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Memorandum 93-23

Subject: Study N-202 - Judicial Review of Agency Action--Scope of Review (Consultant's Background Study)

Attached to this memorandum is a copy of the second installment of Professor Asimow's study on judicial review of agency action. This portion relates to the scope of judicial review.

We have received copies of two letters commenting on preliminary drafts of the study and we expect to receive additional letters commenting on the study. The letters will be attached to a supplementary memorandum.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

THE SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

by

Michael Asimow
Professor of Law
UCLA Law School

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CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

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By Michael Asimow
Professor of Law
UCLA Law School
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This is the second study I have prepared for the Law Revision Commission on judicial review of the actions of administrative agencies. The first study focussed on issues of standing to sue and timing of review.[1] This study covers the scope of judicial review.

The most critical and difficult issues in drafting a new judicial review statute arise out of the need to define the extent of a court's power to substitute its judgment for that of the agency on various types of agency decisions. These decisions are agency determinations of fact, law, discretion, and procedure. Reduced to a single sentence, the basic question is whether a court has the power to substitute its judgment for that of the agency or whether the court must accept a reasonable agency determination even if the court disagrees with it. This question is of fundamental importance to the separation of judicial and executive power, since the scope of review defines the boundary of authority between a court and an agency.

The following material attempts clearly to separate the court's power with respect to agency decisions of fact, law, discretion, and procedure. Essentially my approach is to treat the court's power to review each type of determination as being the same regardless of whether the determination arises out of

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[1]Michael Asimow, "Judicial Review: Standing and Timing" (Sept. 1992).

agency adjudication, rulemaking, or some other function.[2] Also I have tried to unify the standards applicable to the different types of determination in order to minimize the need to decide, for example, whether the court is reviewing an issue of fact or discretion. Thus there will be only two variations: a court has power to substitute its judgment or it does not. If it does not, it must affirm an agency decision if it is reasonable. Finally, the court's power should not vary depending on whether the agency determination arises at the state or the local level.

This study also includes some closely related issues: the appropriate record for judicial review, the agency's obligation to provide a reasoned explanation for its decision, and the burden of proof on judicial review.

A number of remaining issues will be covered in a third judicial review study. These include design of a single judicial review statute to replace the antiquated writ system now used in California.

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[2]See Charles H. Koch, "An Issue Driven Strategy for Review of Agency Decisions," 43 Admin. L. Rev. 511, 519-23 (1991) (scope of review should not depend on what form of agency action is being reviewed).

A. Judicial review of agency fact findings

In prescribing the scope of judicial review, the single most controversial issue will be the scope of the court's power over agency findings of fact. California law calls in many cases for the court to exercise independent judgment in reviewing agency findings of fact. Whether to preserve independent judgment, and in what form, will be a difficult and contentious problem.

1. Federal law and law of other states

As will be discussed below, California law requires a reviewing court to exercise independent judgment of an agency's factual determinations that substantially deprive a litigant of a fundamental vested right. It is important to realize that this standard is not followed by any other state or the federal government.

The federal courts use the substantial evidence test for review of factual determinations by federal agencies.[3] Most states do the same.[4] Some states use the clearly erroneous test.[5] California's standard of independent judgment review

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[3]Federal APA §706(2)(E).

[4]Project, "State Judicial Review of Administrative Action," 43 Admin. L. Rev. 571, 754-56 (1991).

[5]See §15(g)(5) of the 1961 Model State APA which prescribes the "clearly erroneous" standard and was adopted by many states. 15 Uniform L. Annot. 300 (1990). As discussed below, the clearly erroneous test is generally perceived to give courts greater powers to review agency findings than does the substantial evidence test. See text at notes 96-104.

North Dakota appears to use a preponderance of the evidence test, but in practice this turns out to be a reasonableness test, not a true independent judgment. N.D.C.C., § 28-32-19(5) (1991); Bickler v. North Dakota Hwy. Commr., 423 N.W.2d 146 (1988). Although the Texas APA calls for conventional substantial evidence review, some agencies are outside the APA; as to the latter, the courts conduct a trial de novo--for the pur-

for factual determinations is an anomaly. It stands completely alone.

2. Present California law

a. History of independent judgment test--Standard Oil decision and its progeny

Prior to 1936, adjudicatory (or "quasi-judicial") action of both state and local government was routinely reviewed in the courts through the common law writ of certiorari (called the writ of review in California), although the scope of review under that writ was somewhat unclear.[6] Under certiorari, the reviewing court examined the record of the adjudicatory decision; among the questions considered was whether the orders

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pose of deciding whether there was substantial evidence for the agency decision! Workers' compensation cases are tried completely de novo. See Eissinger, "Judicial Review of Findings of Fact in Contested Cases under APTRA," 42 Baylor L. Rev. 1 (1990).

Missouri employs a peculiar bifurcated standard: substantial evidence where fact finding involves administrative discretion but independent judgment in cases where the agency only applied the law to the facts. Mo. Rev. Stat. §536.140.2 (1990). Missouri is not comparable to other states, however, since agency adjudicatory decisions are made by an administrative court rather than by agency heads and the statute refers to review by trial courts of the decisions of the administrative court.

Some states utilize independent judgment for particular situations. See, e.g., Weeks v. Personnel Bd. of Review, 373 A.2d 176 (R.I. 1977) (review of decision to discharge police officer). To my knowledge, only California applies it to a large universe of cases.

[6]CCP 1067 et.seq. See Suckow v. Alderson, 182 Cal. 247, 187 Pac. 965 (1920); D. O. McGovney, "Administrative Decisions and Court Review Thereof, in California," 29 Calif. L. Rev. 110, 146-48 (1941).

were supported by competent evidence.[7] The court used independent judgment to review questions of law and procedure.

In 1936, the California Supreme Court changed the course of administrative law with its historic decision in Standard Oil Co. of California v. State Board of Equalization.[8] The Court held that the Board of Equalization could not constitutionally exercise judicial power by deciding questions of law or fact in tax cases.[9] Syllogistically, it followed that its adjudicatory decisions could not be reviewed by the writ of certiorari since that writ applied only to the review of judicial action. The Standard Oil decision was deeply rooted in the Court's distrust of new and suspect administrative agencies.[10] The ironic result of the Standard Oil decision was that it stripped the courts of any mechanism for reviewing agency adjudicatory decisions.[11] Thus it increased, rather

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[7]Lanterman v. Anderson, 36 Cal.App. 472, 172 Pac.625 (1918) (entire lack of evidence); Comment, "Administrative Adjudication in California and its Review by the Writ of Certiorari," 25 Calif. L. Rev. 694, 698-99, 706 (1937).

[8]6 Cal.2d 557, 59 P.2d 119 (1936).

[9]The Court held that its decision was not applicable to either local government decisions or to decisions of statewide agencies of constitutional status since local government or constitutional agencies could legitimately exercise judicial power.

[10]See B. Abbott Goldberg, "The Constitutionality of Code of Civil Procedure Section 1094.5(d): Effluvium from an Old Fountainhead of Corruption," 11 Pacific L. J. 1,6 (1979) (citing numerous studies that so analyze Standard Oil and its progeny).

[11]In the Standard Oil case itself, the taxpayer could obtain review by paying the tax and suing for a refund. Such second chances would not generally be available in the case of other administrative orders.

than decreased, the potential for tyrannical administrative decisions.[12]

Immediately sensing the gravity of the crisis that its own ill-advised decision had caused, the Supreme Court began a search for a new remedy that would function as a substitute for certiorari. After a confusing series of decisions,[13] the Court settled on mandamus.[14] The writ of mandamus had long been employed as a device to compel government to carry out a non-

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[12]The rigid application of separation of powers and due process articulated in the Standard Oil case and its progeny set off a torrent of academic criticism and ridicule that has not subsided to this day. See, e.g., Kenneth C. Davis, Administrative Law Treatise 412-15 (1st ed. 1958); Sam Walker, "Judicially Created Uncertainty: The Past, Present, and Future of the California Writ of Administrative Mandamus, 24 U.C. Davis L. Rev. 783 (1991); Goldberg, supra note 10; Victor S. Netterville, "Judicial Review: The 'Independent Judgment' Anomaly," 44 Calif. L. Rev. 262 (1956); Lowell Turrentine, "Restore Certiorari to Review State-Wide Administrative Bodies in California," 29 Calif. L. Rev. 275 (1941); McGovney, supra note 6; Comment, "A Proposal for a Single Uniform Substantial Evidence Rule in Review of Administrative Decisions," 12 Pacif. L. Journal 41 (1980). Judicial criticism in dissenting opinions by Chief Justices Gibson and Traynor and Justice Burke, among others, was no less severe. See the dissenting opinions in Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal.3d 28, 112 Cal.Rptr. 805 (1974); Bixby v. Pierno, 4 Cal.3d 130, 151, 93 Cal.Rptr. 234, 249 (1971) (Burke & Coughlin, JJ); Moran v. State Bd. of Med. Exam., 32 Cal.2d 301, 315, 196 P.2d 20 (1948); Laisne v. State Board of Optometry, 19 Cal.2d 831, 848, 123 P.2d 457, 467-78 (1942) (4-3 decision, Gibson, C.J. dissenting); Dare v. Board of Medical Examiners, 21 Cal.2d 790, 803, 136 P.2d 304, (4-3 decision, Traynor, J. dissenting).

[13]The Court rejected the writ of prohibition for the same reason it had rejected certiorari--it only lies to review judicial action. Whitten v. State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296 (1937). It settled on mandamus and at first held that every instance of judicial review had to be accompanied by a judicial trial de novo. Laisne v. State Bd. of Optometry, note 12.

[14]Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848 (1939).

discretionary duty owed to the plaintiff and to correct an abuse of discretion.[15] The courts twisted mandamus into a vehicle that could be used for review of adjudicatory agency action by holding that a failure to make findings in accordance with the evidence would be treated as an abuse of discretion.

However, consistent with the distrust of agencies that had animated Standard Oil, the Supreme Court decided that due process and separation of powers required trial courts to exercise independent judgment on the evidence when considering an application for mandate.[16] On this point, the Court was heavily influenced by some then recent but now discredited United States Supreme Court cases indicating that separation of powers or due process required reviewing courts to exercise independent judgment of certain factual questions.[17] In short order,

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[15]CCP §1085.

[16]Drummey v. State Board of Funeral Directors, note 14. In Drummey, the Court's hostility to administrative agencies was apparent. It said: "But to say that [agencies'] findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded." 13 Cal.2d at 85.

[17]St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) (whether rates set by agency are confiscatory); Crowell v. Benson, 285 U.S. 22 (1932) (certain constitutional issues in federal workers' compensation); Ng Fund Ho v. White, 259 U.S. 276 (1922) (issue of citizenship in deportation case); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920) (confiscatory rates). None of these cases had anything to do with licensing and none even remotely suggested that due process required judicial de novo trials for licensing determinations. These cases have all been disapproved by later decisions and have no current importance. The one exception is that a true trial de novo is still required to resolve the question of whether a deportee is a citizen. See generally Kenneth Culp Davis, Administrative Law Treatise §29.23 (2d ed. 1984).

the Court backtracked. Agency decisions denying applications for licenses were reviewed under the substantial evidence test, while decisions revoking professional licenses remained under independent judgment.[18]

Because traditional mandamus reviewed non-judicial action, the courts sometimes conducted trials to determine facts. But judicial trials were superfluous when it came to reviewing adjudicatory action under the new administrative mandamus procedure since a record had already been generated in the agency. Consequently, continuing to backtrack,[19] the Supreme Court decided that there should be no trial de novo. Instead, review would be on the administrative record already made (with only limited ability to introduce additional evidence).[20]

b. The enactment of section 1094.5.

[18]McDonough v. Goodcell, 13 Cal.3d 741, 91 P.2d 1035 (1939) (rejecting application for a bail bond license by a person who had been in the business for many years before the licensing statute was enacted). For a vivid description of the background of McDonough and the reason why the Supreme Court wanted a reviewing court to defer to the agency in that case, see Goldberg, note 10 at 31-33.

[19]Laisne v. State Board of Optometry, note 12 supra (trial de novo required in the case of revocation of professional license).

[20]Dare v. Board of Medical Examiners, note 12 supra. According to Dare, new evidence could be introduced if i) the board had excluded admissible evidence, ii) the evidence could not with reasonable diligence have been introduced before the agency, or iii) credibility is in issue, in which case impeaching evidence could be offered. Dare was a 4-3 decision; Justice Traynor's dissent was devastating. He pointed out that the procedure designed by the majority had certain elements of certiorari, certain elements of a motion for a new trial, and no elements at all of mandamus. He called strongly for overruling Standard Oil.

The Judicial Council's 1944 study that led to the enactment of California's APA confronted the disarray left in the wake of Standard Oil. Since that case and its progeny rested on a mixture federal and state constitutional provisions, the Judicial Council felt unable to recommend that the state return to the pre-1936 practice of reviewing adjudicatory decisions through certiorari.[21] Thus the Council accepted the judicial status quo and proposed codification of administrative mandamus. Code of Civil Procedure section 1094.5 was enacted in the form that the Council suggested and, with only minor changes, remains in that form today.

Section 1094.5 provides for review of adjudicatory decisions by a superior court judge without a jury. The court considers whether agency proceeded 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."

The Judicial Council was unable to formulate a standard to distinguish the cases in which independent judgment must be used. Thus the section reads:

> Where it is claimed that the findings are not supported by the evidence, in cases in which

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[21]Judicial Council of California, Tenth Biennial Report to the Governor and the Legislature 26-28, 133-45 (1944). The Council's approving discussion of the report of the U. S. Attorney General's Committee on Administrative Procedure makes clear that the Council favored the substantial evidence test as opposed to independent judgment. Id. at 147-51.

> 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; and 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.

Thus the legislature left it to the courts to mark out the circle within which the independent judgment rule would be applied. In the intervening 48 years since enactment of section 1094.5, the courts have seized this opportunity and have vastly widened the circle.[22]

Normally, in mandamus trials under section 1094.5, the court decides the case entirely on the written record made before the agency. If there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded before the agency, the court can remand the case to be reconsidered in light of such evidence. In cases in which the court exercises independent judgment, it may admit such evidence without remanding to the agency.

c. Judicial process under the independent judgment test.

