she was entitled was the service-connected or the non-service-connected benefit. That question could only be answered by a court independently reviewing the evidence. *Id.* at 45-46, 520 P.2d at 40-41, 112 Cal. Rptr. at 816-17.

¹²⁸ *Id.* at 45, 520 P.2d at 40, 112 Cal. Rptr. at 816.

2. *Harlow*: Due Process Rights?

In the area of due process rights the court continued the fact-specific inquiry as the determination for independent judgment review. In *Harlow v. Carleson*¹²⁹ the court held that termination of welfare benefits implicated fundamental vested rights. The trial court had denied the petitioner's request to conduct an independent judgment review, instead applying the substantial evidence test.¹³⁰ The supreme court, however, found that the right to continued receipt of welfare benefits was a fundamental, vested right, because the right was "already possessed" or "legitimately acquired."¹³¹ This, the court stated, was the "relevant factor" for determining vestedness.¹³²

The court had never expressly defined the term "vested" in this way. It had merely carved various angles of the concept into recognizable form, while the bulk of the idea of "vestedness" remained amorphous. *Harlow* was no improvement.

The court probed no deeper in determining that the right was also fundamental. After noting those rights that had been deemed fundamental and those that had not,¹³³ the court simply found the right to continued welfare benefits to be closest to the right of the widow in *Strumsky* to receive her husband's retirement benefits. The court, however, did allude to a landmark United States Supreme Court case holding that welfare benefits are pro-

¹²⁹ 16 Cal. 3d 731, 548 P.2d 698, 129 Cal. Rptr. 298 (1976).

¹³⁰ *Id.* at 734, 548 P.2d at 700, 129 Cal. Rptr. at 300.

¹³¹ *Id.* at 736, 548 P.2d at 701, 129 Cal. Rptr. at 301. The court noted that its cases had uniformly held that whether a right was "already possessed" or "legitimately acquired" was a factor in determining the applicability of independent judgment review, while permanency was not. "[T]he fact that the right to future benefits is not irretrievably lost, when terminated, has no bearing on the question of whether a right is 'vested.'" *Id.* Thus, the court implicitly anticipated the problem of "reappointment" that it addressed in *Anton*. See *infra* notes 141-50 and accompanying text. In *Anton*, however, the right to reappointment was a function of the agency's initial and routinely repeated validation of a doctor's qualification. While a welfare beneficiary's right to benefits comes and goes with the beneficiary's level of income, the doctor in *Anton* had the right to reappointment because he had been found qualified when he first acquired hospital privileges.

¹³² *Harlow*, 16 Cal. 3d at 736, 548 P.2d at 701, 129 Cal. Rptr. at 301.

¹³³ *Id.* at 736-37, 548 P.2d at 701-02, 129 Cal. Rptr. at 301-02. The court compared *inter alia* *Bixby* (holding corporation's right to obtain approval of recapitalization plan not fundamental) with *Strumsky* (holding widow's right to receive death allowance fundamental) and *Yakov* (holding right to continue one's trade or profession fundamental).

tected as a due process right.¹³⁴

The court thus echoed its previous allusions to the constitutional due process aspect of the standards for administrative mandamus. As it had declined to do on previous occasions, however, the court neither drew the concepts together nor described just what the relationship was. The court once again did not indicate that independent review was required to guarantee due process rights. Perhaps the court continued to steer away from such a classification in order to limit the circumstances in which administrative mandamus claims would be brought. Yet the court also did not further restrict those classes of rights subject to independent judgment review. The opportunity to improve the precision of the standard passed untaken.

3. *Dickey*: Disability Benefits

The same year *Harlow* was decided the court found another member of the fundamental vested rights class: full salary payments for disability during the active employment of two police officers. In *Dickey v. Retirement Board*,¹³⁵ the court recognized the distinction between the concepts of vestedness and fundamentalness. According to the court, a right could be vested but not fundamental, or, presumably, fundamental but not vested, and that some, as yet unquantified, showing was required of both to warrant independent judgment review.

The distinction created a two-pronged test for determining independent judgement review. The two prongs are conjunctive. Under the first part, a right, at least in the employment context, would vest if it were contemplated as compensation upon the acceptance of employment.¹³⁶ The disability payments here, the court found, were akin to the retirement benefits in *Strumsky*, which vested at the time of initial employment.¹³⁷

Under the second prong of the test, courts must look to the nature of the right that vested under the first prong, and then ask whether that right has an effect "in human terms" on the individ-

¹³⁴ *Id.* at 737, 548 P.2d at 702, 129 Cal. Rptr. at 302, (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)). The court then went on to find such due process rights important enough to warrant independent judgment review. *Id.*

¹³⁵ 16 Cal. 3d 745, 548 P.2d 689, 129 Cal. Rptr. 289 (1976).

¹³⁶ *Id.* at 749, 548 P.2d at 691, 129 Cal. Rptr. at 291.

¹³⁷ *Id.*

ual.¹³⁸ It is not an inquiry into the amount of harm in the particular case.¹³⁹ Regardless of the amount involved, the court concluded, the right in *Dickey* was fundamental because it directly affected “an employee’s ability to continue to support his family while incapable of working due to injury received as a result of his employment.”¹⁴⁰ Thus, *Dickey* held that in order to qualify for independent review the employment-related right must be both vested and fundamental. The right is both if it is “contemplated as compensation” at initial employment, and has an effect “in human terms” on the individual.

4. *Anton*: The “Right To Reappointment”

The court in *Anton v. San Antonio Community Hospital*¹⁴¹ had to decide whether a physician who had been repeatedly reappointed to a hospital’s medical staff for twelve previous years had a fundamental, vested right to that reappointment in the future. The court did not elaborate on the fundamentalness of the right: it was manifest, the court said, that it affected the physician’s fundamental right to pursue his livelihood.¹⁴²

The matter of vestedness was more problematic because each physician underwent an annual reappointment procedure. The court stated, however, that this was more analogous to the revocation of, rather than to the application for, a nonemployment-related license or permit.¹⁴³ The physician’s initial admission to

¹³⁸ *Id.* at 751, 548 P.2d at 692, 129 Cal. Rptr. at 292 (quoting *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 481 P.2d 242, 252, 112 Cal. Rptr. 234, 244 (1971))

¹³⁹ *Id.* at 751, 548 P.2d at 692-93, 129 Cal. Rptr. at 292-93.

¹⁴⁰ *Id.* at 751, 548 P.2d at 693, 129 Cal. Rptr. at 293.

¹⁴¹ 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977). The holding of *Anton* with respect to the applicability of independent judgment review to decisions of private hospital boards was superseded when the legislature enacted § 1094.5(d):

Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

CAL. CIV. PROC. CODE § 1094.5(d) (West Supp. 1991).

¹⁴² *Anton*, 19 Cal. 3d at 823, 567 P.2d at 1173-74, 140 Cal. Rptr. at 453-54.

¹⁴³ *Id.* at 824, 567 P.2d at 1174, 140 Cal. Rptr. at 454. The court rejected

membership, his relationship with the hospital, his routine reappointment for the last twelve years, coupled with the due process requirements of a hearing before denial of continued reappointment, gave the physician a vested right to reappointment.¹⁴⁴

The court concentrated on the physician's initial admission to membership. In deciding to accept the physician, the Board determined his fitness "*and granted him the full rights of membership.*"¹⁴⁵ The physician, therefore, had a right that vested with his appointment and could be divested only with a proper showing. Such a showing could divest this "right to reappointment" only after incompetence was established according to the minimum requirements of procedural due process.¹⁴⁶

Thus the court further defined the distinctions required to determine the proper standard of review, that is, to determine the vestedness, if not the fundamentalness, of the right. The holder of a license, permit, or other professional privilege possessed a fundamental vested right to its continued possession, at least in the employment arena.¹⁴⁷ Similarly, the possessor of a privilege that was subject to periodic redetermination possessed a fundamental vested right, but only if those redetermination procedures comported with procedural due process requirements.¹⁴⁸ The initial applicant for such a privilege did not possess a fundamental vested right.¹⁴⁹

The court further complicated the standard for independent judgment review by acknowledging that issues of professional incompetence should be addressed by the agency concerned.

the argument that once the current term of membership ends the vestedness also ends, because the claimant has become akin to an initial applicant for a license. *Id.* The court distinguished between a physician's relationship with the hospital and the process of licencing. The former case "gives rise to rights and obligations" not involved in the latter. *Id.*

¹⁴⁴ *Id.* at 824, 567 P.2d at 1174-75, 140 Cal. Rptr. at 454-55.

¹⁴⁵ *Id.* at 824, 567 P.2d at 1175, 140 Cal. Rptr. at 455 (emphasis in original).

¹⁴⁶ *Id.* at 825, 567 P.2d at 1175, 140 Cal. Rptr. at 455 (quoting *Woodbury v. McKinnon*, 447 F.2d 839, 842 (5th Cir. 1971)). In declaring that mandatory periodic review of the appointment did not render the appointment any more "probationary or tentative," *id.* at 824, 567 P.2d at 1175, 140 Cal. Rptr. at 455, the court once again implicitly rejected the "expectation of permanency" argument. *See supra* note 131.