The judicial process inherent in applying the independent judgment test is totally different from the process inherent in applying the substantial evidence test. The substantial evidence test requires a trial court judge to start with the agency's findings of fact. The judge then considers the evidence on both sides--the evidence supporting and the evidence

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[22]See text at notes 39-56.

opposing the agency's conclusions[23]--and affirms the decision if a reasonable person could have arrived at the same findings based on the evidence as did the agency.[24] Even though the court may disagree with the agency's findings, it must sustain them if a reasonable person could have come out the same way the agency did.[25]

Under independent judgment the trial court begins with the evidence in the record, but it ignores the agency's findings. It is empowered to make fact findings on its own, without giving any deference to the findings of the agency or the administrative judge, even on questions of the credibility of witnesses.[26]

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[23]A court must scrutinize evidence both supporting and opposing the agency's conclusion when conducting substantial evidence review. Bixby, note 12 at 143 n.10, 144, 149 n.22, approving LeVesque v. Workmen's Comp. App. Bd., 1 Cal.3d 627, 83 Cal.Rptr. 208 (1970). Earlier cases had taken a contrary view. Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649 (1953).

[24]One court, quoting earlier decisions, defined substantial evidence as "a solid, reasonable and credible showing..." and "ponderable legal significance...reasonable in nature, credible, and of solid value..." Dep't of Parks v. State Personnel Bd., 233 Cal.App.3d 813, 831, 284 Cal.Rptr. 839, 849 (1991).

[25]This often makes all the difference. See text at notes 29-32; Frink v. Prod, 31 Cal.3d 166, 169, 181 Cal.Rptr. 893 (1982) (trial judge stated that weight of evidence was in petitioner's favor but substantial evidence supported decision of the agency).

[26]Guymon v. Bd. of Accountancy, 55 Cal.App.3d 1010, 128 Cal.Rptr. 137 (1976) (trial court makes its own determination of the credibility of witnesses). There is a contrary view on this issue: the trial court should leave credibility questions to the administrative law judge or the agency heads. E.g. Mullen v. Dep't of Real Estate, 204 Cal.App.3d 295, 301, 251 Cal.Rptr. 12 (1988); Campbell v. Bd. of Dental Examiners, 17 Cal.App.3d 872, 95 Cal.Rptr. 351 (1971); Arenstein v. Board of Pharmacy, 265 Cal.App.2d 179, 188, 71 Cal.Rptr. 357 (1968). See Netterville, supra note 12 at 280-85 (1956).

Some early cases indicate that a presumption of correctness attaches to agency decisions reviewed under independent judgment. E.g. Dare v. Bd. of Medical Examiners, note 12. However, it is difficult to reconcile such a presumption with the independent judgment test. In practice, it appears that

Probably, the administrative agency need not even make findings, since the only findings that count are those of the trial court.[27] The independent judgment test also applies to so-called ultimate or mixed questions (i.e. whether the facts fit a vague statutory standard such as "gross negligence"), at least where decision on that issue turns on disputed facts rather than on abstract reasoning.[28]

As aptly described to me by a Superior Court judge experienced in writ cases, the judicial process in an independent judgment case is like that of a trial judge who tries an ordinary civil case where the litigants have stipulated to trial

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the Dare presumption is ignored. Ralph N. Kleps, "Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions 1949-1959," 12 Stanf. L. Rev. 554, 577 (1960).

[27]Cooper v. Kizer, 230 Cal.App.3d 1291, 1299-1300, 282 Cal.Rptr. 492, 497 (1991); Guymon v. Bd. of Accountancy, supra note 26 at 1015 ("California fixes responsibility for factual determination at the trial court rather than the administrative agency tier of the pyramid as a matter of public policy"). But see American Funeral Concepts v. Calif. State Board of Funeral Directors and Embalmers, 136 Cal.App.3d 303, 186 Cal.Rptr. 196 (1982) (trial court cannot cure agency's failure to make proper findings).

[28]This is an important point, since an appellate court reviewing a trial court decision under the independent judgment test is bound by the substantial evidence rule. See text at notes 30-32. Therefore, if an ultimate question is treated as an issue of law, the appellate court would have independent power to decide it, but if it is a question of fact, the appellate court would have to affirm a reasonable trial court decision. The difficult problem of deciding what scope of review to employ in reviewing agency decisions of mixed or ultimate questions is further discussed in text at notes 72-75. As pointed out there, a court retains considerable power to treat a question of ultimate fact as an issue of law where it is predominantly one of legal principles and their underlying values.

based on depositions and oral argument. Taking account of burdens of proof imposed on the proponent,[29] the trial judge simply decides the case as if the administrative law judge and the agency heads had never made any decision at all. Thus, in independent judgment cases, an agency's function is little more than to hold a hearing and make a record. Its decision counts for nothing.

An appellate court's function also differs, depending on whether a trial court exercised independent judgment or substantial evidence. If the trial court exercised independent judgment, the appellate court must affirm if there was substantial evidence supporting the trial court's decision.[30] This is intended to be, and is in practice, a standard which makes it unlikely that an appellate court will overturn the trial court's factfindings in an independent judgment case. In essence, independent judgment gives enormous power to the single trial court judge that reviews an agency order.[31]

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[29]The Commission has decided that a proponent has the burden of proof, normally by a preponderance of the evidence. In cases involving occupational licensee discipline, the burden is clear and convincing evidence unless the agency provides a different burden by regulation. Draft statute §648.310.

[30]The scope of review is the same as when an appellate court reviews a jury's verdict. Yakov v. Board of Medical Examiners, 68 Cal.2d 67, 64 Cal.Rptr. 785 (1968); Moran v. State Bd. of Med.Examiners, note 12.

[31]"The appellate court's review of the superior court judge's gleanings from the administrative transcript is just as circumscribed as its review of a jury verdict or a judge-made finding after a conventional trial...Moran...enthrones each superior court judge as the practical arbiter of the facts and restricts appellate courts to a role more appropriate to the review of jury verdicts in automobile collision cases." Lacy v. Calif. Unempl. Ins. App. Bd., 17 Cal.App.3d 1128, 1134, 1135 n.2, 95 Cal.Rptr. 566 (1971).

In contrast, if the trial court applied substantial evidence, the appellate court does exactly what the trial court did--examine the administrative record to see whether there was substantial evidence for the agency's decision. Here the appellate court's review power is the same as that of the trial court.[32] The appellate court in a substantial evidence case must be deferential to the agency--not to the trial court. The difference is subtle but important: an appellate court has much less power in reviewing the decision of a trial court that exercises independent judgment than in reviewing the decision of a trial court that reviews a decision under the substantial evidence test.

d. Removal of the constitutional basis for the independent judgment test.

Since 1945, the courts have struggled long and hard to make sense of the scope of review provisions in section 1094.5. This odyssey is chronicled below. Perhaps the most important development, however, was the Supreme Court's Tex-Cal decision.[33]

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[32]See, e.g., Rasmussen v. City Council of Tiburon, 140 Cal.App.3d 842, 849, 190 Cal.Rptr. 1, 5 (1983).

[33]Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal.3d 355, 156 Cal.Rptr. 1 (1979). Two justices (Manuel and Mosk) concurred fully in Justice Newman's majority opinion (which contained much other material besides the discussion of the constitutionality of imposing the substantial evidence test). Justice Tobriner concurred in the judgment and Justices Richardson and Taylor concurred in the result. These justices did not explain their reservations. Dissenting on another issue, Justice Clark concurred in "the conclusions reached by the majority opinion." The Tex-Cal holding that the legislature could mandate substantial evidence review for any agency was reiterated in Frink v. Prod, note 25 at 173.

That case upheld the constitutionality of a statute requiring courts to use the substantial evidence test in cases arising under the Agricultural Labor Relations Act.[34] Tex-Cal holds that the independent judgment test is not constitutionally based so that the legislature could abolish it. Provided that the agency guarantees administrative due process, the legislature can prescribe substantial evidence review, whether or not the aggrieved party is deprived of a fundamental vested right. This decision knocks the props from under the Standard Oil decision and its progeny.[35]

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[34]Prior to Tex-Cal, the Supreme Court had shifted the constitutional footing of independent judgment. In expanding independent judgment to the decisions of local agencies and private organizations, it declared that separation of powers would not prevent such bodies from exercising judicial power. Nevertheless, in a mystifying non-sequitur, it also declared that the constitution did not authorize them to exercise judicial power. Consequently, they were not exercising judicial power and independent judgment review was needed so that fundamental vested rights could not be taken away without a judicial decision. See Anton v. San Antonio Community Hospital, 19 Cal.3d 802, 822, 140 Cal. Rptr. 453 (1977) (private organizations); Strumsky, note 12 (local agencies).

[35]In McHugh v. Santa Monica Rent Control Bd., 49 Cal.3d 348, 261 Cal.Rptr. 318 (1989), the Court upheld the power of a local agency to order restitutive damages. Such non-judicial agencies can engage in adjudication and award damages in furtherance of an underlying regulatory purpose, if they are subject to the "principle of check" by appropriate judicial review. Thus McHugh continues the trend evidenced by Tex-Cal of flexible application of the judicial power provision of the California Constitution.

McHugh did not indicate what the scope of judicial review would have to be to satisfy its "principle of check," but it indicated approval of numerous sister-state cases on this point which authorize substantial evidence review. Nevertheless, the court observed that independent judgment may be the "appropriate standard for a court to apply in reviewing the administrative determination," given that "a private party has a 'direct pecuniary interest' in the agency's determination." Id at 375 n.36. As I interpret this footnote, it applies existing law on independent judgment; it does not indicate that independent judgment is constitutionally required.

As a result of Tex-Cal, it is now reasonably clear that the legislature can mandate substantial evidence review for the decisions of statewide nonconstitutional agencies and local government agencies. Thus the way is open for this Commission to design a modern instrument for judicial review of adjudicatory action and, if the Commission so chooses, to abolish the independent judgment test or shrink the circle of cases to which it applies.

e. Policy rationale for independent judgment.

While independent judgment is no longer constitutionally compelled, the courts have adhered to the test as a matter of policy and have reformulated the test. In the leading decision of Bixby v. Pierno,[36] the Supreme Court shifted the focus of the test from "vested rights" to "fundamental rights." In Bixby, Justice Tobriner articulated the policies behind independent judgment in compelling terms. He spoke of the possible capture of the legislative and executive departments by powerful economic forces.

> Although we recognize that the California rule yields no fixed formulas and guarantees no predictably exact ruling in each case, it performs a precious function in the protection of the rights of the individual. Too often the independent thinker or crusader is subjected to the retaliation of the professional or trade group; the centripital pressure toward conformity will often destroy the advocate of reform. The unpopular protestant may well provoke an aroused zeal of scrutiny by the licensing body that finds trivial grounds for license revocation. Restricted to the narrow ground of

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[36]Note 12. The Bixby discussion is all dictum; the holding of the case was that substantial evidence, not independent judgment, applied to judicial review of the approval by the Corporations Commissioner of a corporate reorganization.

> review of the evidence and denied the power of an independent analysis, the court might well be unable to save the unpopular professional or practitioner. Before his license is revoked, such an individual who walks in the shadow of the governmental monoliths, deserves the protection of a full and independent judicial hearing.[37]

Nevertheless, there have always been strong opposing views about the policy merits of the independent judgment test. These views have been forcefully and repeatedly expressed both in the literature and in Supreme Court dissents, particularly by Chief Justices Gibson and Traynor and Justice Burke.[38] In the recommendation section of this report, I will return to these policy arguments.

f. Vested fundamental rights protected by the independent judgment test.

The Standard Oil decision covered only nonconstitutional agencies of statewide jurisdiction. Therefore, it never applied to agencies created in the California constitution since, by hypothesis, these agencies could exercise judicial powers without conflicting with the allocation of judicial powers to the courts. Thus, for example, decisions of constitutional

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[37]4 Cal.3d at 146-47. In equally stirring rhetoric, the Court concluded: "At a time in this technocratic society when the individual faces ever greater danger from the dominance of government and other institutions wielding governmental power, we hesitate to strip him of a recognized protection against the overreaching of the state. The loss of judicial review of a ruling of an administrative agency that abrogates a fundamental vested right would mark a sorry retreat from bulwarks laboriously built. Such an elimination would not only overrule decisions long held in California, but destroy a bed-rock procedural protection against the exertion of arbitrary power. Id. at 151.

[38]See note 12.

agencies, such as the Workers' Compensation Appeals Board, State Personnel Board, Regents of the University of California, Alcoholic Beverage Control Appeals Board, and Public Utilities Commission could be reviewed under the substantial evidence test or any other test that the legislature might prescribe. Even though the independent judgment test is now a matter of policy, not constitutional law, the decisions of constitutional agencies continue to be reviewed under the substantial evidence test.[39] Since independent judgment is now based on policy, not constitutional law, it seems completely illogical that the test should not apply to statewide constitutional agencies whose decisions affect vested, fundamental rights quite as often as nonconstitu-

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[39]Indeed the fact findings of the Public Utilities Commission are final and unreviewable (including findings of ultimate fact and findings of reasonableness) except in constitutional cases. Pub. Util. C. §§1757, 1760. See Camp Meeker Water System, Inc. v. PUC, 51 Cal.3d 845, 863, 274 Cal.Rptr. 678 (1990) (findings supported by any evidence must be affirmed). In ironic contrast, ratemaking decisions of the Insurance Commissioner are reviewable under the independent judgment test. Ins.C. §§1858.6, 1861.09.

If the Commission decides to abolish independent judgment, it should decide whether to preserve the PUC's unique immunity from even substantial evidence-type review of its fact findings. This immunity seems to exist largely for historic reasons (it protected the PUC from overzealous review by courts hostile to utility regulation) and there seems no obvious reason why it should be preserved today. As discussed in Part C, courts routinely review the factual support for discretionary decisions of all agencies and it is hard to see why the PUC should be exempt.

A similar irrational distinction occurs in personnel cases. Decisions of the State Personnel Board are reviewed under substantial evidence since the agency is constitutional, but local personnel decisions are reviewed under independent judgment. Skelly v. State Personnel Bd., 15 Cal.3d 194, 217 n.31, 124 Cal.Rptr. 14 (1975); Richardson v. Bd. of Supervisors of Merced County, 203 Cal.App.3d 486, 493, 250 Cal.Rptr. 1 (1988).

tional statewide agencies.

Similarly, Standard Oil did not cover local government, but in 1974 the Court expanded independent judgment to cover judicial review of local agency decisions.[40] While this move might have been justifiable since local governments often furnish inadequate adjudicatory procedures,[41] it caused confusion since local land use, personnel, and environmental decisionmaking is difficult to fit into the fundamental vested rights framework.

What then are the fundamental vested rights to which the independent judgment test now applies? Originally, the independent judgment test focussed on "vestedness." Thus independent judgment applied to deicisions taking away property rights (including professional licenses or requiring money payments) but not to decisions denying applications (such as license applications). In Bixby, the Court changed the emphasis to "fundamentalness," ruling that independent judgment applied to "fundamental vested rights" and making the degree of vestedness a factor in deciding fundamentalness.[42] Nevertheless, Bixby did not con-

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[40]Strumsky, note 12 (state and local agencies stand on same constitutional footing insofar as legislature's ability to delegate judicial power).

[41]The Court also required independent review of decisions of some private organizations such as private hospitals. These too might provide inadequate procedural protection and the impartiality of their decisionmakers is often questionable. Anton, note 34 at 820-25, 140 Cal. Rptr. 442, 452-55 (1977) (private hospital decision to exclude doctor from staff--independent judgment review). Anton was overruled by §1094.5(d) requiring substantial evidence review of decisions by private hospital boards except in a few situations. The story of section 1094.5(d) is well told in the article by retired Judge B. Abbott Goldberg cited in note 10.

[42]See Frink, note 25 (vestedness is only one factor).

tract the circle drawn by prior case law; consequently, a "direct pecuniary impact" still triggers independent judgment even though the payor is a large business or even a government agency that could not even plausibly meet the "fundamentalness" standard.[43]

After Bixby reconceptualized the doctrine, independent judgment began to spread inexorably from its roots in professional license revocation cases. The circle widened, precedent by precedent. In Bixby, the court made the intuitive nature of the "fundamentalness" inquiry quite explicit:.

> The coverage of independent judgment has been prescribed on a case-by-case basis; the courts attempt to reason from prior precedents, expanding them where necessary to cover an interest that strikes them (or a majority of them) as "fundamental." The coverage of independent judgment has been prescribed on a case-by-case basis; the courts attempt to reason from prior precedents, expanding them where necessary to cover an interest that strikes them (or a majority of them) as "fundamental." [T]he courts in this case-by-case analysis consider the nature of the right of the individual: whether it is a fundamental and basic one, which will suffer substantial interference by

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[43]Alameda County v. Board of Retirement, 46 Cal.3d 902, 251 Cal.Rptr. 267 (1988) (Board granted disability benefits which may increase County's required contributions to retirement system--County receives independent judgment review); Interstate Brands v. Unemployment Insurance Appeals Bd., 26 Cal.3d 770, 163 Cal.Rptr. 619 (1980) (decision awarding unemployment compensation benefits to employee is reviewed under independent judgment).

Pecuniary impact gets independent judgment protection in some cases, but by not means all. See, e.g., Hope Rehabilitation Services v. Dep't of Rehabilitation, 212 Cal.App.3d 938, 261 Cal.Rptr. 123 (1989) (facility must repay $152,000 in state funds--substantial evidence test used despite impact on provider and on services to disabled clients).

I defy anyone to provide a principled explanation of why pecuniary impacts on local government or big business deserves independent judgment review or to distinguish the cases which do and do not provide independent judgment.

> the action of the administrative agency, and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him...In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation.[44]

For example, independent judgment covers drivers' licenses, a particularly important right in our "travel-oriented society."[45] Similarly, it covers the loss of social welfare benefits such as pensions and welfare, since such benefits are both vested and fundamental in the life situation of the recipient[46] and it covers negative personnel decisions of local government.[47]

The Court has enormously complicated the problem by stating that a person's interest need not be "vested" if it is "fundamental" enough, with fundamentalness being judged both

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[44]Bixby, 4 Cal.3d at 144.

[45]Berlinghieri v. Department of Motor Vehicles, 33 Cal.3d 392, 188 Cal.Rptr. 891 (1983), cautioning that a vested, fundamental right for mandamus purposes is not the same thing as a right which would trigger strict scrutiny under due process or equal protection. Thus the classifications in the implied consent law do not trigger strict scrutiny, but suspension of a driver's license pursuant to that law triggers independent judgment.

[46]Strumsky, note 12 (widow's claim to obtain service-connected as opposed to non-service connected death benefit); Harlow v. Carleson, 16 Cal.3d 731, 129 Cal.Rptr. 298 (1976) (loss of welfare benefits).

[47]Young v. Governing Board of Oxnard School Dist., 40 Cal.App.3d 769, 115 Cal.Rptr. 456 (1974) (decision not to rehire probationary teacher); Perea v. Fales, 39 Cal.App.3d 939, 114 Cal.Rptr. 808 (1974) (five-day suspension of police officer). Since the State Personnel Board is a constitutional agency, its decisions are reviewed under substantial evidence.

by the economic impact of the decision and by the "character and quality of its human aspect."[48] Thus cases involving denial of applications for public assistance were swept under the independent judgment test since the applicant's very survival might depend on whether the benefits are received.[49] Yet rejected applicants for professional and occupational licenses remain outside the circle, as they always have.[50] In another patently useless attempt to articulate a legal standard, the Court remarked that independent judgment covers a "residual right possessed by all of the citzenry to be exercised when circumstances require."[51]

In deciding whether to engage in independent review, courts must first answer the metaphysical question of whether a status has "fundamentalness." This inquiry is particularly elusive when the interest at stake arises out of a state or

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[48]Interstate Brands, note 43.

[49]Frink v. Prod, note 25. See also Cooper v. Kizer, 230 Cal.App.3d 1291, 282 Cal.Rptr. 492 (1991) (application for Medicaid); Kerrigan v. FEPC, 91 Cal.App.3d 43, 154 Cal.Rptr. 29 (1979) (whether job application rejected because of age discrimination).

[50]See, e.g., Unterthiner v. Desert Hospital Dist. of Palm Springs, 33 Cal.3d 285, 188 Cal.Rptr. 590 (1983) (rejection of doctor's application to be on staff of a public hospital); Frink, note 25 at 179-80. The idea seems to be that agency expertise is more significant in deciding questions of application for licenses than in deciding questions of revocation. Evidently, though, expertise in denying applications for welfare is less important than in denying applications for licenses. The lack of logic in these distinctions has been often criticized: agency expertise may or may not be involved in decisions to grant permission as well as in decisions to withdraw a prior permission.

[51]Frink, note 25 at 180.

local decision implementing a business, land use, natural resource, or environmental regulatory program.[52] Of course, such regulation constantly imposes limitations on people's ability to run their own businesses or deal with their own property as they see fit.[53] Here the degree to which an in-

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[52]Most decisions negatively affecting business have not qualified for independent judgment review. See, e.g., Standard Oil Co. v. Feldstein, 105 Cal.App.3d 590, 603-06, 164 Cal.Rptr. 403 (1980) (order shutting down refinery unit constructed at a cost of $200 million doesn't threaten Standard Oil with financial ruin--right neither fundamental nor vested). Thus a decision finding an employer guilty of discrimination is reviewed under substantial evidence, while a decision finding that no discrimination occurred is reviewed under independent judgment because freedom from discrimination is a fundamental right). See, e.g., City and County of Los Angeles v. Civil Service Commission, 8 Cal.App.4th 273, 10 Cal.Rptr.2d 150, 153 (1992).

However, some negative decisions affecting business do receive independent judgment review, especially if they require the payment of money. See Interstate Brands, note 43 (order requiring payment of unemployment benefits). A rent control board's decision lessening a landlord's control over his property (by deciding that parking was a "base amenity") was subject to independent judgment review. 301 Ocean Ave Corp. v. Santa Monica Rent Control Board, 228 Cal.App.3d 1548, 279 Cal.Rptr. 636 (1991). But denial of a landlord's request for a rent increase is reviewed under substantial evidence, even though a rent level that denies a reasonable return on property is an unconstitutional deprivation of property. San Marcos Mobilehome Park Owners' Ass'n v. City of San Marcos, 192 Cal.App.3d 1492, 238 Cal.Rptr 290 (1987).

There is simply no principled way to distinguish these cases.

[53]A typical case is Goat Hill Tavern v. City of Costa Mesa, 6 Cal.App.4th 1519, 8 Cal.Rptr.2d 385 (1992). In Goat Hill, a city refused to renew a saloon's conditional use permit. Using independent judgment, the trial court reversed the city's decision and the court of appeals affirmed. It acknowledged that most local land use planning decisions are reviewed under substantial evidence, but this one was different since it would have extinguished an existing business entirely as distinguished from merely reducing its profits.

In contrast, Smith v. County of Los Angeles, 211 Cal.App.3d 188, 196-200, 259 Cal.Rptr. 231, 236-38 (1989) holds that a decision denying a conditional use permit to an adult entertainment facility, thus putting it out of business, is reviewed under the substantial evidence test. And refusal to grant a permit to allow a homeowner to build a wall protecting his house from destruction by the sea (without granting a right of public access to the beach) is also reviewed under substantial evidence. Somehow an agency's decision compelling a homeowner to choose between loss of his home or loss of his

terest is vested (and the degree to which legitimate reliance interests have been built upon it), along with the interest's fundamentalness in the recipient's life situation are the critical variables.

The criterion for applying independent judgment does not match up to any other legal standard; it has some relationship to liberty and property interests protected by state and federal due process[54] and some relationship to fundamental rights given strict scrutiny under equal protection and some relationship to vested rights protected from changes in the law or from regulatory decisions, but it is not the same as any of these tests.[55]

No attempt here is made to discuss in detail the endless stream of independent judgment v. substantial evidence cases; a long, tedious study would be necessary to dissect them and it would probably be outdated the day after it was written. In sum, the distinction is utterly incoherent and can be resolved only by what Justice Newman called "the incessant litigant's parade" to the courts.[56]

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privacy doesn't infringe a fundamental vested right. Whalers' Village Club v. Calif. Coastal Comm'n, 173 Cal.App.3d 240, 220 Cal.Rptr. 2 (1985), cert.den. 476 U.S. 1111 (1986). In the latter case the court tried to explain how the concept of fundamental vested rights under §1094.5 is different from the doctrine protecting vested land uses from intervening changes in the law. Id. at 252.

[54]See approving cites to federal fourteenth amendment cases in both Bixby, note 12 at 144, n.12 and Frink, note 25 at 178-79.

[55]See Whalers' Village Club, note 53.

[56]Dissenting in Frink, note 25 at 182.

g. Legislative trend

There is a legislative trend in favor of substantial evidence. For example, overruling a Supreme Court case, the legislature dispensed with independent judgment review of hospital decisions to exclude doctors from staff.[57] The Agricultural Labor Relations Act mandates substantial evidence review in all cases.[58] The CAL-OSHA legislation could not be more emphatic in calling for substantial evidence review.[59] Judicial review of adjudicatory decisions under the California Environmental Quality Act employs substantial evidence, not independent judgment.[60] On the other hand, in cases of cease and desist orders by the Water Board to persons holding permits to appropriate water, the legislature called for independent judgment review.[61] It did not disturb the prior law of independent judgment review in attorney discipline cases when it adopted the State Bar Court legislation.[62]

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[57]CCP §1094.5(d), overruling Anton, note 41.

[58]Upheld in Tex-Cal, discussed in text at notes 33-35.

[59]Labor Code §6629 provides: "Nothing in this section shall permit a court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

[60]Pub. Res. C. §21168.

[61]Water Code §1804(c). Prop. 103 preserved independent judgment in insurance ratemaking cases. Ins. C. §§1858.6, 1861.09.

[62]Nevertheless, the Supreme Court applies something much closer to substantial evidence: "Although we independently examine the record, we give great weight to the findings below especially when...they are based on conflicting testimony...The referee is in the best position to resolve credibility questions because he is able to observe the demeanor of the witnesses and evaluate the character of the witnesses." Borre v State Bar of California, 52 Cal.3d 1047, 1051-52, 277 Cal.Rptr. 864 (1991).

3. Recommendation

I recommend that California dispense with the independent judgment test in all cases of judicial review of agency factfindings. I also recommend that California adopt the substantial evidence on the whole record test for the review of such decisions. As discussed above, the substantial evidence test is regarded by most jurisdictions as providing adequate protection for the rights of private litigants.[63] None of the Superior Court and appellate court judges whom I consulted oppose this recommendation; private lawyers who represent professionals very strongly oppose the recommendation; unsurprisingly, lawyers on the staff of the Attorney General support it.

a. The substantial evidence on the whole record test.

Before considering the arguments for and against this recommendation, it is important to define exactly what the substantial evidence on the whole record test entails. It requires the court to examine the evidence in the record <u>both</u> supporting and opposing the agency's findings[64]. If a reasonable person could have made such findings, the court should sustain them.

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[63]The remaining jurisdictions use a "clearly erroneous" standard. Neither the federal government or any other state uses "independent judgment" for review of broad classes of agency action.

[64]This is existing California law. See note 23.

As the Commission has already decided, a reviewing court must give great weight to an administrative judge's decision based on demeanor. Where the agency heads come to a different conclusion about credibility from that of the administrative judge, this conflict detracts from the substantiality of the evidence supporting the agency's decision. This test gives far more bite to the substantial evidence standard than would be the case if the court ignored the conflict (as apparently it can under present law.

Finally, it should be made emphatically clear that substantial evidence is not a toothless standard which calls for a court merely to rubber stamp an agency's findings if there is "any evidence" to support them.[65] The reviewing court is empowered and obliged by the substantial evidence test to reverse an agency decision that seems unresponsive to the evi-

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[65]Applying the substantial evidence test to review of a jury verdict, a Court of Appeal said: "Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote, or conjectural, then his opinion has no evidentiary value...In those circumstances, the expert's opinion cannot rise to the dignity of substantial evidence." Pacific Gas & Elec. Co. v. Zuckerman, 189 Cal.App.3d 1113, 1135, 234 Cal.Rptr. 630 (1987). See Martin, "New Bite for an Old Maxim," 10 Calif. Lwyr. 73 (June, 1990) (substantial evidence test has bite in California). This is definitely a meaningful form of review of fact findings.