¹⁴⁷ *See supra* notes 141-46 and accompanying text.

¹⁴⁸ *See supra* notes 141-46 and accompanying text.

¹⁴⁹ *But see supra* note 98 and accompanying text.

The court indicated that upon remand the trial court also may wish to remand the competency issue to the Board. Otherwise, the court implied, the trial court would have nothing upon which to exercise its independent judgment.¹⁵⁰ Thus the court implicitly underscored the entirely case-specific nature of independent judgment review, further ensuring that no one universal formula would emerge.

C. *Tex-Cal: Weakening the Foundation*

In 1979, the court finally offered an opinion that admitted the deficiencies in the precedents it had provided for determination of which standard of review applied in particular administrative mandamus cases. While not disapproving of the dual-standard approach per se, the court in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board*¹⁵¹ held that this approach was not constitutionally mandated if sufficient procedural protections otherwise existed. Moreover, the court suggested that the single standard would alleviate many of the uncertainties and much of the delay associated with the two standards of section 1094.5.¹⁵² Nonetheless, the cause of these problems, the court implied, was not so much the dual standard, but the lack of a certain and consistent rule “as to which of two standards apply in a particular case.”¹⁵³

At issue in *Tex-Cal* was a section of the Agricultural Labor Relations Act specifying the standard of review for decisions of the Agricultural Labor Relations Board. The section limited court review to the substantial evidence standard,¹⁵⁴ but the petitioner argued that the California constitution required courts to implement the same standard mandated for section 1094.5 review involving fundamental vested rights.¹⁵⁵ The court disagreed,

¹⁵⁰ *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 825 n.24, 567 P.2d 1162, 1175 n.24, 140 Cal. Rptr. 442, 455 n.24 (1977). The court cited *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515, 522 P.2d 12, 17, 113 Cal. Rptr. 836, 841 (1974) (holding that administrative mandamus, as codified in § 1094.5, requires that the agency “bridge the analytic gap between raw evidence and ultimate decision”). *Id.* After it has done so, the reviewing court then must review that “analytic route.” *Id.* Thus, no universal rule was anticipated.

¹⁵¹ 24 Cal. 3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

¹⁵² *Id.* at 346 n.6, 595 P.2d at 585 n.6, 156 Cal. Rptr. at 7 n.6.

¹⁵³ *Id.* at 345, 595 P.2d at 584, 156 Cal. Rptr. at 6.

¹⁵⁴ *Id.* at 340, 595 P.2d at 581, 156 Cal. Rptr. at 3.

¹⁵⁵ *Id.* at 343, 595 P.2d at 582, 156 Cal. Rptr. at 4. The petitioner cited

extracting from previous cases the principle that a statute controlling judicial review of administrative decisions would be constitutional if it required the "substantial evidence" standard *and* guaranteed "administrative due process," a test which the statute at issue passed.¹⁵⁶ Thus, the court recognized that the dual standard was not constitutionally mandated.¹⁵⁷

Perhaps as a result of looking at administrative mandamus free from the restraining weight of its precedents, the court indicated that the rules of section 1094.5 "arose out of and perpetuated a state of judicially created uncertainty as to which of two standards apply in a particular case."¹⁵⁸ According to the court, none of the cases developing the administrative mandamus rules had invalidated a statutorily mandated substantial evidence standard. Those cases need not have rested on constitutional limitations on legislative power. Rather, those holdings could as well have been "grounded in judicially fashioned rules of procedure or interpretation of section 1094.5."¹⁵⁹ The court refused to infect another

*Drumme*y for the proposition that independent review was required of vocational licence suspension, *id.* at 343, 595 P.2d at 583, 156 Cal. Rptr. at 3, because "giv[ing] finality to a licensing agency's findings on conflicting evidence would . . . permit the agency to exercise judicial power in violation of the Constitution." *Id.* at 343, 595 P.2d at 584, 156 Cal. Rptr. at 6.

¹⁵⁶ *Id.* at 344, 595 P.2d at 584, 156 Cal. Rptr. at 6. The particular section involved required the "substantial evidence" standard, and guaranteed administrative due process because the statute as a whole "generally assures the essentials of due process." *Id.*

¹⁵⁷ See Note, *Administrative Adjudications*, *supra* note 8. In arguing that the future lies in a single, "substantial evidence" standard, the author reawakened the old rationale that agencies are more experienced in, and better equipped to deal with, specialized issues. *Id.* at 637. According to this Note, the single standard is further justified by the "extensive due process protection provided at the agency level." *Id.* at 639 n.104. The Note thus recognized that the fairness of a single standard depends on the agency's competence as a decisionmaker. *Id.* at 636. Thus, in arguing that fundamental, vested rights do not warrant independent judicial review, the Note resolves the tension between agencies and the judiciary, between efficiency and individual rights, in favor of agency efficiency and to the detriment of the judiciary's historical protection of those rights.

¹⁵⁸ *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 345, 595 P.2d 579, 584, 156 Cal. Rptr. 1, 6 (1979).

¹⁵⁹ *Id.* at 345, 595 P.2d at 585, 156 Cal. Rptr. at 7. The court acknowledged that in no prior cases rejecting the substantial evidence standard had the legislature specifically commanded that standard. *Id.* Here, however, the legislature *had* commanded the substantial evidence standard. Ag. Labor Rel. Act, CAL. LAB. CODE §§ 1140-1166.3 (West 1989).

review process with rules that hinge on whether the aggrieved party was deprived of a fundamental vested right. Such rules would "make the distinction 'on a case-by-case basis' . . . a prolific source of the litigious delay that the Legislature indisputably sought to avoid."¹⁶⁰

In the wake of *Tex-Cal* it may have appeared that the way was finally clear for construction, by the court or the legislature, of a uniform and consistently applied standard of review for administrative mandamus cases. There was no constitutional impediment to legislative abrogation of the dual standard, as long as it was accompanied by due process guarantees. The court specifically denounced the "judicially created uncertainty" wrought by the availability of two standards of review, with no definitive means of determining which to apply.¹⁶¹ Indeed, some commentators have seen *Tex-Cal* as signalling a watershed in the development of procedure for judicial review of administrative decisions.¹⁶²

Yet *Tex-Cal* has proven to be anything but a watershed. While cognizant of its prerogative to enact administrative provisions

In fact, the court specifically stated that "[o]ur holding does not, of course, affect review of administrative findings where the Legislature has left the choice of the standard to the courts (e.g., as in § 1094.5)." *Tex-Cal*, 24 Cal. 3d at 346, 595 P.2d at 585, 156 Cal. Rptr. at 7. Thus, while the constitution may no longer be viewed as prohibiting a legislatively mandated "substantial evidence" standard, where the legislature has not acted, independent review is alive and well.

¹⁶⁰ *Tex-Cal*, 24 Cal. 3d at 346, 595 P.2d at 585, 156 Cal. Rptr. at 7 (citation omitted). This admission underscores the court's recognition that efficiency is the underlying rationale for a single standard. Nowhere in the opinion does the court suggest that the single standard is therefore preferable for those cases where the court otherwise exercises its independent judgment under § 1094.5. Indeed the court specifically states that its "holding does not, of course, affect review of administrative findings where the Legislature has left the choice of standard to the courts." *Id.*

¹⁶¹ *Id.* at 344-45, 595 P.2d at 584, 156 Cal. Rptr. at 6.

¹⁶² See Note, *Administrative Adjudications*, *supra* note 8, wherein the author calls *Tex-Cal* a "dramatic shift from previous holdings," *id.* at 618, and suggests that "in the aftermath of the . . . opinion it therefore appears that no serious impediment remains to prevent the return to a single substantial evidence standard of review of administrative adjudications in California," *id.* at 630, and that "the court has opened a path toward a workable single standard." *Id.* at 640; see also Comment, *Proposal*, *supra* note 8, at 45 ("The *Tex-Cal* principle of ensuring administrative due process is the *culmination* of a struggle by the California Supreme Court to prevent unbridled agency discretion and still leave administrative agencies with enough power to effectively perform their functions." (emphasis added)).

with single standards of review, the legislature has not reformed section 1094.5. The court criticized its previous inability to state reliable rules for implementation of the dual standard, but the standards remain and the rules are no less uncertain. The court continues to cite the *Bixby-Strumsky* "rule" while determining, "on a case-by-case basis" and by "no fixed formula," which of the myriad of rights affected by administrative adjudication warrant independent review and which do not.¹⁶³

III. CONTINUING UNCERTAINTY: THE NEWEST APPROACHES

As the court itself implicitly acknowledged in *Tex-Cal*, the search for consistency as to when independent judgment review was authorized by law could not succeed as long as it was carried out on a "case-by-case basis."¹⁶⁴ Throughout the opinions issued since codification, the court has used various descriptive terms, such as vested rights and fundamental vested rights, and such amorphous concepts as "importance to the individual in human terms." These attempts to outline categories of rights only raised additional questions. Rather than declaring these questions unanswerable, after all its noble efforts, and heeding the message of *Tex-Cal* to steer toward a single standard, the court began anew the search for theoretical definitions crafted for specific holdings. These approaches would once again fail to build any predictable precedent.

A. Direct Pecuniary Interests: Vestedness Ascendant

The language of the *Bixby* opinion alluding to non-economic rights had, in the court's view, fostered a "fundamental misapprehension" that it corrected in the 1980 *Interstate Brands v. Unemploy-*

¹⁶³ See, e.g., *Alameda Co. v. Board of Retirement*, 46 Cal. 3d 902, 760 P.2d 464, 251 Cal. Rptr. 267 (1988), discussed *supra* notes 135-40 (*Bixby-Strumsky* rule used to determine whether independent judgement review applied to granting of a service-related disability pension); *Unterthiner v. Desert Hospital*, 33 Cal. 3d 285, 656 P.2d 554, 188 Cal. Rptr. 590 (1983), discussed *supra* notes 141-50 (*Bixby-Strumsky* rule used to determine whether independent judgment review applied to denial to a physician of hospital privileges); *Frink v. Prod.*, 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982), discussed *infra* notes 194-203 (*Bixby-Strumsky* rule used to determine whether independent judgment review applied to denials of applications for welfare benefits).

¹⁶⁴ See *supra* note 153 and accompanying text.

ment Insurance Appeals Board¹⁶⁵ decision. Through its explanation of what *Bixby* had not done, the court reaffirmed the property right element of the independent review standard while announcing a new definition of it for use in administrative mandamus.

In *Interstate Brands*, an employer sought writ after the Unemployment Insurance Appeals Board had reversed the decision of a referee who had determined that employees who had been locked out by the employer in a labor dispute were not entitled to unemployment benefits.¹⁶⁶ The trial court found that the Board's decision affected the employer's fundamental vested rights, and upon independent review of the evidence concluded that it was not supported by the weight of that evidence.¹⁶⁷

The Board argued that use of the independent judgment test was improper according to *Bixby*'s test for vestedness and fundamentalness.¹⁶⁸ The Board urged that vestedness alone would not qualify for independent review. Further, according to the Board, the right was not fundamental because the potential charges against the employer's reserve account were of minor consequence.¹⁶⁹

The court responded that this reflected a misapprehension of the *Bixby* rule.¹⁷⁰ Although *Bixby* described a fundamental right in terms that pointed beyond purely economic considerations, the original link of fundamentalness and vestedness with property rights was not to be abandoned.¹⁷¹ The court held that the

¹⁶⁵ 26 Cal. 3d 770, 608 P.2d 707, 163 Cal. Rptr. 619 (1980).

¹⁶⁶ The procedural background for the cases discussed in this section will be more fully elaborated, since they have not been discussed elsewhere.

¹⁶⁷ *Id.* at 773-74, 608 P.2d at 709, 163 Cal. Rptr. at 621. The factual issue independently reviewed by the trial court was whether the employees were "voluntarily unemployed" within the meaning of Unemployment Insurance Code § 1262. *Id.* at 773, 608 P.2d at 709, 163 Cal. Rptr. at 621. The referee had ruled the employees ineligible for benefits because of their participation in a "trade dispute," while the Board found that they were not "voluntarily unemployed." *Id.*

¹⁶⁸ *Id.* at 774-75, 608 P.2d at 709-10, 163 Cal. Rptr. at 621-22. The *Bixby* test is explained *supra* in notes 115-117 and accompanying text.

¹⁶⁹ *Interstate Brands*, 26 Cal. 3d at 775, 608 P.2d at 710, 163 Cal. Rptr. at 622. The court, however, pointed out that while "[a]n order of eligibility for benefits has no immediate effect on the employer," it could "affect its future rate of contribution to the unemployment fund." *Id.* at 775 n.3, 608 P.2d at 710 n.3, 163 Cal. Rptr. at 622 n.3.

¹⁷⁰ *Id.*

¹⁷¹ The court was pointing to an unexpressed or assumed link between vested and fundamental rights; since only property rights were at first

employer's right at issue in *Interstate Brands* was a property right entitling it to independent review because the employer had "a direct pecuniary interest" in the charges that might be made to its reserve account.¹⁷² An erroneous charge would, therefore, constitute a "wrongful deprivation of property."¹⁷³

The court declined to follow the plain meaning of its language requiring that abrogation of a fundamental right "have some significant impact in human terms" in order to trigger independent review;¹⁷⁴ effects other than those that are purely business-related may also impermissibly impinge on fundamental rights.¹⁷⁵ In refusing to limit the inquiry to business impacts, the court stated that the pre-*Bixby* cases dealt with property rights that *Bixby* did not affect.¹⁷⁶ The *Bixby* opinion, the court explained, did not restrict independent review in decisions where it had been previously established.¹⁷⁷ Instead, *Bixby* was meant to provide a doctrinal ground for expanding independent review to cases "not

afforded independent review, there was no separate question of fundamentalness. *See id.* at 775-76, 608 P.2d at 710-11, 163 Cal. Rptr. at 622-23.

¹⁷² *Id.* at 776, 608 P.2d at 710, 163 Cal. Rptr. at 622. This direct pecuniary interest resulted from the Unemployment Insurance Act, which provided for "rate of contributions by an employer based upon the ratio of the employer's average base payroll to the amount of revenue with which he is credited on the books of the Employment Stabilization Commission." *Id.* An award of benefits would thus deplete the reserve account and could affect the employer's rate of contribution. *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See supra* note 115 and accompanying text.

¹⁷⁵ The Board had argued that no fundamental right of an employer could be affected, given the *Bixby* requirement that there be some impact on it that was significant "in human terms," unless the increase in the contribution rate was so great that it would effectively drive the employer out of business. *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 777, 608 P.2d 707, 711, 163 Cal. Rptr. 619, 623 (1980).

¹⁷⁶ *See id.* at 777, 608 P.2d at 711, 163 Cal. Rptr. at 623-24. The court noted that *Bixby* had cited with approval the most recent cases in which judicial review was sought by an employer. *Id.* *See Bixby v. Pierno*, 4 Cal. 3d 130, 143 n.10, 481 P.2d 242, 251 n.10, 93 Cal. Rptr. 234, 243 n.10 (citing *General Motors Corp. v. Cal. Unemployment Ins. Appeals Bd.*, 253 Cal. App. 2d 540, 545, 61 Cal. Rptr. 483 (1967)).

¹⁷⁷ *Interstate Brands*, 26 Cal. 3d at 779, 608 P.2d at 712, 163 Cal. Rptr. at 624-25. Whatever meaning the court's reference to pre-*Bixby* "decisions" establishing availability of independent review may have had, the suggestion that pre-*Bixby* "classes of decisions" were unaffected by *Bixby* was pointless because, as this Article illustrates, the court's attempts to define any such "classes" have not succeeded.

involving vested property rights in the traditional sense.”¹⁷⁸

Thus, following *Bixby*, the court would determine the fundamentalness of a right by examining the character of its human aspect in addition to the extent of its economic impact.¹⁷⁹ The court clarified this position, however, by noting that it did not intend its language in *Bixby*, describing the trend of the court towards greater sensitivity to non-economic rights, to mean that rights “whose most visible dimension is the economic one” would not for that reason be considered fundamental.¹⁸⁰ Nevertheless, the court indicated that in assessing the fundamentalness of a right it would “remain especially responsive to the human as opposed to the purely economic dimension of the rights affected.”¹⁸¹

The court attempted to explain the distinction, or lack thereof, between “vestedness” and “fundamentalness.” Alluding to a passage in *Bixby* in which the fundamentalness of a right was described as depending upon the extent to which it is already possessed, or is already vested, the court recognized that “it could truly be said that the search for ‘vestedness’ and the search for ‘fundamentalness’ are one and the same.”¹⁸² The uncertainty

¹⁷⁸ *Id.* at 779, 608 P.2d at 712-13, 163 Cal. Rptr. at 624-25.

¹⁷⁹ *Id.* at 780, 608 P.2d at 713, 163 Cal. Rptr. at 625. The court labeled as “a statement of historical fact” its remark in *Bixby* that in examining fundamentalness it had exhibited “slighter sensitivity to the preservation of purely economic privileges.” *Id.* at 780 n.6, 608 P.2d. at 713 n.6, 163 Cal. Rptr. at 625 n.6 (quoting *Bixby*, 4 Cal. 3d 130, 145, 481 P.2d 242, 253, 93 Cal. Rptr. 234, 245 (1971)). This observation is hard to square with the court’s consistent reiteration of the vested property right requirement prior to *Bixby*.

¹⁸⁰ *Id.* at 780 n.6, 608 P.2d at 713 n.6, 163 Cal. Rptr. at 625 n.6.

¹⁸¹ *Id.* This focus on a distinction between the purely economic dimension of rights and their “human” aspect is unfortunate, but may merely reflect the court’s penchant for choosing broad, amorphous terms, undefinable in a legal sense. The court has never truly explained what it means by “human” as opposed to “economic.” Depending on what the court interprets these terms to mean, they surely cannot be so distinguished even conceptually; a significant economic impact will normally occasion a significant human impact. This purported distinction has continued to plague the court’s approach to administrative mandamus. This Article concludes with a suggestion for resolution of this problem, by recognizing and making explicit the court’s view that it is where these terms coincide, not where they diverge, that independent judgment review is appropriate. See *infra* notes 254-64 and accompanying text.