In the area of administrative law, see, as examples of meaningful judicial review under the substantial evidence test, Sierra Club v. Contra Costa County, 10 Cal.App.4th 1212, 13 Cal.Rptr.2d 182, 189 (1992) (lack of substantial evidence to support findings that overriding concerns outweigh adverse environmental impacts); Newman v. California State Personnel Bd., 10 Cal.App.4th 41, 12 Cal.Rptr.2d 601 (1992) (lack of substantial evidence to support personnel decision).

dence, unfair, outrageous, not "ballpark." That is what Superior Court judges claim they actually do now when they apply the substantial evidence test in reviewing agency findings[66] and that is what they should do. If there be any doubt that substantial evidence is intended to provide for meaningful review in administrative cases,[67] the comment to the new section should make this intention unmistakably clear.[68]

In thinking about this recommendation, and whether it would significantly detract from the protections available to the people of California, it is important to realize that courts would retain very substantial powers to reverse unjust agency decisions. As already mentioned, the substantial evidence test can be a remarkably powerful weapon in the hands of a judge who is offended by the agency outcome, particularly where the agency heads have disagreed with the findings of an administrative judge. An additional and extremely significant point is that under the substantial evidence test, an appellate court has much broader reviewing power than it has under independent judgment;[69] thus the greater power of the appel-

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[66]Every judge I interviewed agreed with that statement.

[67]Witkin's discussion of substantial evidence in California procedure attempts to discourage attorneys from pursuing review because judicial reversal is unlikely. 9 Bernard Witkin, Calif. Procedure §§278-85 (1985). I think Witkin overstates the matter.

[68]See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), holding that the federal APA sent a message to reviewing courts to be less deferential in applying the substantial evidence test than they had been prior to its enactment. The comment to this provision in a new APA should send a similar message.

[69]See text at notes 30-32.

late court would, in part, compensate for the decreased power of the trial court.

In addition, courts are empowered to find agency action an abuse of discretion--a potent weapon against apparently overzealous regulators who might, for example, revoke a license for a trivial first offense. On numerous occasions, California courts (under either independent judgment or substantial evidence) have set aside penalty decisions as an abuse of discretion while affirming the agency's findings of fact.[70] Strengthening and clarifying a court's power to reverse for abuse of discretion is discussed in Part C of this report.

Similarly, courts retain power to correct procedural errors; a judge concerned with unfair results can often find a procedural error (such as inadequate findings or inadequately explained reasons or unexplained inconsistency with prior

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[70]See, e.g., Skelly, note 39 (dismissal excessive for taking long lunch breaks); Magit v. Bd. of Med. Examiners, 57 Cal.2d 74, 87, 17 Cal.Rptr. 488, 495 (1961) (revocation of license of doctor who used unlicensed personnel to anesthetize patients was excessive); Harris v. Alcoholic Beverage Control App. Bd., 62 Cal.2d 589, 43 Cal.Rptr. 633 (1965) (random incidents not sufficient for revocation of liquor license); Toyota of Visalia, Inc. v. Dep't of Motor Vehicles, 155 Cal.App.3d 315, 324-28, 202 Cal.Rptr. 190 (1984) (trial court's reduction of penalty against car dealer affirmed--penalty was inconsistent with that in other similar cases).

One attorney who represents doctors told me of a recent case in which an ALJ had recommended probation for his client; the agency heads rejected the ALJs decision and ordered revocation. The trial judge upheld the agency's fact findings but held the penalty was an abuse of discretion. Although the attorney thought that this story was a compelling argument for retaining independent judgment, it is not. Since the case involves abuse of discretion, it would have come out the same way under substantial evidence.

cases) with which to compel an agency to reexamine a case. Clarifying the court's power to reverse for procedural error is discussed in Part D of this report.

Courts will retain the power of independent judgment over questions of law. Captured or overzealous agencies are at least as likely to make errors of law (such as by misinterpreting provisions in applicable statutes) as to make skewed factual judgments.[71] The court's power to reverse an agency decision because of a misinterpretation of statute or other legal text is discussed in Part B of this report.

Moreover, there is often considerable difficulty in deciding whether to review certain issues as questions of fact or questions of law; as a result, the courts have considerable discretion to classify such issues as law and exercise independent judgment.[72] Often, but not always, an agency's deci-

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[71]See, e.g., Association of Psychology Providers v. Rank, 51 Cal.3d 1, 270 Cal.Rptr. 796 (1990) (regulation limits practice of psychologists--invalid as inconsistent with governing statute); Merrill v. Dep't of Motor Vehicles, 71 Cal.2d 907, 80 Cal.Rptr. 89 (1969) (DMV refused application by discount house for an auto dealer's license because of misinterpretation of governing statute).

[72]The problem of drawing the distinction between law and fact pervades the field of civil procedure and is problematic in many areas of the law. Neither federal nor California law is clear on the standard for reviewing mixed questions of law and fact. See Witkin, note 67 at §§241-242 (often impossible to decide whether issue is one of fact or law); J. Eisenberg et.al., California Practice Guide--Civil Appeals and Writs §8.3 (distinction often subtle and blurred); Victor S. Netterville, "Administrative 'Questions of Law' and the Scope of Judicial Review in California," 29 So. Calif. L. Rev. 434 (1956) (inquiry into what courts do results in intellectual chaos); Lacy v. Calif. Unempl. Ins. App. Bd., 17 Cal.App.3d 1128, 1134, 95 Cal.Rptr. 566 (1971) (many issues might with equal force be classed as questions of law or fact). See generally George C. Christie, "Judicial Review of Findings of Fact," 87 Northwestern Univ. L. Rev. 14 (1992) which summarizes the vast literature on the question.

sion that the facts fit a broadly stated statutory terms (like "gross negligence" or "unprofessional conduct" or "employee") is reviewed as a question of fact.[73] Even where the mixed question is reviewed as a fact question, however, it is often possible to isolate questions of law that can be decided abstractly; on such issues, a court retains independent judgment.[74] Thus the ability of courts to extract issues as ques-

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[73]Many cases use a rule of thumb that such determinations (whether of lower courts or of agencies) are reviewed as questions of fact when the facts of the given case (or inferences to be drawn from the facts) are disputed. See, Borello & Sons v. Dep't of Indus. Rel., 48 Cal.3d 341, 349, 256 Cal.Rptr. 543 (1989) (are "sharefarmers" "employees"--fact since dependent on resolution of disputed evidence); Bd. of Educ. of Long Beach v. Jack M., 19 Cal.3d 691, 698-99 n.3, 139 Cal.Rptr. 700 (1977) (whether teacher's acts are "immoral or unprofessional conduct" and show "evident unfitness to teach"). Even where the facts are undisputed, but the factual inferences to be drawn are not apparent, the issue can be treated as one of fact. Interstate Brands, note 43 at 774 n.2 (qualification for unemployment benefits in case of a strike); Lacy, note 72 (reasonableness of employer's order is question of fact even though facts are not disputed).

[74]It is often necessary to interpret a statute abstractly before applying a vague statutory term to the facts, and this interpretation often resolves the case. There are countless examples. See Morrison v. State Board of Educ., 1 Cal.3d 214, 229, 82 Cal.Rptr. 175 (1969) (teacher cannot suffer revocation of credential under "immoral conduct" standard unless conduct involves unfitness to teach); Harrington v. Dep't of Real Est., 214 Cal.App.3d 394, 400, 214 Cal.Rptr. 528, 531 (1989) (whether conviction involves involves moral turpitude is question of law).

In Crocker Nat. Bank v. City of San Francisco, 49 Cal.3d 881, 888, 264 Cal.Rptr. 139 (1989), the Supreme Court improved on the normal law/fact methodology used in California cases. It held that whether an item is a "fixture" for tax purposes is a question of law. "If the pertinent inquiry [in answering a mixed question] requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." Similarly, see William R. Andersen, Judicial Review of State Administrative Action--Designing the Statutory Framework," 44 Admin. L. Rev. 523, 559 (1992) (if dispute concerns the meaning or purpose of a statute, more intensive review is appropriate; if dispute concerns the meaning or weight of facts within an agency's area of

tions of law, and to decide them independently, is an important ingredient in protecting regulatees against overzealous agencies even if the independent judgment for review of factual determinations is abolished.[75]

b. Historic arguments

Independent judgment emerged from an era of intense judicial hostility to government regulation and to administrative agencies. But that was fifty years ago, and we have long since come to understand that economic regulation and agency adjudication are constitutionally appropriate and practically indispensable to modern government. Is it not possible that independent judgment is a vestige of a bygone era that should be swept away with other discredited judicial inventions that inhibited government from governing?

Independent judgment emerged during an era when California lacked an administrative procedure act and before modern

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expertise, less intensive review is appropriate).

[75]I do not, however, recommended legislation clarifying the law-fact distinction; I would continue to leave the distinction to the courts who seem to be handling it pretty sensibly. Even in the hands of our nonpareil Commission draftspersons, a statute clarifying the standard of review for mixed questions would be too vague to do much good. Moreover, the distinction pervades the entire field of procedure and should not be solved for administrative law alone.

However, it might be possible to express some of the relevant criteria in a comment. For example, a comment might say that while the application of broadly defined legal terms (such as "negligence" or "good cause" or "employee") to specific facts within an agency's area of expertise is normally reviewable as a question of fact, courts frequently can isolate abstract issues embedded in those legal terms and decide them as questions of law.

notions of procedural due process had taken root. In 1940, there was nothing to assure fair and impartial procedure, so there was a much greater need for a judicial check on agencies. Today, both statutory and constitutional law assure fair procedure. If the proposed adjudication provisions of a new APA are approved, all statewide adjudicating agencies will be required to provide procedures that far exceed what due process requires (and which are superior to present law).

Indeed, it is a striking irony that the attorneys who will protest most vehemently against abolition of independent judgment represent professional licensees. Yet professional licensees are the beneficiaries of California's system of <u>independent administrative law judges</u> that is the envy of most other states and of the federal bar. Most states, and the federal government, have <u>no</u> independent judges. Our OAH ALJs provide a vitally important buffer against regulatory zeal or harassment. Under provisions already accepted by the Commission, the credibility judgments of those ALJs will be difficult for agency heads to overturn.

c. Bureaucratic accountability

In evaluating the arguments for and against independent judgment, one quite fundamental point should not be overlooked: the legislature invested specialized administrative boards with primary responsibility for making certain kinds of decisions. If the agencies do a bad job, the governor can and should be blamed, because the governor's appointees to regulatory boards have let down the people of the state either

by overly passive regulation or by picking on people who should have been left alone. Only by allowing the agency heads to make their own decisions can they, and the governor who appointed them, be held accountable.

The independent judgment test transfers the responsibility for adjudicatory decision to unaccountable, generalist trial courts. This permits the agency to pass the buck: they might say, why should we try to solve a problem when our decisions count for nothing? I believe that agencies entrusted with regulatory responsibilities should have the power to carry out their assigned duties; responsibility for regulation must be joined with authority to do the job. Judicial review should exist not to supplant an agency's judgment but only as a check against bureaucratic abuse.

d. Arguments for rejecting the independent judgment test.

Proposed changes in administrative procedure or judicial review can be evaluated by balancing three variables: accuracy of result, acceptability, and efficiency. An ideal administrative procedure or review mechanism should reach <u>accurate</u> results, meaning a decision that correctly reflects the data considered by the agency, that is faithful to legislative intent, and that is consistent with decisions in similar cases. The procedure should be <u>acceptable</u>, meaning that it should seem fair both to the people affected and to the public for whose benefit regulation occurs. Finally, the procedure should be <u>efficient</u>, meaning that it should function at the

least possible cost to regulated persons, to the executive branch of government, and to the courts. In striking a balance, reasonable people often disagree--and they certainly will on this issue.

i. Accuracy

A troubling aspect of independent judgment is that it substitutes the factual conclusions of a non-expert trial judge for the expert and professional conclusions of the administrative judge and the agency heads. When the question is what actually happened and why, and whether a licensee's errors or misconduct are such as to require discipline, especially in cases involving technical material or the clash of expert witnesses, I believe that an accurate call is more likely to be made by professionals than by a generalist trial judge who has no experience whatsoever in assessing such matters and probably lacks the time and energy to master them.[76] The professionals are the administrative judges who try cases of this sort every day, actually hear the lay and expert witnesses testify, and can take the necessary time to understand the issues and to question the experts until they do understand. The professionals also include, of course, the agency heads (assisted by their advisory staff) whose professional

[76]"A judge's cram course in medicine is a poor substitute for the professional judgment of the highly educated practitioners in the field." Anton, note 34 at 832 (Clark, J. dissenting).

and regulatory experience has qualified them for the task.[77]

Independent judgment presents an additional accuracy-related problem: it insures a pattern of decisions that cannot be uniform. Administrative mandamus actions are generally filed in the county of the plaintiff's place of business.[78] Thus every superior court in the state hears section 1094.5 cases. This system insures disparity of results. Given the responsibility to find the facts, judges naturally project their own philosophic biases, for and against the regulatory system, into the process of factfinding. Disparity between

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[77]Defenders of independent judgment claim that the expertise argument is oversold because trial judges decide technical cases all the time. Anticipating judicial review, attorneys introduce sufficient expert testimony in administrative hearings so that a generalist judge can understand the technical or specialized evidence.

I am not persuaded. Even if the testimony in the record helps judges grasp technical materials, they remain far from being an expert. Judges are extremely busy and have limited time and energy to master difficult scientific or technical material they were never trained to deal with. A judge's assessment of technical matters remain at best an educated guess, at worst a shot in the dark. I think we make a mistake when we assume judges can become experts quickly in issues that professionals take a lifetime to master. Some, but not all, of the superior court judges I interviewed felt at a disadvantage in dealing with difficult medical or technical issues in writ cases.