¹⁸² *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 779 n.5, 608 P.2d 707, 712 n.5, 163 Cal. Rptr. 619, 625 n.5 (1980). The

continues.

The direct pecuniary interest test was applied in a more express fashion in the court's most recent statement of the administrative mandamus standards. The facts of *County of Alameda v. Board of Retirement*,¹⁸³ decided in 1988, were similar to those in *Interstate Brands* in that they involved the granting of a service-related disability pension to an employee.¹⁸⁴ The employee, a county deputy sheriff, had been granted the pension by the Board of Retirement, based on various injuries he claimed were work-related and had rendered him unable to perform his job. On the county's petition for mandate under section 1094.5, the trial court applied the independent judgment test and issued the writ setting aside the Board's decision. The employee argued on appeal that application of the independent judgment test was inappropriate, but the court of appeal and the supreme court disagreed, affirming the trial court's judgment.

County of Alameda echoed *Interstate Brands*' "direct pecuniary interest" corollary test for determining entitlement to independent judgment review.¹⁸⁵ As it had consistently done throughout its administrative mandamus opinions, the court declined to expressly limit this test, preferring instead to find in it a satisfac-

court reached this conclusion by acknowledging that "[t]he ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking judicial power." *Id.* (emphasis omitted). Because this "ultimate question" becomes the actual test for review, that test is the same for both vestedness and fundamentalness.

¹⁸³ 46 Cal. 3d 902, 760 P.2d 464, 251 Cal. Rptr. 267 (1988).

¹⁸⁴ *Id.* at 909, 760 P.2d at 468-69, 251 Cal. Rptr. at 272. The interest of the County of Alameda in the benefits was not as direct as the employer's interest was in *Interstate Brands*. The decision to award the benefits would affect the County only as the payments were reflected in the actuarial survey upon which the Board of Retirement based its recommendations for appropriations and for funds needed to cover deficits. *See id.* at 908-09, 760 P.2d at 468, 251 Cal. Rptr. at 271.

¹⁸⁵ *Id.* at 908, 760 P.2d at 468, 251 Cal. Rptr. at 271. The court reaffirmed this test in its 1989 decision in *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 375 n.36, 777 P.2d 91, 108 n.36, 261 Cal. Rptr. 318, 335 n.36 (1989) ("[W]e observe that in cases . . . in which a private party has a 'direct pecuniary interest' in the administrative agency's determination—the independent judgment test may be the appropriate standard for a court to apply in reviewing the administrative determination."). *Id.* at 375 n.36, 777 P.2d at 108 n.36, 261 Cal. Rptr. 335 n.36.

tory rationale for the disposition of the particular controversy presented.¹⁸⁶

The facts in the case, the court pointed out, differed from those in *Interstate Brands* only in the identity of the petitioner: where in *Interstate Brands* the petitioner had been a private employer, in *County of Alameda* the petitioner was a public employer.¹⁸⁷ Both cases involved possible increases in amounts each employer would be required to contribute to a retirement or disability system, and thus each had a direct pecuniary interest in challenging these amounts.¹⁸⁸ The difference in identity of the employer/petitioners was irrelevant. Independent judgment review was intended to ensure that evidence of certain disputes would receive careful examination.¹⁸⁹ That goal would not be served by making its availability dependent on "the identity of the litigants, rather than the nature of their dispute."¹⁹⁰ Such a distinction, the

¹⁸⁶ The court merely argued by analogy to the *Interstate Brands* case in which it had found that the employer had a "direct pecuniary interest" in benefits paid as part of that scheme and that this interest thereby qualified for independent judgment review. According to the court, the right at issue in *County of Alameda* was similar enough to the right in *Interstate Brands* that it too would qualify for independent review. *County of Alameda*, 46 Cal. 3d. at 909-10, 760 P.2d at 469, 251 Cal. Rptr. at 272. As long as the right was sufficiently similar to one previously passed upon, the court would not question whether the test upon which it relied was sound, nor would it expressly limit it to the situation found in the case at issue.

¹⁸⁷ *Id.* at 909, 760 P.2d at 468, 251 Cal. Rptr. at 272.

¹⁸⁸ *Id.* at 909, 760 P.2d at 469, 251 Cal. Rptr. at 272. Whether the effect on the respective employer's contribution would be the same regardless of the nature of the employer, as the court claimed, is open to question. As pointed out above, the effect on the County of Alameda of the potential benefits was considerably less direct than was that of the benefits at issue in *Interstate Brands*. See *supra* note 184.

¹⁸⁹ *County of Alameda*, 46 Cal. 3d at 909-10, 760 P.2d at 469, 251 Cal. Rptr. at 272. That the evidence before the agency is "carefully examined" does not mean that it is re-evaluated. Because the administrative agency's evaluation of the evidence carries little or no weight when its decision is independently reviewed, it is not actually re-evaluated, but is *judicially* evaluated for the first time. See *Dare v. State Bd. of Medical Examiners*, 21 Cal. 2d 790, 795, 136 P.2d 304, 307 (1943). Conversely, evidence in those administrative decisions that are not independently reviewed is not entitled to any judicial evaluation; rather, those decisions are subject to a judicial determination that they are supported by substantial evidence.

¹⁹⁰ *County of Alameda*, 46 Cal. 3d. at 909, 760 P.2d at 469, 251 Cal. Rptr. at 272. This statement overlooks the fact that for administrative mandamus the identity of the parties often determines, or is at least an important aspect of, the nature of the dispute. When an agency, supposedly better equipped

court concluded, would also result in private sector employees receiving more favorable treatment from the courts than would employees of public employers.¹⁹¹ The court thus hinted that even in a case-by-case analysis, there was room for some generalization, particularly when the right was of a direct pecuniary interest.

B. Residual Rights: Fundamentalness Ascendant

The court showed yet again how malleable and ineffective the *Bixby-Strumsky* and *Interstate Brands* tests were in yet another interpretation of the standard of review it purported to distill from its precedents. In 1982 in *Frink v. Prod*¹⁹² the court had to determine whether denials of applications for welfare benefits could be judicially reviewed using the independent judgment standard, even though the rights to such benefits were not technically "vested," as that term had previously been defined.¹⁹³ According to *Bixby* and *Interstate Brands*, neither fundamentalness nor vestedness could be considered alone in determining whether a right would invoke the independent judgment test.¹⁹⁴ The court in *Frink* acknowledged that the terms "fundamental" and "vested" were relative because the court had defined fundamental in terms of "the effect of the right in economic and human terms" and "the importance of it to the individual."¹⁹⁵ It then equated the

than the judiciary to do so, has made an "initial determination whether an individual qualifies to enter a profession or trade," it will be upheld upon a showing of substantial evidence. *Frink v. Prod*, 31 Cal. 3d 166, 175, 643 P.2d 476, 480, 181 Cal. Rptr. 893, 897 (1982). Furthermore, one of the major objections to independent judgment review is that agencies, as opposed to courts, often possess special professional expertise. See, e.g., *Laisne v. California St. Bd. of Optometry*, 19 Cal. 2d 831, 866, 123 P.2d 457, 476 (1942) (Gibson, C.J., dissenting). For further discussion of *Laisne*, see *supra* notes 28-63.

¹⁹¹ *County of Alameda*, 46 Cal. 3d at 909, 760 P.2d at 469, 251 Cal. Rptr. at 272. The court punctuated this conclusion by bluntly declaring that "[t]his result interjects confusion into the proceedings and is absurd." *Id.*

¹⁹² 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982).

¹⁹³ *Id.* at 171, 643 P.2d at 478, 181 Cal. Rptr. at 895.

¹⁹⁴ *Id.* at 174-77, 643 P.2d at 480-82, 181 Cal. Rptr. at 897-99. As these cases indicated, however, the distinction between fundamentalness and vestedness was so vague that the absence of either in their traditional senses would not necessarily preclude independent review. See *supra* notes 110-28, 165-82 and accompanying text.

¹⁹⁵ *Frink*, 31 Cal. 3d at 177, 643 P.2d at 482, 181 Cal. Rptr. at 899. The extent of a right's economic effect would surely be affected by the degree to

right of an applicant for welfare benefits who had established the requisite need with the right of an approved recipient to continue receiving benefits.¹⁹⁶ The court had held in *Harlow* that the right of an approved recipient merits independent judgment review.¹⁹⁷ In the court's view, the right of a needy applicant was important enough to be considered fundamental, and fundamental enough to overcome the lack of vestedness.¹⁹⁸

In distinguishing between two types of cases, however, the court's language almost established a new test. In the first type, a licensing authority supplies an expertise which the court is ill-equipped to supplant when the agency's decision is that an applicant is not fit to hold the license. In cases involving an individual's qualification for public assistance, however, the court can readily discern whether the individual has the requisite "need."¹⁹⁹ Where in the former type of case the petitioner must prove prior qualification by the authority to establish vestedness, the latter type requires only an "absence of income or other source of funds" to qualify an individual for "statutory public assistance programs."²⁰⁰ The availability of public assistance is thus a "residual right possessed by all of the citizenry to be exercised when circumstances require."²⁰¹ This right, as one of the

which it was vested. Moreover, because the "effect and importance of rights may vary greatly," the court recognized that "the fundamental character of rights may vary significantly." *Id.*

¹⁹⁶ *Id.* at 179, 643 P.2d at 483, 181 Cal. Rptr. at 900.

¹⁹⁷ *Id.* at 178-79, 643 P.2d at 482-83, 181 Cal. Rptr. at 899-900. See *supra* notes 129-34 and accompanying text for a discussion of *Harlow*.

¹⁹⁸ *Frink*, 31 Cal. 3d at 180, 643 P.2d at 484, 181 Cal. Rptr. at 901. As the court put it, "While the degree to which the right is vested may not be overwhelming, the degree of fundamentalness is. Weighing them together as required by *Bixby* and *Interstate Brands*, we conclude the independent judgment standard should be applied to decisions denying applications for welfare benefits." *Id.* The court thus overruled prior decisions in *Tripp v. Swoap*, 17 Cal. 3d 671, 552 P.2d 749, 131 Cal. Rptr. 789 (1976) and *Bertch v. Social Welfare Dept.*, 45 Cal. 2d 524, 289 P.2d 485 (1955), at least to the extent that they were inconsistent with the opinion.

¹⁹⁹ *Frink*, 31 Cal. 3d at 180, 643 P.2d at 483-84, 181 Cal. Rptr. at 900-01. Deciding if an applicant is qualified for welfare benefits, the court explained, does not require the "'delicate task' of evaluating competence to engage in a broad field of endeavor as is true in most licensing cases." *Id.* at 180, 643 P.2d at 484, 181 Cal. Rptr. at 901.

²⁰⁰ *Id.*

²⁰¹ *Id.* The existence of such a broadly defined class of rights appears to render meaningless the requirement of vestedness. The number of constitutional or statutory rights that persons can exercise "when

“constitutional and statutory rights” that are possessed by an individual, is vested, even though it does not constitute “tangible wealth.”²⁰²

Thus, *Frink* established that fundamentalness and vestedness involve factors that must be weighed together, and are clearly not separate tests. It also increased the category of rights to which independent judgment review adheres. While the number of different types of rights which might be affected by license or permit terminations is finite, the number of different types of “residual rights possessed by all of the citizenry” may not be.²⁰³

The reconstructed standard from *Frink* was applied in *Unterthiner v. Desert Hospital District*²⁰⁴ in 1983. The court was called upon to decide whether the denial to a physician of hospital privileges should be reviewed under the independent judgment standard or should be subject, as all initial applications for professional privileges had been, to the substantial evidence standard.²⁰⁵ Applying *Frink* and *Anton*, the court found that the denial of hospital privileges so impacted the physician’s ability to practice his profession that it clearly impinged upon a fundamental

circumstances require” is virtually limitless. Despite the language, the court’s holding must be read as limited to rights of the same particular type involved in the case, namely rights affecting an individual’s means of living. See *infra* notes 254-64 and accompanying text for discussion of a proposed new test based on this principle.

²⁰² *Frink*, 31 Cal. 3d at 180, 643 P.2d at 483, 181 Cal. Rptr. at 900 (quoting *Kerrigan v. Fair Employment Practice Comm’n*, 91 Cal. App. 3d 43, 51, 154 Cal. Rptr. 29, 35 (1979)). The view that a right was vested merely by being already possessed was described in *Harlow v. Carleson*, 16 Cal. 3d 731, 735-36, 548 P.2d 698, 701, 129 Cal. Rptr. 298, 301 (1976). See *supra* notes 129-34 and accompanying text.

²⁰³ In other words, only a limited number of professional licenses may be issued to a limited number of individuals found qualified; only those who have been deemed qualified have a vested right protected by independent judgment review. On the other hand, every individual may have a right to public assistance, as well as any number of other constitutional or statutory rights.

²⁰⁴ 33 Cal. 3d 285, 656 P.2d 554, 188 Cal. Rptr. 590 (1983), *cert. denied*, 464 U.S. 1068 (1984).

²⁰⁵ *Id.* at 293, 656 P.2d at 558-59, 188 Cal. Rptr. at 594-95. See *supra* notes 141-50 and accompanying text (discussing distinction between professional licenses that had been suspended or revoked, thus qualifying for independent judgment review, and “decisions which merely affected the initial acquisition of such a right,” which “did not warrant similar attention”).

right.²⁰⁶

The court also found, however, that under *Anton*'s distinction between a physician already admitted to hospital staff membership and one making an initial application, the petitioner's right was not vested.²⁰⁷ Unlike the right to welfare benefits addressed in *Frink*, this right was not one that everyone might potentially possess. Furthermore, possession of a right to practice generally does not automatically result in a right to perform surgery.²⁰⁸ Rather, qualification for that right was a "legislative fact."²⁰⁹ Conversely, the independent judgment rule applied only to adjudicatory determinations and not to the legislative actions of an agency.²¹⁰

²⁰⁶ *Unterthiner*, 33 Cal. 3d at 296-97, 656 P.2d at 561, 188 Cal. Rptr. at 597.

²⁰⁷ *Id.* at 297, 656 P.2d at 561-62, 188 Cal. Rptr. at 597-98. While the court said that it was "[w]eighing the degree of vestedness and fundamentalness," it apparently chose to consider only vestedness, since its holding was made expressly to "adhere to the rule that substantial evidence review applies to decisions denying initial applications for hospital privileges." *Id.* at 298, 656 P.2d at 562, 188 Cal. Rptr. at 598. The court, in effect, disregarded the substantial fundamentalness it had ascribed to a doctor's need for hospital privileges by concluding that, "[w]hile access to a hospital may be crucial to a doctor's livelihood in some cases, the licensed doctor seeking hospital privileges is not in a substantially different position than the medical school graduate seeking a license to practice medicine. In each case, the substantial evidence rule applies." *Id.* at 298, 656 P.2d at 563, 188 Cal. Rptr. at 599.

²⁰⁸ *Id.* at 297, 656 P.2d at 561-62, 188 Cal. Rptr. at 597-98. A doctor licensed to practice medicine possesses some elements of a right to hospital privileges. Such a license, however, brings no right to practice a specialty when the doctor's qualifications for that specialty have not been reviewed by the licensing agency. *Id.*

²⁰⁹ *Id.* at 297, 656 P.2d at 562, 188 Cal. Rptr. at 598. Because the legislature, not the licensing agency, established the requirement of additional standards for the specialty, those standards and the conformity of the doctor's conduct with them the court labeled "legislative" facts. Because the independent judgment rule applies only to adjudications, the right to practice the specialty does not qualify for independent judgment review. The court did not explain why specific agency factfinding necessary for applying the standards could not be subject to independent judgment review.

²¹⁰ *Id.* The vague distinction maintained in California between quasi-judicial and quasi-legislative administrative actions is discussed in Moskowitz, *Spinning Gold Into Straw: The Ordinary Use of the Extraordinary Writ of Mandamus to Review Quasi-Legislative Actions of California Administrative Agencies*, 20 SANTA CLARA L. REV. 351, 351 n.2 (1980).

The court concluded, therefore, that considerations of vestedness and fundamentalness did not preclude maintenance of the *Anton* distinction.²¹¹ The judiciary was to defer to administrative expertise for determination of a physician's qualification for hospital privileges measured by standards legislatively established.²¹² Once again the court did not explain why judicial involvement would be any more appropriate, given the significance of "administrative expertise," when reviewing the revocation of a previously granted hospital privilege. Presumably, the court would have no more expertise than the agency for determining whether a physician had abused the privilege. The standards to be invoked in either instance would be the same "legislative facts."

C. "Important" Rights: Beyond Due Process

The uncertainty inherent in the independent judgment "rule" was not to be cured by construction of a constitutionally prescribed test. In 1983 the court held the retention of a drivers license to be a fundamental right. The court's conclusion in *Berlinghieri v. Department of Motor Vehicles*²¹³ rested primarily on practical considerations. According to the court, retention of a drivers license is a particularly important right in our "travel-oriented society."²¹⁴ The revocation of that right can and often does constitute a "severe personal and economic hardship."²¹⁵

Before reaching this conclusion, however, the court explained that a right may be fundamental in the context of the "relationship between *administrative* and *judicial* adjudicatory decisions,"²¹⁶ yet not so fundamental that its abridgement triggers the constitu-

²¹¹ See *Unterthiner v. Desert Hosp. Dist.*, 33 Cal. 3d 285, 297 n.6, 656 P.2d 554, 562 n.6, 188 Cal. Rptr. 590, 598 n.6 (1983).

²¹² *Id.* at 298, 656 P.2d at 562-63, 188 Cal. Rptr. at 598-99.

²¹³ 33 Cal. 3d 392, 657 P.2d 383, 188 Cal. Rptr. 891 (1983).

²¹⁴ *Id.* at 398, 657 P.2d at 387, 188 Cal. Rptr. at 895.

²¹⁵ *Id.* at 398, 657 P.2d at 387, 188 Cal. Rptr. at 895-96. Apparently a drivers license is only important enough to those who already have one. Needing to drive but not having a license is not sufficient. In addition, the question is presented whether the right to a drivers license is not a statutory right which every person may exercise by passing a driving test. See *Frink v. Prod.*, 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982) discussed *supra* in notes 192-203 and accompanying text.