[78]See 2 Gregory Ogden, Calif. Public Agency Practice §53.03[3] (1992), discussing CCP §393(1)(b) (county in which cause of action arose is proper county for trial of action against public officials). See Duval v. Contractors' State License Board, 125 Cal.App.2d 532, 271 P.2d 194 (1954) (county in which contractor's business was situated); Sutter Union High School District. v. Superior Court, 140 Cal.App.3d 795, 190 Cal.Rptr. 182 (1983) (case involving teacher discipline properly set in Sutter County where relevant events occurred). In addition, where an action against the state or an agency may be commenced in Sacramento, the action may be commenced and tried in any city where the Attorney General has an office. CCP §401.

judges is an inevitable result of our judicial system, but it is neither an inevitable nor a desirable result when applied to the judicial review of the decisions of a regulatory agency. And, especially in counties that do not have a huge volume of writ business and judges who specialize in hearing them, it would not be surprising if hometown judges lean over backwards for a hometown professional represented by a hometown lawyer.[79]

Defenders of independent judgment claim I have the accuracy story backwards. Following Justice Tobriner in Bixby,[80] they claim that regulators are often fired up with regulatory zeal, intimidated by adverse criticism into trying to prosecute everyone in sight, captives of their staff, vindictively trying to silence a critic or a maverick, or engaged in carrying on some kind of turf war. Presumably, superior court judges are more dispassionate and can use their independent judgment power to reach more rather than less accurate results than the agencies.

I cannot and do not try to rebut this argument by claiming that the problem is nonexistent. Agencies do go out of control, but in my view, not often. Mostly, given their limited resources, they bring only the most egregious cases and seldom bring cases that are not at least plausible. But

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[79]Members of the Attorney General's staff whom I interviewed assert that this is the case. Moreover, we should not forget that judges in California are subject to election challenges.

[80]See text at note 37.

using the independent judgment standard to rein in agencies that have gone out of control only makes sense if one assumes that regulatory bias produces inaccurate results at the agency level in a very high percentage of cases.

We forget that more often than not it is the aggressive regulatory agency that is the "maverick;" passivity in professional licensing agencies has been much more the rule than the exception.[81] Rules of judicial review that discourage aggressive law enforcement, in order to deal with the relatively rare case of regulatory fanatacism, are a case of misplaced priorities.

In the last analysis, the institutional bias argument cannot be empirirally resolved. But admitting the possibility that agency heads may generate inaccurate decisions because of their institutional prosecutory bias or for some other reason, I believe that independent judgment of the facts by trial courts is not the right way to solve the problem.

For one thing, independent judgment solves only a small part of the problem. There are so many ways that an agency might pick on disfavored groups or mavericks or conduct turf wars besides rendering biased fact findings in the process of revoking licenses. It might reject an application for a li-

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[81]As retired Judge B. Abbott Goldberg wrote, "The court still seems to fail to appreciate that an administrative agency may be the servant of the public rather than an enemy of a licensee. A 'maverick' hospital that disciplines a deficient doctor may do so to assure the quality of care to patients. This 'maverick and unconventional' hospital may be as much deserving of protection as an individual practitioner." Goldberg, note 10 at 30 (1979).

cense, a decision reviewable only under substantial evidence. It might adopt a regulation disfavoring a group of competitors[82] or use legislative muscle to get a statute passed or rejected. It could construe the law in the course of adjudicating a case in a way that insures a harsh regulatory outcome no matter how the facts are found. Independent judgment offers no protection in such cases. Or suppose the agency finds a trivial rule violation and assesses a disproportionately heavy penalty. Choice of sanction is reviewable not under independent judgment but only under the more restricted abuse of discretion standard.[83]

So, all in all, the independent judgment test seems to deal only with a small part of the problem of the institutional prosecutory bias of regulatory agencies, if there is such a problem. And, as discussed above,[84] independent judgment is probably unnecessary to deal with that problem, since courts can do virtually as much with their other judicial review tools to protect private litigants against regulatory bullies. In short, independent judgment seems like a cannon that is being deployed to kill a mouse. And while it may kill the mouse some of the time (i.e. in those cases in which in-

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[82]See Moore v. Calif. State Bd. of Accountancy, 2 Cal.4th 999, 9 Cal.Rptr.2d 358 (1992) (prohibiting noncertified accountants from calling themselves accountants); Association of Psychology Providers v. Rank, note 39 (regulation limits practice of psychologists--invalid as inconsistent with governing statute).

[83]See text at note 70 and Part C.

[84]Text at notes 69-75.

justice is created by biased fact findings that can be detected and corrected by a superior court judge exercising independent judgment), the cannon may well blow away the house in which the mouse is hiding. As discussed above, independent judgment generates incorrect and disuniform results in cases which are not at all characterized by any form of agency misconduct or msisplaced zeal. Moreover, as discussed below, the independent judgment system is extremely costly and inefficient, and it systematically disfavors the public interest.

ii. Inefficiency of the independent judgment rule.

The second relevant factor is procedural efficiency: administrative procedure should deliver results quickly at low cost to litigants and to the government. I believe that independent judgment is very inefficient.

First, the issue of scope of review is itself a massive consumer of judicial resources.[85] Year after year, dozens of appellate court decisions (and probably hundreds if not thousands of trial court decisions) grapple with the peripheral issue of whether or not independent judgment applies, instead of proceeding quickly to decide the merits.[86] And when the decision about scope of review turns, as it does, on the degree of "vestedness" and the degree of "fundamentalness," and

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[85]See Walker, note 12.

[86]Superior court judges whom I interviewed agreed that a considerable amount of their time is consumed in determining which standard of review should be applied to a given case.

the effect of the agency decision "in human terms and the importance of it to the individual in the life situation,"[87] terms that are almost a parody of what a legal standard should be, there is license for the worst sort of result-oriented judicial legislation. Every judge is invited to play favorites.[88]

Second, the independent judgment test makes exceptional demands on trial court judges, far greater than those imposed by the substantial evidence test.[89] Independent judgment requires a much more exacting scrutiny of every word in the record (and sometimes the transcripts are very lengthy) than does substantial evidence.[90] Assume a case in which a professional's license has been revoked for gross negligence. The

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[87]Bixby, 4 Cal.3d at 144.

[88]Compare the obviously conflicting judicial philosophies about regulation in the recent cases involving rent control and environmental regulation discussed in notes 52-53.

[89]Most of the superior court judges I interviewed confirmed this statement. One told me that he believes that he cannot entrust the reading of the record to a law clerk or legal assistant in an independent judgment case. He must read every word himself, just as he would hear every word in a case in which he were the trial judge.

[90]The Judicial Council report that proposed adoption of section 1094.5 favorably quoted the reports of the United States Attorney General's Committee and the Benjamin Commission in New York and a law review article, all to the effect that independent judgment imposed a undue burden on California's judiciary. Judicial Council of California, Tenth Biennial Report to the Governor and the Legislature 148-49 (1944).

In addition to the burden imposed by independent judgment on trial court judges, the procedure sometimes requires the court to remand the case to the agency to supply additional technical details to enable to court intelligently to exercise its responsibility. Anton, note 34 at 832 (1977) (Clark, J. dissenting). The inefficiencies are obvious.

case is reasonably close on the facts, so that the probability that the professional in fact was grossly negligent lies within a probability range of 60%-40% either way. There is solid expert testimony on both sides. In such a case, there is obviously substantial evidence to support the agency's decision. It is not difficult for a court to come to this conclusion after a relatively cursory examination of the evidence in the record. But if the judge must decide which side preponderates--even if it is 51-49--the judicial burden is far greater.[91]

Third, independent judgment is inefficient because it encourages many more people to seek judicial review than would do so under substantial evidence. If the agency has put on a strong case, it is likely that judicial review under a substantial evidence standard will be unavailing. People will not wish to pay lawyers to seek it unless they strongly believe that the decision is infected by legal or procedural errors or, on the facts, is unreasonable. In contrast, under independent judgment, the private party always has a shot.[92] After all, a generalist judge will decide the facts de novo without according any deference to the findings of the ALJ or

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[91]To me it is like grading an exam pass-fail as opposed to assigning a number grade. I can read the exam quite quickly and decide if it is pass or fail; but I must weigh every word when I assign a number grade. The analogy to grading was suggested by Thomas O. McGarity, "Some Thoughts on 'Deossifying the Rulemaking Process," 41 Duke L.J. 1385, 1453 (1992).

[92]An Deputy Attorney General who handles Medical Board cases estimated that 90% of the physicians sanctioned by the Board seek judicial review.

the agency heads. In that situation, it will often be worth spending the extra money to seek review. And the result is that many more cases come to our overburdened superior courts.

In short, the inefficiency of independent judgment is a serious criticism of existing law. In this era of vastly overburdened trial courts, the abolition of independent judgment would entail significant savings for our judicial system. As part of a package of administrative law reforms, a proposal that will save significant state resources must be considered attractive.

iii. Acceptability.

Turning finally to the question of acceptability of the process (or, to use different words, its perceived fairness), it seems clear that persons subject to the regulatory process have a strong preference for independent judicial judgment. They believe that fairness requires that an independent generalist judge make the fact findings rather than the agency that they perceive has prosecuted them.

Of course, the holders of protected interests are entitled to due process; they get it and more. In the case of professional licensing, they receive an initial hearing from a group of highly skilled administrative law judges structurally and attitudinally independent of the regulatory agency and those initial ALJ decisions are adopted by agencies in the vast majority of cases. In any event, the hearings and appeals within the agencies (especially as these will be revised by the new provisions on adjudication such as separation of

functions) are accompanied by almost every possible protection to assure a fair result.[93]

But regulation is about more than providing the maximum possible set of protections to regulatees. The regulatory process must be fair and balanced, not only to regulated parties, but to the members of the public who the regulatory process is designed to protect. There is a vital public interest--a fundamental vested right, if you will--in allowing regulation to do its job.[94] Whether that job is removing incompetent or corrupt professional licensees, administering benefit programs, or engaging in land use planning, regulation of business, personnel decisionmaking, or environmental protection, the public has a real stake in a balanced and fair

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[93]Of course, this is not necessarily true in areas of local regulation where the new APA will not apply and decisionmakers are constrained only by whatever procedural statutes or regulations happen to exist and by procedural due process. Thus there is a stronger argument for retaining independent judgment for appeals from local government than from state government. However, most of the local government decisions now reviewed under independent judgment are local personnel decisions, such as discharging police officers, and typically these decisions are surrounded by quite adequate procedural protections. As to the balance, I think the case for applying independent judgment to local decisions about benefit programs, or to environmental and land use decisions, is relatively weak. Thus I would urge that independent judgment be abolished for review of local as well as for state decisions.

[94]"...The Oil Companies are asking us to determine they have a fundamental vested right to release gasoline vapors while dispensing fuel to their customers. How are we to answer the public, on the other hand, who assert a fundamental vested right to breathe clean air? If either exists, it must be the latter." Mobil Oil Corp. v. Superior Court, 59 Cal.App.3d 293, 305, 130 Cal.Rptr. 814 (1976). The same could be said of the public's fundamental vested right to competent licensed professionals to serve them.

process. The public legitimately needs a regulatory system that will not remove qualified professionals from practice, but also will not make it unreasonably difficult for the regulatory process to remove unqualified ones.

I believe that transferring responsibility for finding the facts from agencies to superior court judges biases the adjudicatory process in favor of those holding protected interests and against protection of the public. As discussed above, it tends to produce inaccurate and inconsistent results since superior court judges lack the time and expertise to familiarize themselves with the scientific, technical, or financial issues raised by the random assortment of independent judgment cases that happen to come to them. Moreover, this inaccuracy systematically favors private litigants and disfavors the regulators (and thus the public they are seeking to protect) because the only decisions that come to the court are ones in favor of the agency and against the private litigant. The private interest gets a second bite at the apple; the public interest does not. And there is concern that some judges may lean in favor of their hometown professionals and against the bureaucrats. It appears that the independent judgment test allows professionals to win a large number of cases before the superior court that they would lose if the test were substantial evidence.[95]

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[95]Unfortunately, it is not possible to confirm this statement by empirical evidence. My evidence is anecdotal. One practitioner told me that in many years of practice representing professional licensees, mostly doctors, he had never lost an independent judgment case and never won a substantial evidence case. Even allowing for permissible exaggeration and even if most of his clients were the victims of unwarranted regulatory harassment, some of his clients who won in the superior court should probably not be practicing medicine.

All this is cause for serious concern. Perhaps in the criminal law it is better for a guilty person to go free lest we convict an innocent person. However, the regulatory process is different. An adjudicatory system biased in favor of professionals and other private interests may be quite acceptable to those interests, but it is unfair and unacceptable to members of the public whose interest is in allowing a regulatory scheme to work as intended.

e. Fallback positions

If the Commission does not wish to follow the above recommendation but wants to change the status quo, I can think of several fallback positions.

i. Clearly erroneous

The clearly erroneous test is used by federal (but not California) appellate courts in reviewing the decisions of lower court judges in cases without juries.[96] It is also the test prescribed by the 1961 Model State Administrative Procedure Act,[97] although it was rejected by the newer 1981 Model Act that opts for the substantial evidence test.[98]

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[96]Fed. R. Civ. Proc. 52(a) provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

[97]§15(g)(5) provides for reversal if the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." 15 U.L.A. 300 (1990).

[98]1981 Model State APA §5-116(c)(7): "The court shall grant relief...if...The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act."

Some California cases use the "clearly erroneous" test in defining the scope of judicial review of agency interpretations of law. See discussion in Part B.

According to the leading federal case, a court using the clearly erroneous test should reverse an agency if it "is left with the definite and firm conviction that a mistake has been committed."[99] The idea is that the court reverses if it is clearly convinced that an agency finding, even one supported by substantial evidence, is incorrect. Thus the clearly erroneous test allows the reviewing court somewhat greater power to overturn agency fact findings than does the substantial evidence test.[100] Still, the clearly erroneous test gives the court less freedom to overturn agency findings than is now accorded in California under the independent judgment test. Some authors have urged that the clearly erroneous test be used in administrative law in place of substantial evidence.[101] These arguments were accepted by the drafters of the 1961 Model State APA but not the drafters of the 1981 Model Act.

I do not favor adoption of the clearly erroneous test. For one thing, such a substitution is certain to be confusing to many judges. In Washington, the clearly erroneous test was employed from 1972 until it was abandoned when Washington adopted the 1981 Model Act. As chronicled by the leading ob-

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[99]United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

[100]See Davis, note 17 at §29:5.

[101]Frank Cooper, "State Administrative Law" 722-37 (1965).

server of Washington administrative law, the clearly erroneous test produced complete confusion in the Washington appellate court decisions; the judges could not get straight on how the test differed from substantial evidence.[102] Many writers cannot see any real difference between clearly erroneous and substantial evidence.[103] To adopt a test hitherto unknown to California law, and expect generalist trial judges to figure out how the new test relates to substantial evidence and independent judgment, guarantees confusion and conflicting decisions.

Moreover, if clearly erroneous is understood to give the reviewing court much greater power than it has under substantial evidence, very close to what the courts now have under independent judgment, I would be opposed to the adoption of the test for the same reasons I oppose independent judgment. On the other hand, if the test is perceived to mean about the same thing as substantial evidence, there is no point in

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[102]William R. Andersen, "Judicial Review of Agency Fact-Finding in Washington: A Brief Comment," 13 Willamette L. J. 397 (1977).

[103]See Andersen, note 74 at 552. "Many judges find it most difficult to distinguish between the 'substantial evidence' and 'clear error' tests. Attempts to differentiate between the two tests produce confusion for Bench and Bar alike." Cooper, "Administrative Law: The 'Substantial Evidence' Rule," 44 A.B.A.J. 945, 947 (1958). "[The tests] are, in practice, so nearly alike that only the scholastic mind of the hypercritical law-review writer presumes to see any real difference between them." Vanderbilt, "Introduction," 30 N.Y.U. L. Rev. 1267, 1268. Some writers believe that clearly erroneous gives judges <u>less</u> power than substantial evidence. Project, "State Judicial Review of Administrative Action," 43 Admin. L. Rev. 571, 726 (1991). This was also the view of some Washington court decisions discussed in Andersen, supra.

adopting it in lieu of the more familiar substantial evidence test.

I think it would be far better to make clear that the substantial evidence test in the new APA is intended not as a rubber stamp test but as one with real bite--one that require judges to carefully scrutinize the record to make sure that the agency fairly resolved the issues. Adoption of a brand new test to achieve the same result is likely to produce more harm than good.[104]

ii. Preserve but narrow independent judgment test.

In cases involving attorney discipline, the independent judgment test applies, but in practice, the Supreme Court uses something much more like substantial evidence to review decisions of the State Bar Court. It gives "great weight" to the State Bar Court's findings, particularly when based on conflicting evidence.[105] Possibly a new statute could maintain "independent judgment" but also require the court to give great weight to the findings and conclusions of the agency. Although this seems contradictory, it might be a way to com-

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[104]Adopting the clearly erroneous test could be a compromise position. It entails abandonment of independent judgment in favor of a less intrusive test, but it would provide more intrusive review in cases that today are judged under substantial evidence (e.g. cases decided by constitutional agencies and cases in which there is no deprivation of a fundamental vested right). Constitutional agencies like the Workers' Compensation Appeals Board and the State Personnel Board would oppose more intrusive review of their decisions.

[105]Borre, note 62.

promise the conflicting positions that will be advanced on this issue. Because this approach is certain to cause judicial confusion, however, I do not recommend it.

iii. Retain independent judgment for licensing only.

Another compromise would be to retain independent judgment for the cases in which the test first arose--occupational and professional licensee discipline--and dispense with it in all of the other areas to which it has spread. This would neutralize the main source of opposition to the change--the attorneys who represent professionals in licensing cases.

One advantage of this approach is that it would save the courts from having to struggle with the vague standards of vestedness and fundamentalness under the Bixby test. Substantial evidence would become the test in all cases involving benefit determinations, land use planning, environmental law, personnel, drivers' license revocation, professional license applications, civil rights, and any other form of economic regulation other than serious sanctions against professional or occupational licensees.

However, as already indicated, I would oppose this halfway measure. Independent judgment would seem to cause the most serious problems in terms of accuracy, efficiency, and harm to the public interest, in the area of professional licensing, where litigants have the greatest ability and incentive to manipulate the system to their advantage. Moreover, it is in precisely this area where litigants already

have the most due process--access to an independent ALJ and all the benefits of the adjudication provisions of the new APA. Thus it would make little sense to single out this area for the most intrusive judicial review.

B. Judicial review of agency interpretations of law

An agency frequently has occasion to interpret the meaning of statutes or of its own regulations or of other legal materials such as the common law. It might engage in legal interpretation when carrying out any of its functions: adjudicating cases, engaging in rulemaking, advising regulatees or its own staff, or exercising discretion. There are differences of opinion concerning the appropriate scope of judicial review of agency interpretations of law.

1. Present California law.

The mainstream California rule is that the court can substitute its judgment for that of an agency when it reviews an agency's legal interpretation. It need not accept an agency's interpretation with which it disagrees, even if the legal text being interpreted is ambiguous and the agency's interpretation is reasonable, regardless of whether the interpretation is contained in a rule, an adjudication, or in some other form of agency action.[106] Thus, in a recent case involving the

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[106]See Ass'n of Psychology Providers, note 71 at 11 (overturning interpretation contained in a legislative regulation); Dyna-Med, Inc. v. FEHC, 43 Cal.3d 1379, 1388-89, 241 Cal.Rptr. 67 (1987) (overturning agency's interpretation contained in an adjudicatory decision); Vaessen v. Woods, 35 Cal.3d 749, 756, 200 Cal.Rptr. 893 (1984) (overturning interpretation of ambiguous statute in legislative regulation); Carmona v. Division of Industrial Safety, 13 Cal.3d 303, 309-10, 118 Cal.Rptr. 473 (1974) (overturning agency's interpretation of its own regulation); Cooper v. Swoap, 11 Cal.3d 856, 864, 115 Cal.Rptr. 1 (1974) (overturning interpretation in a legislative regulation); Western Mcpl. Water Dist. v. Superior Court, 187 Cal.App.3d 1106, 1110-11, 232 Cal.Rptr. 359 (1986).

legality of an administrative regulation, the Supreme Court said:

> When a court inquires into the validity of an administrative regulation to determine whether its adoption was an abuse of discretion, the scope of review is limited...When, however, a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute...Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations...[107]

The rule that a court can substitute judgment on a question of legal interpretation is subject to several caveats.

a. Deference or great weight.

Even though courts normally are empowered to substitute their judgment for an agency's interpretation, the courts generally accord "deference" or "great weight" to that interpretation.[108] Deference means that the agency's view of the

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[107]Ass'n of Psychology Providers, note 71.

[108]See, e.g., Dix v. Superior Court, 53 Cal.3d 442, 461, 279 Cal.Rptr. 834 (1991) ("unless unreasonable or clearly contrary to the statutory language or purpose, the consistent construction of a statute by an agency charged with responsibility for its implementation is entitled to great deference"); California Ass'n of Psychology Providers v. Rank, supra (recognizing deference rule but invalidating interpretation in a legislative regulation); Nipper v. Calif. Automobile Assigned risk Plan, 19 Cal.3d 35, 45, 136 Cal.Rptr. 854 (1977) (referring to an administrative regulation: "We have generally accorded respect to administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose"); Morris v. Williams, 67 Cal.2d 733, 737, 748, 63 Cal.Rptr. 689 (1967) (agency construction entitled to great weight but final responsibility for interpretation rests with the courts); Lusardi Construction Co. v. Calif. Occup. Safety & Health Appeals Bd., 1 Cal.App.4th 639, 643, 2 Cal.Rptr.2d 297, 300 (1991) (since interpretation of regulation is question of law, while agency's interpretation is entitled to great weight, ultimate resolution of legal question rests with the courts).

correct interpretation is given more weight by the court than the interpretation suggested by other litigants. Thus if the court is in doubt about the correct interpretation, it is likely to accept the agency's approach. But the key point of the "deference" or "great weight" principle is that a court is never required to follow the agency's approach even if it is reasonable: the court retains power to substitute its own judgment for that of the agency.

The degree to which the court will defer to the agency's interpretation depends on many factors. For example, a court is more likely to defer to an agency's interpretation of its own regulations than to its interpretation of a statute. It is more likely to defer to an agency's interpretation of a statute than to an agency's interpretation of the common law. Other indicia that increase the degree to which a court will defer include:

i) Whether the agency's interpretation was contemporaneous with enactment of the statute;[109]

ii) Whether the agency has been consistent in its interpretation and the interpretation is longstanding;[110]

iii) Whether the legislature reenacted the statute in question with knowledge of the agency's prior interpretation;[111]

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[109]See Woosley v. State of California, 3 Cal.4th 758, --, -- Cal.Rptr.2d-- (1992); Dyna-Med, note 106 at 1388, citing numerous cases but finding interpretation not contemporaneous.

[110]See, e.g. Dix v. Superior Court, supra; Scates v. Rydingsword, 229 Cal.App.3d 1085, 1097, 280 Cal.Rptr. 544 (1991).

[111]See Moore v. California State Bd. of Accountancy, note 44, 9 Cal.Rptr.2d at 369 (1992) (legislature presumed to be aware of longstanding administrative construction of statute).

court might find that the legislature has delegated interpretive power when it writes extremely vague statutory language.[114] Similarly, a long line of cases involving Board of Equalization tax regulations appear to hold that the legislature delegated power to the Board to interpret the meaning of taxation statutes.[115]

Normally, however, when the court reviews a regulation, it separates the issues: it substitutes judgment on interpretive issues (such as whether the statute authorized the regulation and the meaning of the words in the statute) but applies the abuse of discretion standard to the issue of whether the regula-

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[114]"Where the intelligibility of the statutory language depends upon the employment of administrative expertise, which it is the purpose of a statutory scheme to invoke, the judicial role 'is limited to determining whether the [Department] has reasonably interpreted the power which the Legislature granted it." Henning v. Divis. of Occupational Safety & Health, 219 Cal.App.3d 747, 758, 268 Cal.Rptr. 476 (1990) (emphasis added); California Beer and Wine Wholesalers Ass'n v. Dep't of Alcoholic Beverage Control, 201 Cal.App.3d 100, 106-07, 247 Cal.Rptr. 60 (1988) (same).

[115]See, e.g., Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization, 17 Cal.3d 86, 92-93, 130 Cal.Rptr. 321 (1976), which recognizes the difference between a formal Board regulation (to which the Court could give only limited judicial review) and the Board's interpretation of the statute occurring in the course of Board adjudication or other agency activity (which was entitled to great weight but which the Court was not required to follow). See also Wallace Berrie & Co. v. State Bd. of Equalization, 40 Cal.3d 60, 65, 219 Cal.Rptr. 142 (1985) (distinguishing between the scope of review applicable to legislative and interpretive rules); International Business Machines v. State Board of Equalization, 26 Cal.3d 923, 931 n.7, 163 Cal.Rptr. 782, 786 (1980).

In Assoc. of Psychology Providers v. Rank, note 71, the Court distinguished Culligan in holding that it had the ultimate power to interpret the statute despite an agency's contrary interpretation in a legislative regulation.

iv) The degree to which the legal text is technical, obscure or complex and the agency seems to have qualifications to interpret it that are superior to the court's;[112]

v) The degree to which the interpretation appears to have been carefully considered by responsible agency officials. For example, an interpretation contained in a rule adopted with public notice and comment seems more deserving of deference than one contained in an advice letter sent out by a single staff member. Similarly, an interpretation contained in an opinion rendered in the course of formal adjudication seems likely to have been carefully considered and thus is relatively deserving of deference.

b. Delegated power to interpret.

There is an important exception to the rule that a court can substitute its judgment about legal interpretation: where the legislature has delegated authority to the agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. It would be appropriate to hold that the legislature has delegated interpretive power to the agency where a statute empowers the agency to adopt a rule that defines a word in a statute.[113] Similarly, a

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[112]See, e.g., Young v. California State Bd. of Control, 93 Cal.App.3d 637, 640, 156 Cal.Rptr. 91 (1979). This factor blends imperceptibly into the situation in which the court finds that the legislature intended to delegate interpretive power to the agency, in which case the court must affirm a reasonable agency interpretation even if the court disagrees with it. See text at notes 113-16.

[113]See Moore, note 44 (legislature left to Board to decide what designation would be "likely to be confused with" C.P.A., including power to interpret meaning of statutory phrase).

tion is reasonably necessary to effectuate the purpose of the provision of law being interpreted.[116]

c. Possibly inconsistent case law

There is a line of California cases that appear to call for reasonableness review of agency interpretations of law, rather than substitution of judicial judgment. These cases usually involve legal questions arising in the course of judicial review of agency regulations or other "quasi-legislative" agency action. These decisions appear to equate the court's power to reverse an agency's legal interpretation with the court's power to reverse the agency's discretionary judgment embodied in the rule.[117]

It is unclear whether these decisions are inconsistent with the general rule that a court has power to substitute judgment

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[116]See Ass'n of Psychology Providers, note 71; Henning v. Divis. of Occupational Safety & Health, note 114. These cases explicitly distinguish between the two issues.

[117]See, e.g., Ralphs Grocery Co. v. Reimel, 69 Cal.2d 172, 174-75, 70 Cal.Rptr. 407 (1968): "In reviewing the propriety of administrative regulations allegedly promulgated pursuant to a grant of power by the Legislature, this court undertakes a two-pronged inquiry...we first determine whether the regulation lies within the scope of authority conferred, and, second, '[i]f we conclude that the Administrator was empowered to adopt the regulations we must also determine whether the regulations are reasonably necessary to effectuate the purpose of the statute'...Furthermore these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations...In determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate." (Emphasis added) Similarly, see Ford Dealers Ass'n v. DMV, 32 Cal.3d 347, 185 Cal.Rptr. 453 (1982); ALRB v. Superior Court, 16 Cal.3d 392, 411-12, 128 Cal.Rptr. 183 (1976); Benton v. Bd. of Superv. of Napa County, 226 Cal.App.3d 1467, 1479, 277 Cal.Rptr. 481 (1991).

on questions of law. They may not be inconsistent. First, these decisions may intend their "reasonableness" language as merely a restatement of the ordinary deference rule.[118] Second, these cases may represent examples of the principle discussed above:[119] if the legislature delegated interpretive power to the agency, the court must accept any reasonable interpretation.[120]

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[118]A number of cases on this point engage in a mystifying form of double talk. Ontario Community Foundation, Inc. v. State Board of Equalization, 35 Cal.3d 812, 816, 201 Cal.Rptr. 165 (1984): "In determining the proper interpretation of a statute and the validity of an administrative regulation, the administrative agency's construction is entitled to great weight, and <u>if there appears to be a reasonable basis for it, a court will not substitute its judgment</u> for that of the administrative body...Such a limited form of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise...Correspondingly, <u>there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute</u>...Acknowledging that the interpretation of a statute by one charged with its administration was entitled to great weight, we nonetheless affirmed: "Whatever the force of administrative construction...final responsibility for the interpretation of the law rests with the courts."...<u>Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to, strike down such regulations.</u>." (emphasis in original--citations omitted). Similarly, see Aerospace Corp. v. State Bd. of Equalization, 218 Cal.App.3d 1300, 1311, 267 Cal.Rptr. 685, 692 (1990).