²¹⁶ *Berlinghieri*, 33 Cal. 3d at 396, 657 P.2d at 386, 188 Cal. Rptr. at 894 (quoting *Hernandez v. Department of Motor Vehicles*, 30 Cal. 3d 70, 83, 634 P.2d 917, 924, 177 Cal. Rptr. 566, 573 (1981) (emphasis in original)).

tional principles of due process or equal protection.²¹⁷ A court could thus determine that a particular right was a fundamental right justifying independent judgment review of an administrative decision affecting that right, while not finding it fundamental enough for the court to apply strict scrutiny to legislative actions affecting it. Perhaps asking the impossible, the court cautioned “against any blurring of two separate and distinct senses in which the term ‘fundamental’ is used.”²¹⁸ The court distinguished between the test for determining the existence of a fundamental right for the purposes of equal protection and due process,²¹⁹ and the fundamental right analysis used for administrative mandamus. The former focused on the right’s “constitutional basis or its specific impact on a particular segment of society,” while in examining the latter the courts were “more concerned with the personal nature of the interest.”²²⁰

Thus once again the court rejected the traditional test for constitutional analysis and instead continued the fact-specific, analogizing method of determining the fundamentalness of a right in the administrative mandamus context. The only basis for determining the fundamentalness of the right to a driver’s license was the importance the court deemed it to be to the individual.²²¹

²¹⁷ *Id.*

²¹⁸ *Id.* at 397, 657 P.2d at 387, 188 Cal. Rptr. at 895. The sense in which the term has been used for administrative mandamus review is hardly distinct; the seminal articulation of it describes it merely in terms of its “effect in human terms” and its “importance” for the individual. *Bixby v. Pierno*, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971), discussed *supra* in notes 115-27 and accompanying text. Couching the concept in such broad and vague phrasing certainly precludes maintenance of any meaningful distinction between the administrative mandamus and the constitutional senses of fundamentalness.

²¹⁹ The test for fundamentalness in the constitutional due process context was elaborated in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). For a right to be considered fundamental in this sense it must be specifically protected by the constitution, “affect the integrity of the political process,” or “ha[ve] a disproportionate impact upon a discrete and insular minority.” *Berlinghieri*, 33 Cal. 3d at 397, 657 P.2d at 387, 188 Cal. Rptr. at 895 (citing *Carolene Products*, 304 U.S. at 152-53).

²²⁰ *Berlinghieri*, 33 Cal. 3d at 397, 657 P.2d at 387, 188 Cal. Rptr. at 895.

²²¹ The court thus eschewed considering as a factor the effect abrogation of a particular right might have on society, or even what society’s interest in the right might be. The *Berlinghieri* opinion nowhere alludes to the importance to society of insuring that only competent persons are allowed to drive. Nor did the *Unterthiner* court consider society’s interest in properly qualifying medical specialists. Society’s interest may be presumed to be

Presumably it would be more important to some individuals than to others, a point the court acknowledged in noting that for the petitioner the license had a particular importance because of her profession as a delivery driver.²²² The same right therefore may be fundamental to one person in one context and not to another in a different context.

Along with *County of Alameda* and *Frink*, this case illustrates that the category of fundamental and vested rights warranting independent judgment review is still not subject to any recognizable limit. While the constitution might have provided some parameters in the beginning,²²³ it no longer does so. The court in both *Berlinghieri* and *County of Alameda* deemed that the rights falling within the category were not limited to individual due process and equal protection rights.²²⁴

D. The Standard of Review Today

The procedural rules for the writ of administrative mandamus today in California are remarkably unintelligible relative to other areas of the law. Barring legislative or judicial action to change the law, an aggrieved party seeking review of an administrative action in California cannot predict with any certainty what standard of review will be applied to any given petition.²²⁵

already represented in the licensing authority; yet when a right qualifies for independent judgment review and the agency's role is minimized, the courts do not weigh any societal interest in passing judgment.

²²² *Id.* at 398, 657 P.2d at 387-88, 188 Cal. Rptr. at 896.

²²³ *See, e.g.,* *Dare v. Board of Examiners*, 21 Cal. 2d 790, 136 P.2d 304 (1943) (finding independent judgment review available when "constitutional right either of liberty or of property" involved), discussed *supra* in note 63.

²²⁴ In *Berlinghieri*, the court stated that "the fact that retention of a driver's license does not rise to the level of a fundamental right for purposes of discussing due process or equal protection of the law is not conclusive in the resolution of the present case." 33 Cal. 3d at 397, 657 P.2d at 387, 188 Cal. Rptr. at 895. *See also* *County of Alameda v. Board of Retirement*, 46 Cal. 3d 902, 907, 760 P.2d 464, 467, 251 Cal. Rptr. 267, 270 (1988). In Note, *Factual Determinations*, *supra* note 4, at 1492, the author explains that California courts' exercise of independent judgment review "is not limited to constitutional rights." *Id.* (emphasis in original). He perhaps goes too far, however, in asserting that "[a]lmost all the California cases involve nonconstitutional rights." *Id.* at 1492 n.56.

²²⁵ Indeed the party may not even know with any certainty after review. A court's label for the type of review it conducts, of course, does not indicate the actual process it undertakes. For instance, a court may state

As the judicial history of the writ reveals, the precedents are not helpful. They supply rhetoric; they do not supply rules. The precedents offer descriptive terms. Yet the class of rights which these terms are meant to identify has never been truly defined. The California Supreme Court's protracted attempt to define the standards governing independent judgment has failed. Some opinions have stated that the class includes rights that are fundamental and vested,²²⁶ while others have declared the search for fundamentalness and vestedness to be one and the same.²²⁷ Yet other cases have said that a right may be less vested if it is sufficiently fundamental.²²⁸

Such an attempted classification makes predictability and consistency possible only if rights can be deemed to have the same characteristics as other rights already singled out as members of the class. When presented with a right not sufficiently analogous to one previously passed upon, the court has re-examined the entire foundation for the mandamus doctrine, concluding with a reformulation of the review standard, or an exposition of a rationale, functional in the given instance. The result in such circumstance is thus often not foreseeable in advance, so a petitioner can neither know what standard of review will be applied nor make any reasonable assessment, in light of precedent, of the chances for success.

Therefore, although the court has continued to use the terms "fundamental" and "vested," their meaning has steadily lost precision. The court progressed from recognizing any previously acquired "liberty or property right,"²²⁹ to rights satisfying a sepa-

that it has applied the independent judgment test when, in fact, it merely looked for some substantial evidence so that it could uphold a trial court judgment it considered correct. Fundamental or vested rights, depending on the circumstance, may just be the terms in which the conclusion is announced, and as such "do nothing to articulate the process of analysis by which the issue . . . is to be litigated and decided." Brodie & Linde, *supra* note 5, at 550.

²²⁶ See, e.g., *Dickey v. Retirement Bd.*, 16 Cal. 3d 745, 548 P.2d 689, 129 Cal. Rptr. 289 (1976), discussed *supra* notes 135-40 and accompanying text.

²²⁷ See, e.g., *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 608 P.2d 707, 163 Cal. Rptr. 619 (1980), discussed *supra* at text accompanying notes 165-82.

²²⁸ See, e.g., *Frink v. Prod.*, 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982), discussed *supra* at text accompanying notes 192-203.

²²⁹ See *supra* notes 42-63 and accompanying text.

rate two-pronged test for fundamentalness and vestedness,²³⁰ to any right sufficiently important in human terms,²³¹ to rights satisfying a test in which fundamentalness and vestedness are merely considered two aspects of the same concept.²³² Yet this developing description of rights yielding independent judgment review has left the terms used virtually empty of meaning and, consequently, of little use.

Recent glosses on the concept have added little. The petitioner might have a "direct pecuniary interest" in the right affected. As evidenced by *Interstate Brands*²³³ and *County of Alameda*,²³⁴ the pecuniary interest need not be very direct to qualify the right for independent judgment review. Those rights that do not yield a direct pecuniary interest may still garner independent judgment review if they are "constitutional or statutory rights" or so called "residual" rights. Unlike professional licenses or permits, a court can assess these rights while lacking expertise in the particular area.²³⁵ This corollary, as well as the direct pecuniary interest corollary, is couched in language sufficiently vague to make any number of rights subject to it.

As the court's latest pronouncements on the subject, these corollary tests demonstrate how little the procedural rules for administrative mandamus have been clarified since the writ was created. Indeed, for those practitioners and trial courts navigating the territory of administrative mandamus, today's maps are full of new landmarks but few additional trails. The remark of an early commentator is as appropriate now as it was in 1950: "[T]he ordinary practicing lawyer who enters this field of law today without intensive preparation is apt to be surprised by what he finds."²³⁶ The modest goal of the final section of this Article is to explore how that surprise might be reduced notwithstanding

²³⁰ See *supra* notes 103-28 and accompanying text.

²³¹ See *supra* notes 138-40 and accompanying text.

²³² See *supra* notes 192-203 and accompanying text.

²³³ *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 608 P.2d 707, 163 Cal. Rptr. 619 (1980).