[119]Text at note 113-16.

[120]As already noted, this seems to be the implicit holding of cases involving tax regulations of the State Board of Equalization. See note 115. Similarly, the <u>Ralphs</u> case, note 117, is probably explainable on this ground; the court implicitly decided that the legislature had intended to delegate the construction of the particular statutory words in issue ("foster and encourage the orderly wholesale marketing and wholesale distribution of beer") to the agency. Ralphs, 69 Cal.2d at 176-77. This sort of extremely vague language may well entail a legislative decision to delegate interpretive power to the agency.

It seems reasonably clear that the Supreme Court is now committed to judicial power to substitute judgment on questions of law, even if the agency's interpretation is embodied in a rule, unless the legislature intended to delegate interpretive power to the agency. Thus earlier cases requiring courts to accept any reasonable interpretation contained in an agency rule would probably not be followed today if the issue were clearly presented.[121] Moreover, these cases are contrary to present Government Code §11342.2 which provides that courts can substitute judgment on legal issues when judicially reviewing a regulation.[122]

Numerous decisions declare that a court should affirm the interpretation of a statute by an agency charged with its enforcement if that interpretation is not "clearly erroneous."[123] I interpret this language to mean the same thing as the "deference" or "great weight" standard: if a reasonable interpretation is supported by the indicia of correctness, the court

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[121]See Ass'n of Psychology Providers v. Rank, note 71; City of Coachella v. Airport Land Use Comm'n, 210 Cal.App.3d 1277, 1289, 258 Cal.Rptr. 795, 801 (1989) (Ralphs test applicable only to substantive merit of the legislative act--court has independent judgment in reviewing interpretation of statutes).

[122]Section 11342.2 provides that "no regulation is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute."

[123]See, e.g., Banning Teachers Ass'n v. PERB, 44 Cal.3d 799, 804-05, 244 Cal.Rptr. 671 (1988); Rivera v. City of Fresno, 6 Cal.3d 132, 140, 98 Cal.Rptr. 281 (1971).

would normally follow it, but need not do so.[124] However, the "clearly erroneous" test is ambiguous; it might mean that the court must accept a reasonable agency interpretation with which it disagrees, in which case it would diverge from the mainstream doctrine.[125]

d. Sanction for failure to follow statutory procedure

[124]Thus the Supreme Court said: "When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous." San Lorenzo Education Ass'n v. Wilson, 32 Cal.3d 841, 850, 187 Cal.Rptr. 432 (1982). This language indicates that the Court sees the "clearly erroneous" test as simply another way to state the "deference" test. Similarly, see Coca Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918, 925, 156 P.2d 1 (1945); City of Anaheim v. Workers' Comp. Appeals Bd., 124 Cal.App.3d 609, 613, 177 Cal.Rptr. 441 (1981).

In an early and often quoted decision, the Court said: "...the administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous...But such a tentative administrative interpretation makes no pretense at finality and it is the duty of this court, when such a question of law is properly presented, to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction...The ultimate interpretation of a statute is an exercise of the judicial power..." Bodinson Mfg. Co. v. Calif. Employment Comm'n, 17 Cal.2d 321, 325-26, 109 P.2d 935 (1941). Again, this indicates that "clearly erroneous" is merely a restatement of the normal "deference" standard.

A number of cases stating the "clearly erroneous" test rely on Bodinson or on intervening cases that relied on Bodinson. See Banning Teachers Ass'n, note 123; Judson Steel Corp. v. Workers Comp. Appeals Bd., 22 Cal.3d 658, 668-69, 150 Cal.Rptr. 250 (1978).

[125]The "clearly erroneous" test in federal practice does not allow a court to substitute judgment for the agency; it is more deferential than substitution of judgment but less deferential than the substantial evidence test. See text at notes 96-104.

In Armistead v. State Personnel Board,[126] the Supreme Court decided that an agency had adopted a rule without following the required notice and comment procedures. As a result, it refused to accord the deference to the rule that normally would have been appropriate. This makes sense: if the public should have been involved in the administrative process that produced the rule, but was instead excluded, the rule was adopted without the deliberative process that the legislature intended. Therefore, the agency should not receive the benefit of judicial deference but the court should decide the legal question without granting any deference. By the same token, if courts granted deference to an illegally adopted rule, this might encourage agencies to flout procedural norms.

e. Federal rule: Chevron case

Federal courts have recently evolved an approach quite different from the traditional California rule.[127] Under the Chevron doctrine,[128] a court is required to accept a reasonable agency interpretation of an ambiguous statute. The theory is that Congress has impliedly delegated interpretive power to the agency where Congress has failed to answer a question by writing

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[126]22 Cal.3d 198, 205, 149 Cal.Rptr. 1 (1978). See also Johnston v. Dep't of Personnel Admin., 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853 (1987).

[127]However, there is a line of California cases consistent with Chevron. They appear to hold that agency interpretations of law contained in a legislative regulation are reviewed on the basis of reasonableness. See note 117.

[128]Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

a statute with a plain meaning. The commentators differ sharply on the scope of the Chevron decision and the subsequent caselaw is uncertain in many respects. However, a detailed discussion of Chevron is beyond the scope of this report.

2. Recommendation

Under current California law, a court has power to substitute its judgment about legal interpretation for that of the agency, unless the legislature intended to delegate interpretive power to the agency. Despite having power to substitute judgment, the court normally accords an appropriate level of deference to the agency's interpretation.

However, existing law is unclear. Some cases suggest that when reviewing legislative regulations, a court must uphold a reasonable agency legal interpretation with which it disagrees, even absent a conclusion that the legislature intended to delegate interpretive power to the agency. Other cases utilize a "clearly erroneous" test which may or may not entitle the court to substitute its judgment on a question of law. Thus existing California law is confusing.

I recommend that the law be clarified to indicate that a court has the power to substitute its judgment for that of the agency on a legal question, regardless of whether the agency's interpretation is contained in a formal adjudication or a legislative rule or elsewhere, absent evidence that the legislature intended to delegate interpretive power to the agency. I believe that the final responsibility to decide legal questions belongs to the courts, not to administrative agencies. Normal-

ly, however, the court should give appropriate deference to the agency's interpretation.

I do not believe the Chevron standard[129] should be adopted in California. Often, the Chevron approach simply shifts an interpretive dispute to the question of whether the statute has a plain meaning or not. If it has a plain meaning, the court substitutes its judgment for that of the agency; if not, the court accepts a reasonable agency interpretation. Since plain meaning is largely in the eyes of the beholder, it is not surprising that several post-Chevron Supreme Court decisions have split on whether a statute has a plain meaning. This seems like an unnecessary diversion. Moreover, even though a statute is ambiguous, it is my view that the rule of law requires that courts retain the ultimate responsibility for statutory construction. The statute creates the boundaries within which the agency has discretion; it should be for the court, not the agencies, to fix the location of these boundaries. That is the role of courts in the separation of powers: to say what the law is.

Of course, judicial deference is appropriate in cases where the interpretive question is difficult; and, where there is evidence that the legislature intended to delegate interpretive power, the court must accept a reasonable agency construction. But I see no reason to imply such delegations merely because a statute is ambiguous. Normally, I believe that the legislature intends the court to interpret the laws the legislature has written, not the agencies.

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[129]See text at notes 127-28.

The California rule that agency interpretations are entitled to appropriate deference is sensible and should be maintained. It is often true that an agency's qualification to interpret text is superior to a court's, especially where the materials are technical and engage an agency's expertise. This is especially so when the interpretation is contemporaneous with enactment of the law since an agency is often involved in the legislative process and is privy to legislative intent. Similarly, an interpretation that has been maintained consistently for a long time, or which has received careful consideration and public input, is deserving of deference. But the bottom line should remains this: the court has the responsibility to interpret the law. At most, an agency construction is entitled to great respect, to an extra thumb on the scale--but the court need not accept that interpretation, no matter how reasonable it may seem to be.

The Model Act's provisions on judicial review of questions of law are satisfactory.[130] The MSAPA provides:

> (c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:
>
> (1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional or its face or as applied.
>
> (2) The agency has acted beyond the jurisdiction conferred by any provision of law.
>
> (3) The agency has not decided all issues requiring resolution.

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[130]1981 MSAPA §5-116(c)(1)-(4).

(4) The agency has erroneously interpreted ...the law.[131]

I believe that the MSAPA provision should be supplemented by a provision making clear that the court normally should grant appropriate deference to the agency construction. For example, the comment might say:[132] "The court shall decide questions of law, giving appropriate deference to agency determinations when such deference is warranted by the language or history of the statute or the nature of the question presented."[133]

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[131]In the MSAPA, this provision reads "interpreted or applied" the law. I suggest omission of the language "or applied." "Application" of law seems to mean the decision of ultimate or mixed questions of law and fact. The comment indicates that the drafters intended intensive review for interpretations but deferential review for applications. This seems confusing. In California, such issues are usually reviewed as if they were questions of fact rather than law, which seems the better approach. See notes 72-75. The MSAPA seems to imply that courts should substitute judgment on such issues.

[132]See William R. Andersen, "Judicial Review of State Administrative Action--Designing the Statutory Framework," 44 Admin. L. Rev. 523, 551 (1992).

[133]Useful language on judicial deference appears in the American Bar Association's Restatement of Scope of Review Doctrine. The ABA's Restatement provides:

(f) *Standards of Review: Issues of Law:* The court is the primary authority on ... issues [of law] ... but it shall give appropriate weight to an agency's views concerning those issues. In determining whether and to what extent an agency's interpretation deserves weight, the court shall be guided by such factors as the timing and consistency of the agency's position and the nature of the agency's expertise.

Section of Administrative Law, American Bar Association, "A Restatement of Scope-of-Review Doctrine," 38 Admin. L. Rev. 235 (1986). See Ronald M. Levin, "Scope-of-Review Doctrine Restated: An Administrative Law Section Report," 38 Admin. L. Rev. 239, 242-53, 266-70 (1986).

C. Judicial review of agency's exercise of discretion

1. Introduction

An agency has discretion where the law allows it to choose between several alternatives.[134] Discretion permeates every governmental function. It is an exercise of discretion to choose between several possible policies where a statute leaves the choice to the agency.[135] In adjudication, an agency has discretion to choose a severe or a lenient penalty, to decide the whether there is "good cause" to deny a license, or whether a utility's practices satisfy the public interest. In rulemaking, an agency might have discretion to prescribe the permitted level of a toxin in drinking water. Discretion exists in functions other than rulemaking or adjudication as in deciding with whom to make a contract and on what terms,[136] in setting the

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[134]See, e.g., Bixby v. Pierno, 4 Cal.3d 130, 150, 93 Cal.Rptr. 234 (1971) (whether corporate reorganization is fair, just and equitable requires balance of factors and is reviewable for abuse of discretion); Dep't of Parks v. State Personnel Board, 233 Cal.App.3d 813, 830-34, 284 Cal.Rptr. 839 (1991) (abuse of discretion measures whether, given the established evidence, the act of a tribunal falls within the permissible range of options set by legal criteria).

[135]Many regulatory statutes leave extremely broad policymaking discretion to an agency. For example, it is often within an agency's power, at least at the margin, to decide whether to adopt environmental rules that further economic development at the cost of the environment, or save the environment at the cost of economic development.

[136]See Jt. Counc. of Interns & Residents v. Bd. of Supervisors, 210 Cal.App.3d 1202, 258 Cal.Rptr. 762 (1989) (decision to contract out services); Hubbs v. People ex rel. Dep't of Pub. Works, 36 Cal.App.3d 1005, 112 Cal.Rptr. 172 (1974) (terms on which houses will be leased).

levels of general relief,[137] in preparing an environmental impact statement and assessing the environmental consequences of constructing a highway, or in deciding who to investigate when available resources would not permit the investigation of every complaint.[138]

2. Existing California law.

As a general rule, courts have power to review agency discretionary decisions.[139] Such decisions are reviewed on several distinct grounds.[140]

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[137] Guidotti v. County of Yolo, 214 Cal.App.3d 1552, 271 Cal.Rptr. 858 (1989).

[138] Discretion includes such administrative functions as ranking priorities, weighing risks against the consequences of their occurrence, evaluation of plans, allocation of limited resources. Donald W. Brodie & Hans A. Linde, "State Court Review of Administrative Action: Prescribing the Scope of Review," 1977 Ariz. State L. J. 537, 553-56.

[139] See Saleeby v. State Bar, 39 Cal.3d 547, 563, 216 Cal.Rptr. 367 (1985) (Bar's discretion as to which persons should be reimbursed under client security fund is not limitless and its decisions are reviewable); Manjares v. Newton, 64 Cal.2d 365, 370, 49 Cal.Rptr. 805 (1966) (statute allows school board to provide transportation "whenever in its judgment such transportation is advisable and good reasons exist therefor"--board's choice not to provide transportation reviewable for abuse of discretion); Shuffer v. Bd. of Trustees, 67 Cal.App.3d 208, 220, 136 Cal.Rptr. 527 (1977) (review for abuse of discretion in connection with academic dispute between student and college). Shuffer was apparently extended to private college decisionmaking by Paulsen v. Golden Gate Univ., 25 Cal.3d 803, 809, 159 Cal.Rptr. 858 (1979) (decision denying degree to flunked-out student not arbitrary). A prosecutor's discretion is not controllable in an action brought by a third party but is subject to review in the normal course of criminal litigation. Dix v. Superior Court, note 108 at 451 n.7.