²³⁴ *County of Alameda v. Board of Retirement*, 46 Cal. 3d 902, 760 P.2d 464, 251 Cal. Rptr. 267 (1988).

²³⁵ *Frink v. Prod*, 31 Cal. 3d 166, 180, 643 P.2d 476, 483-84, 181 Cal. Rptr. 893, 900-01 (1982). See *supra* text accompanying notes 192-203. The court has to date found only the right to welfare payments involved in *Frink* to qualify as a residual constitutional or statutory right.

²³⁶ Kleps, *Certiorarified Mandamus I*, *supra* note 8, at 288.

that the uncertainty that produces it is so endemic to judicial interpretation.

IV. PROPOSALS FOR REFORM

The possible means by which predictability and uniformity might finally be achieved for the writ of administrative mandamus are limited. The legislature and the supreme court are the only bodies which could reach such a goal. Notwithstanding more than forty-five years without legislative reform of section 1094.5's embodiment of the dual standards of review, reform is possible. This section will explore some of the possible avenues. Even if a legislative solution were likely, however, its efficacy is questionable.²³⁷

The only realistic source of meaningful action is the court itself. The court created the problem when, in creating and applying the writ, it consistently declared that the standard to be applied would depend on the type of right affected. It is only the court that can now finish the job. To do so it must overrule itself either as to the use of two standards or as to the linkage of that use to the type of right involved. Barring either of those drastic steps, the court might state a test with enough precision that membership in the class can be determined with some degree of certainty. This section will conclude by suggesting such a test.

A. Proposals for Legislative Reform

Possible legislative reform of the administrative mandamus process focuses on three options. The legislature could rid section 1094.5 of the language providing for the dual standard and instead specify that all petitions will be reviewed by the same standard. Alternatively, the legislature might do for every other type of administrative review what it did for private hospital boards in subsection 1094.5(d),²³⁸ namely, specify the standard applicable to judicial reviews of decisions of particular groups of agencies or administrative boards. Finally, the legislature could attempt what the court has failed to do: spell out specifically which rights or types of rights will qualify for de novo judicial review.

²³⁷ See *infra* notes 238-53 and accompanying text.

²³⁸ See *supra* note 141 and accompanying text.

1. One Standard

The most direct step the legislature could take to eliminate the uncertainty of administrative mandamus would be to conform the California process with that of other jurisdictions²³⁹ by imposing a single standard of review on all judicial reviews of administrative actions. This single standard solution has been proposed and discussed elsewhere.²⁴⁰ This proposal, derived from the court's analysis and approval of the Labor Code statute at issue in *Tex-Cal*,²⁴¹ urges a uniform substantial evidence standard complemented by "safeguards at the administrative level to assure the essentials of due process."²⁴² These safeguards would be imposed through a uniform administrative procedure system such as the Administrative Procedure Act. Such safeguards would presumably satisfy *Tex-Cal*'s constitutional scrutiny of the single standard.²⁴³

This solution may lend consistency and predictability to administrative mandamus procedure. It may also, however, strip courts of any flexibility in their review of administrative decisions. Courts would be completely precluded from independently assessing the evidence upon which an administrative decision is made, no matter how important the right affected is to the individual. While there would be due process guarantees at the administrative level, as long as the agency followed the proper procedural prescription its view of the evidence would be the final word.

Such a scheme may be constitutional, at least in the context of the labor code section addressed in *Tex-Cal*. That alone does not make it wise or fair. That the scheme is constitutional does not truly respond to the concerns which motivated the promulgation

²³⁹ See *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 862-63, 123 P.2d at 457, 474-75 (1942) (Gibson, C.J., dissenting) (reviewing all administrative findings of fact by substantial evidence standard accepted in other jurisdictions); see also Note, *Factual Determinations*, *supra* note 4, at 1492-93 (noting most other states have not adopted California's broad review standard).

²⁴⁰ See, e.g., Comment, *Proposal*, *supra* note 8, at 59-67; Note, *Administrative Adjudications*, *supra* note 8, at 633-40.

²⁴¹ See *supra* note 154 and accompanying text.

²⁴² Comment, *Proposal*, *supra* note 8, at 67.

²⁴³ By providing for adequate notice and an opportunity to be heard, the Administrative Procedure Act "parallels or exceeds those safeguards" approved in *Tex-Cal*. Comment, *Proposal*, *supra* note 8, at 67.

of the dual standards in the first place. While the court may have struggled to find a supporting theory, it has constantly adhered to a belief that certain rights in certain circumstances must receive the protection that only independent, de novo, judicial review can provide. Indeed, *Bixby* referred to the abrogation of certain rights as "too important to the individual to relegate it to exclusive administrative extinction."²⁴⁴

The court accepted the *Tex-Cal* statute as constitutional.²⁴⁵ Yet that conclusion hardly affected the court's administrative mandamus holdings. While the court may have once found supporting theory in constitutional requirements of due process and separation of powers, it has long since abandoned any purely constitutional ground.²⁴⁶ Consequently, there would probably be no constitutional impediment to elimination of the two standards from section 1094.5. There would be, however, the forfeiture of all that the court has been trying, albeit with questionable success, to accomplish since *Drummey*. A single standard would eliminate the problem of when to use independent judgment review. Unfortunately, it would eliminate the benefits of that review as well.

2. Specification by Type of Administrative Entity

The legislature could specify the standard of review courts must use in reviewing decisions of specific administrative agencies, as it has already done in some cases.²⁴⁷ This could be done

²⁴⁴ *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971).

²⁴⁵ *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 344, 595 P.2d 579, 584, 156 Cal. Rptr. 1, 6 (1979). See *supra* notes 155-57 and accompanying text.

²⁴⁶ As early as 1943 the court was discussing independent judgment review without express reference to constitutional requirements. See *Dare v. Board of Examiners*, 21 Cal. 2d 790, 136 P.2d 304 (1943), discussed *supra* at notes 59-63 and accompanying text; see also *Berlinghieri v. Department of Motor Vehicles*, 33 Cal. 3d 392, 657 P.2d 383, 188 Cal. Rptr. 891 (1983) discussed *supra* at notes 213-24 and accompanying text (fact that right to drivers license not constitutionally protected is not conclusive for standard of review).

²⁴⁷ The standard of review for judicial review of decisions by private hospital boards is mandated by CAL. CIV. PROC. CODE § 1094.5(d) (West Supp. 1991). See *supra* note 141. Since enactment of that provision, the legislature has specified other agencies for which the substantial evidence standard of review applies, but these are not included in § 1094.5.

by adding additional subsections to section 1094.5, or by including a section governing judicial review in the code section defining the powers of particular agencies.²⁴⁸

This proposal is truly a complicated one. Certainly the prospect of including in section 1094.5 every administrative agency whose adjudicatory decisions might be reviewed is wholly impracticable. Further, specifying the standard of review in each authorizing statute would only apply to legislatively-created agencies; review of local agency decisions would be unaffected.

The types of agencies or boards that the criteria could include and the criteria used in their selection must be fully identified before the usefulness of this proposal can be evaluated. It is beyond the scope of this Article to do so, and the very need for such a catalog suggests the flaws inherent in the idea. It recalls the discredited separation of powers concept and the abandoned distinction between local and statewide agencies.²⁴⁹ To overcome these concerns the legislature would have to include every administrative entity currently operating, and continually add new ones as they emerge. If the intent is to include all administrative entities, this proposal is different only in form from that advocating one single standard.²⁵⁰ If the legislature is to act, the

²⁴⁸ The legislature has done this for a limited number of selected agencies. The code sections restricting superior courts to substantial evidence review of administrative adjudicatory decisions include: CAL. PUB. RES. CODE § 21168 (West 1986) (governing decisions made pursuant to enforcement of California Environmental Quality Act); CAL. PUB. RES. CODE § 25901(b) (West Supp. 1991) (governing decisions by State Energy Resources Conservation and Development Commission); CAL. GOV'T CODE § 66639(b) (West 1983) (governing decisions by San Francisco Bay Conservation and Development Commission); CAL. HEALTH & SAFETY CODE § 25187(g) (West Supp. 1991) (governing enforcement of California hazardous waste control provisions); CAL. GOV'T CODE § 3520(c) (West 1980) (governing state employer-employee relations); CAL. GOV'T CODE § 3542(c) (West Supp 1991) (governing state public education employees); CAL. GOV'T CODE § 3564(c) (West 1980) (governing state higher education employees); CAL. BUS. & PROF. CODE § 23090.2(d) (West 1985) (governing decisions of Department of Alcoholic Beverage Control, also mandating substantial evidence review but restrict judicial review to the court of appeal or the supreme court).

²⁴⁹ See *supra* notes 27-40 and accompanying text (discussing separation of powers) and note 62 and accompanying text (discussing local/statewide agency distinction).

²⁵⁰ CAL. CIV. PROC. CODE § 1094.5 (West Supp 1991) would apply to the decisions of any agency for which the standard of review is not otherwise specified. Therefore, individually specifying the standard of review for all

single standard is the preferable option.

3. Specification of Rights

The third possible legislative alternative is perhaps the least practicable. The legislature might do by prospective designation what the courts have been trying to do case-by-case: specify those rights or types of rights for which independent judicial review would be "authorized by law."

Besides sharing with the "specification of agencies" proposal the same "cataloging" obstacles, this option would likely produce the injustice of denying independent judicial review to a particular petitioner who asserts a right not yet provided for in the statute. Any purported designation of rights would by implication relegate all those not mentioned to the more deferential standard.²⁵¹ The purpose of dual standards would thus be defeated: the rights or types of rights potentially affected by administrative adjudication are so varied and dynamic that they cannot all be specified. Any attempt to do so by codification would be fragmentary, outmoded, and unfair within a short time.

Once again, the only genuine and realistic legislative alternative is the one other states have adopted.²⁵² Independent judgment review would have to give way to the single standard in administrative mandamus proceedings. As pointed out above,²⁵³ however, while such a single standard approach would certainly create an efficient and predictable review system, and would probably be superior to the procedure as it now operates, it would not be preferable to judicial refinement of the existing two-standard system.

agencies would have the same effect as specifying one standard in § 1094.5 that would then apply to all agencies not otherwise covered.

²⁵¹ Were the legislature to promulgate a list of rights or types of rights qualifying for independent review, courts confronted with rights not listed would have to be persuaded that the legislature would have recognized the rights at issue if it could have. Petitioners would have to argue that the legislature could not have recognized the rights either because they did not exist or were thought to be outside the legislature's power, but that the legislature would have included the rights in the legislation if it could have. This burden of proving speculation would be virtually insurmountable.

²⁵² For sources discussing other states' approaches, see *supra* note 4-5.

²⁵³ See *supra* notes 239-46 and accompanying text.

B. Judicially Created Certainty: The Right to a Livelihood

The Supreme Court of California created and perpetuated the uncertain and unpredictable procedure for the writ of administrative mandamus. It is up to the supreme court to preserve the benefits of a flexible judicial response to administrative adjudications by imparting consistency to the rules governing that procedure. The court could completely abandon the checkered record it has created by attempts to salvage independent judgment review, and declare that the substantial evidence standard will prevail in all future cases. This would be no different in effect than legislative implementation of a single standard. Yet not only is the court unlikely to do what it has resisted doing for fifty years, it would be neither prudent nor necessary to do so. There is an alternative: the court could finally state a workable test that would apply with the same degree of consistency as other rules controlling complex procedures.

Such a test need not be spontaneously generated. It can be constructed from the language of the court's prior holdings. Indeed, it could be said that the court has already stated such a test, though too obliquely.

In *Bixby v. Pierno*²⁵⁴ the court, in summarizing its administrative mandamus opinions, noted that California courts had "particularly" protected the right to practice one's trade or profession.²⁵⁵ While the reach of independent judgment review is not defined this narrowly, this conclusion crystallizes the essence of the class of rights to which it is intended to apply. It captures the real focus of the court's attention throughout the cases decided since *Drummey*. As further developed through more recent cases, the court's focus on the right to practice a trade or profession has expanded to include the general right to a livelihood.²⁵⁶ The

²⁵⁴ 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

²⁵⁵ *Id.* at 143, 481 P.2d at 251, 93 Cal. Rptr. at 243. See also *Anton v. San Antonio Community Hospital*, 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977), discussed *supra* at notes 141-50 and accompanying text (finding physician's right to privileges at hospital is a property interest related to practice of profession); *cf. Unterthiner v. Desert Hospital Dist.*, 33 Cal. 3d 285, 656 P.2d 554, 188 Cal. Rptr. 590 (1983), discussed *supra* at notes 204-12 and accompanying text (finding fundamental right of licensed doctor to practice profession but not to specialize).

²⁵⁶ See, e.g., *Berlinghieri v. Department of Motor Vehicles*, 33 Cal. 3d 392, 657 P.2d 383, 188 Cal. Rptr. 891 (1983), discussed *supra* at notes 213-24 and accompanying text (right to retain drivers license affects "very

right to practice one's profession or trade thus serves as the foundation for a new statement of the test. Cases after *Bixby* offer corollaries to this concept.

The court in *Interstate Brands* echoed *Bixby* in declaring that it would "remain especially responsive to the human as opposed to the purely economic dimension of rights affected by administrative action."²⁵⁷ Yet *Interstate Brands* also broached the "direct pecuniary interest" concept,²⁵⁸ upon which the court has most recently relied.²⁵⁹ Not more than two years later the court posited the "residual rights" concept.²⁶⁰ Therefore, a new test might be formed around these concepts. This test would mandate independent judgment review when the potential pecuniary interest implicated by a residual right becomes important to the petitioner "in human terms" by directly and substantially affecting the petitioner's livelihood.

Such a test would be consistent with the court's precedents, which have favored *existing* means of earning a living. These means may be professional skills needing only a certificate to be effective,²⁶¹ death, disability or welfare benefits for which statu-

livelihood" of delivery truck driver); *Frink v. Prod*, 31 Cal. 3d 166, 180, 643 P.2d 476, 484, 181 Cal. Rptr. 893, 901 (1982) discussed *supra* at notes 192-203 and accompanying text (finding denial of right of needy welfare applicant deprives applicant "of the very means for his survival" and "is seeking aid because of deterioration of his life situation in economic terms"). *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 608 P.2d 707, 163 Cal. Rptr. 619 (1980) and *County of Alameda v. Board of Retirement*, 46 Cal. 3d 902, 760 P.2d 464, 251 Cal. Rptr. 267 (1988), while not directly involving the livelihood of individuals as petitioners, did involve the "livelihood" of the petitioning employers. Because the agencies' decisions related to an entire class of employers, they affected the employers' ability to operate, which directly affected the livelihood of the employees. These cases implicitly recognized that the livelihood of employers is in effect inseparable from the livelihood of their employees.

²⁵⁷ *Interstate Brands*, 26 Cal. 3d at 780 n.6, 608 P.2d at 713 n.6, 163 Cal. Rptr. at 625 n.6.

²⁵⁸ See *supra* notes 165-82 and accompanying text.

²⁵⁹ See *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 375 n.36, 777 P.2d 91, 108 n.36, 261 Cal. Rptr. 318, 335 n.36 (1989); *County of Alameda*, 46 Cal. 3d at 908, 760 P.2d at 468, 251 Cal. Rptr. at 271.

²⁶⁰ *Frink*, 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893; see *supra* notes 192-203 and accompanying text.

²⁶¹ See, e.g., *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 823, 567 P.2d 1162, 1173, 140 Cal. Rptr. 442, 453-54 (1977) (finding fundamentalness of physician's right to hospital privileges "manifest"

tory requirements have been met,²⁶² or possession of a permit or license to engage in a business which the possessors already rely upon for their living.²⁶³ This "right to a livelihood" would thus qualify for independent review where other rights, such as the right to a firearms permit for people who do not need guns to earn their living, or the right to a business license not already issued and not essential for the marketing of special skills or training, would not qualify for independent review.²⁶⁴ Violations of constitutional rights could, of course, be addressed through ordinary lawsuits, but not in all cases through the writ of administrative mandamus.

Admittedly, this test is far from perfect and is little more than the synopsis of a principle. Whether there might be any realistic expectation of its adoption would depend as much on the fortuity of administrative mandamus litigation as on the attention and approval of courts. It does, however, embody what is perhaps the only common thread tying all of the court's precedents together: the need for judicial intervention when administrative factfinding negatively affects an individual's or an employer's means of liveli-

because it affected right to pursue livelihood.) See *supra* notes 141-50 and accompanying text.

²⁶² See, e.g., *Frink*, 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (finding right to welfare benefits where statutory requirements met); *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (finding right to death benefits where statute provided for them upon death of husband).

²⁶³ See, e.g., *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 87 P.2d 848 (1939) (ruling revocation of license to operate funeral home qualifies for independent judgment review); cf. *Southern California Jockey Club v. California Horse Racing Bd.*, 36 Cal. 2d 167, 223 P.2d 1 (1950) (ruling application for license to operate horse racing track does not qualify for independent judgment review).

²⁶⁴ Thus, for example, while the petitioner in *Merrill v. Department of Motor Vehicles*, 71 Cal. 2d 907, 458 P.2d 33, 80 Cal. Rptr. 89 (1969), discussed *supra* at notes 88-98 and accompanying text, would not receive independent judgment review of his application for a license to operate a vehicle merchandising scheme, the petitioners in *Drummey*, 13 Cal. 2d 75, 87 P.2d 848 (1939), discussed *supra* at notes 14-46 and accompanying text, and *Laisne v. California State Board of Optometry*, 19 Cal. 2d 831, 123 P.2d 457 (1942), discussed *supra* at notes 28-63 and accompanying text, would, under the proposed test, have been entitled to independent judgment review even if they had been applying initially for licenses. The latter rights would receive independent review because the petitioners would not have been able to practice their respective professions of funeral director and optometrist without such licenses.

hood. The test is offered as one means of preserving independent judgment review as a tool with which courts can guarantee justice in administrative adjudications, while not impeding the vital functions of administrative agencies.

These agencies cannot operate without some adjudicatory power. Yet the judiciary's power must be supreme if it is to secure justice. The California supreme court has embraced this precept in steadfastly authorizing independent judgment review.