[140] The court's power to reverse for abuse of discretion is the same whether the court has reviewed agency fact findings under the independent judgment test or the substantial evidence test. Cadilla v. Bd. of Med. Examiners, 26 Cal.App.3d 961, 103 Cal.Rptr. 455 (1972).

a. Legal questions embedded in exercise of discretion

In reviewing discretionary action, a court first decides whether the agency's choice was legally allowable. Discretion is always constrained at the margin by applicable statutes and constitutional provisions. For example, an agency authorized to adopt drinking water standards by regulation might adopt a regulation relating to control of irrigation runoff; a court might decide that the legislature did not authorize the agency to do that.[141] California law allows the court to substitute judgment on these questions of law (even when reviewing regulations), although normally considerable deference is given to the agency's view.[142]

In exercising discretion, an agency generally must consider and balance various factors established by statute, constitution, or common law. A reviewing court decides independently whether the agency considered all of the legally relevant factors and whether it considered factors that it legally should not have considered.[143] For example, in decid-

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[141]Ass'n of Psychology Providers, note 71 (regulation limiting practice of psychologists inconsistent with governing state); Morris v. Williams, note 108 at 748-49 (if regulation transgresses statutory power, court does not reach abuse of discretion issue).

[142]See Part B of this study.

[143]Clean Air Constituency v. Calif. Air Resources Bd., 11 Cal.3d 801, 813-16, 114 Cal.Rptr. 577 (1974) (energy crisis not permissible reason to delay implementation of emission controls); Guidotti v. County of Yolo, note 137 (court considers whether agency considered all relevant factors and demonstrated rational connection between those factors, the choice it made, and the purpose or the enabling statute); Levin, note 133 at 250-53 (1986) (decision of whether appropriate factors were considered is question of law).

ing whether there is good cause to discharge a government employee, the courts have established that the ground for discharge must relate to the person's fitness for the job[144] and the relevant factors the agency must consider are whether the misconduct caused harm to the public, the circumstances surrounding the misconduct, and the likelihood of recurrence.[145]

As part of its determination of the legal constraints on the exercise of discretion, the court should decide whether the agency followed legally required procedures.[146] For example, in local land use planning decisions, the statute frequently calls for public hearings and the court should decide whether the agency gave appropriate notice of the hearing.

b. Abuse of discretion

Within the legal limits constraining an agency's discretion, the agency has the power of choice between alternatives. In reviewing the agency's discretionary choices, a court is not permitted to substitute its judgment for that of the agency. Nevertheless, the court can reverse an agency's exercise of discretion where its choice was arbitrary, capricious, or an abuse of discretion. Since all three terms seem to mean the

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[144]Morrison v. State Bd. of Educ., 1 Cal.3d 214, 82 Cal.Rptr. 175 (1969).

[145]Skelly v. State Personnel Bd., 15 Cal.3d 194, 217-18, 124 Cal.Rptr. 14 (1975).

[146]See, e.g., Calif. Hotel & Motel Ass'n v. Industrial Welfare Comm'n, 25 Cal.3d 200, 209-216, 157 Cal.Rptr. 840 (1979) (order lacked statement of basis and purpose required by statute). The reviewing court's power to decide whether appropriate procedures were followed is discussed in Part D of this study.

same thing, I will refer to this type of review as abuse of discretion. Review for abuse of discretion consists of two distinct inquiries: the factual underpinnings of the discretionary decision and the reasonableness of the choice that was made.[147]

i. Factual basis for discretion.

A discretionary decision always depends on certain factual assumptions.[148] Judicial review for abuse of discretion includes, therefore, the question of whether an agency's exercise of discretion was factually supported. In cases of judicial review of agency adjudication, the factual basis for a discretionary act is reviewed under either the substantial evidence or independent judgment tests.[149]

In non-adjudicatory cases, however, review of the factual basis of a discretionary decision is part of the process of abuse of discretion review. The prevailing view is that the standard is identical to the substantial evidence on the whole record test: based on the materials in the record, could a reasonable person could reach the same factual conclusions as did the agency?[150] For example, a county must provide general

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[147]Brodie & Linde, note 138 at 555-56.

[148]See Moore v. California State Bd. of Accountancy, note 44 (opinion poll forms factual basis for Board's regulation); Dep't of Parks v. State Personnel Bd., note 134 at 830-34 (1991) (court considers legal questions, factual questions, and reasonableness of agency's choice).

[149]These tests are discussed in Part A of this study.

[150]See Levin, supra note 133 at 271-72.

relief at a level that permits a recipient to meet basic needs for food and shelter. The county must first conduct a study to determine the cost of housing in the county. A reviewing court scrutinized the agency study of housing costs to see whether it provided a reasonable basis for the decision.[151]

By statute, the test of substantial evidence applies to the judicial review of regulations adopted by state agencies.[152] When the legislature revised the rulemaking provisions of the APA in 1979, it recodified earlier statutes on the scope of judicial review.[153] However, in 1982, the section was amended to provide: "In addition to any other ground which may exist, a regulation may be declared invalid if the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute...which is being implemented...is not supported by substantial evidence."[154]

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[151]Guidotti, note 137. Similarly, see Calif. Hotel & Motel, note 146 at 213 (order must be "reasonably supported" by evidence); Bixby v. Pierno, note 134 at 148-51 (review for abuse of discretion includes scrutiny of whether decision approving reorganization has support of substantial evidence); City of Santa Cruz v. Local Agency Formation Comm'n, 76 Cal.App.3d 381, 393, 142 Cal.Rptr. 873 (1978).

[152]It also applies to judicial review of both quasi-legislative and quasi-adjudicatory discretionary decisions of public authorities under the California Environmental Quality Act. Pub. Res. C. §§21168, 21168.5. See Laurel Heights Improvement Ass'n v. Regents of the Univ. of Calif., 47 Cal.3d 376, 408, 253 Cal.Rptr. 426 (in environmental case court must examine evidence on both sides in applying substantial evidence test).

[153]Prior to the 1982 amendment, Gov't C. §11350(b) provided: "such regulation may be declared invalid if the court cannot find that the record of the rulemaking proceeding supports the agency's determination that the regulation is reasonably necessary..."

[154]Gov't C. §11,350(b).

The legislative history of the 1982 amendment makes clear that the legislature intended a significant intensification of the standard of judicial review of the factual support for a regulation and it also indicates that the legislature intended that a court scrutinize the whole record when reviewing regulations.[155] This legislative action might be considered as a signal that the test of substantial evidence on the whole record probably should be used in all cases in which the issue is the factual basis for agency discretionary action.

Some authorities, however, state that a court should not reverse quasi-legislative agency action unless evidentiary sup-

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[155]ALRB v. Exeter Packers, Inc., 184 Cal.App.3d 483, 492, 229 Cal.Rptr. 87 (1986) (appellate court exercises same scrutiny as does trial court as to whether agency decision supported by substantial evidence). The purpose of the new section was summarized in a letter from Assemblyman Leo McCarthy to Speaker Willie Brown. See Assembly Journal, May 25, 1982, p. 13633-34. McCarthy wrote: "The principal addition AB 2820 makes to what we approved in AB 1111 in 1979 is a specific level of evidence that an agency must meet to demonstrate the need for a particular regulation. The standard is substantial evidence taking the record as a whole into account.

"That standard is a familiar one in the law and has been given a definite interpretation by the courts in the past. Our intent is that an agency must include in the record facts, studies or testimony that are specific, relevant, reasonable, credible, and of solid value, that together with those inferences that can rationally be drawn from such facts, studies, or testimony, would lead a reasonable mind to accept as sufficient support for the conclusion that the particular regulation is necessary. Suspicion, surmises, speculation, feelings, or incredible evidence is not substantial...

"The proposed standard requires the assessment to determine necessity to be made taking into account the totality of the record. That means the standard is not satisfied simply by isolating those facts that support the conclusion of the agency..."

port for agency decision is "entirely lacking."[156] This conflicts with the cases applying a substantial evidence-reasonableness test. In light of the statute just discussed that requires a court to use the substantial evidence test when reviewing the factual basis of a regulation, the "entirely lacking" cases should probably be disapproved.[157] One advantage in doing so is the court will not have to start by trying to figure out whether the agency's action is quasi-judicial or quasi-legislative--a frustratingly opaque determination.[158] The same standard of factual review applies

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[156]See, e.g., Fullerton Jt. Union High School Dist. v. State Bd. of Educ., 32 Cal.3d 779, 187 Cal.Rptr. 398 (1982); Pitts v. Perluss, 58 Cal.2d 824, 27 Cal.Rptr. 19, 24 (1962), involving judicial review of a regulation before the adoption of §11350(b). Clearly present §11,350(b) overturns the rule in Pitts, insofar as it applies to regulations adopted by state agencies, but Pitts might remain authoritative for review of discretionary action other than rulemaking or for rules adopted by local agencies.

[157]In Shapell Industries, Inc. v. Governing Bd., Milpitas Unified School Dist., 1 Cal.App.4th 218, 1 Cal.Rptr.2d 818 (1991), the court recognized this conflict and made clear that it would assess the reasonableness of the factual basis for a local agency's discretionary quasi-legislative determination. The court rejected the "entire absence" test. However, it also observed that it would be more deferential to agency factual determinations of the sort arising in the context of agency legislative action as opposed to those arising in agency adjudicative action. This distinction is appropriate, as pointed out in text at notes 159-62.

[158]There are numerous cases chasing this will 'o the wisp. Some recent examples are California Aviation Council v. City of Ceres, 9 Cal.App.4th 1384, 12 Cal.Rptr.2d 163 (1992) (ordinance approving land use as consistent with airport plan is adjudicative); Jt. Counc. of Interns & Residents v. Bd. of Supervisors of County of Los Angeles, 210 Cal.App.3d 1202, 1209-12, 258 Cal.Rptr. 762 (1989) (decision to contract out medical services is legislative).

An additional advantage of this approach is that a court need not decide whether it is reviewing agency factfinding or agency policymaking or other discretionary action, since the same standard of review will apply to the factual elements of the action regardless of how it is classified. See Koch, note 139. Koch argues that the review standard should depend on the issue to be reviewed, not on the decisionmaking process the agency employed.

to both.

Even using the substantial evidence test, the nature of the facts in dispute should determine how deferential a court will be. Where the facts are non-technical and concern a specific party, as in the case of review of adjudicatory penalties, a court will probably be less deferential; its review of the facts under a substantial evidence test should be relatively demanding.[159] But where the underlying facts are technical in nature and the choice depends heavily on an agency's specialized expertise,[160] or where the facts are generalized rather than specific (or "legislative" rather than

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The text refers here to quasi-legislative action (action taken by agencies operating under delegated power)--not true legislative action (statutes enacted by a legislature). Statutes are reviewed by courts under a "minimum rationality" test: if an argument can be conceived under which a statute is rational, it survives due process and equal protection scrutiny. Tribe, American Constitutional Law 582-86, 1439-46 (2d ed. 1988).

[159]See discussion of the substantial evidence test as one having bite in text at notes 64-69. Even in an adjudication, however, where the facts are of the sort that are determined by observation or testing, the court should not demand that those facts be fully documented in the record. However, the procedure by which the facts were ascertained should be fair with adequate opportunity for challenge of the observed facts. See Siller v. Bd. of Supervisors of City and County of San Francisco, 58 Cal.2d 479, 484, 25 Cal.Rptr. 73 (1962) (requirement of substantial evidence to grant variance from parking requirements satisfied through personal knowledge of neighborhood by decisionmakers); Delta Rent-A-Car Sys., Inc. v. City of Beverly Hills, 1 Cal.App.3d 781, 787, 82 Cal.Rptr. 318 (1969) (same).

[160]See Bixby, note 134 at 148-51 (court could overturn Commissioner's finding that reorganization is fair, just and equitable if it lacks substantial evidence but court should be quite deferential).

"adjudicative"),[161] the court is likely to be relatively deferential. This is particularly true when the agency must make forecasts based on necessarily incomplete data.[162] But that does not mean that the court should limit itself to asking whether there was an "entire absence" of evidence in support of the decision.[163]

ii. Reasonableness of the agency's discretionary choice.

Even if the discretionary decision was factually supported, there remains the issue of whether the action itself was an abuse of discretion. On this issue, a court must not substitute judgment; it must sustain a reasonable agency choice. However, a court should reverse if the agency's choice

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[161]See Jt. Counc. of Interns & Residents, note 136 at 1209-10 (distinguishing facts that help tribunal determine the content of law and policy or help it exercise judgment or discretion from facts concerning the immediate parties). See generally Koch, supra note 139 at 528-32 (arguing for judicial hard look at agency findings of generalized fact).

[162]See Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (agency assertions at the frontiers of science); FCC v. WNCN Listeners Guild, 450 U.S. 582, 595-96 (1981) (forecasts of the direction in which future public interest lies). Where it was possible to gather empirical evidence on a point but the agency chose to proceed without doing so, the factual basis for its decision became questionable. See Motor Vehicle Mfgrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 53-54 (1983).

[163]Shapell Industries, note 163, makes this clear. In reviewing quasi-legislative action (imposing a fee on developers because of school overcrowding), the court scrutinized the reasonableness of the factual determinations underlying the agency decision, but stated that it would be more deferential to determinations of legislative than adjudicative fact.

appears unreasonable[164], outrageous, or inconsistent with prior agency decisions (without adequate explanation for the difference).[165]

For example, courts reverse an agency's decision setting a grossly excessive or unjust penalty[166] or its unreasonable

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[164]See, e.g., Manjares v. Newton, note 139 (school board's decision not to supply transportation to children in remote area was unreasonable); Calif. Teachers Ass'n v. Governing Bd. of Mariposa County Unified School Dist., 70 Cal.App.3d 833, 843, 139 Cal.Rptr. 155 (1977) (school board's refusal to renew a contract, despite a teacher's careless failure to return it on time, was abuse of discretion). These cases are good example of the need to preserve judicial power to overturn an agency decision simply because it is unreasonable.

"A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." Calif. Hotel & Motel Ass'n, note 146 at 212.

"An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation of its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfgrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (overturning irrational exercise of rulemaking authority) (emphasis added).

[165]See Paulsen v. Golden Gate Univ., 25 Cal.3d 803, 809, 159 Cal.Rptr. 858 (1979) (inconsistent treatment may show abuse of discretion if it was result of arbitrary or bad faith decision, but not shown in this case).

[166]For a sample of cases in which courts have held that penalties administered by agencies are excessive, see note 70. Cases on this point often quote Bailey v. Taaffe, 29 Cal.422 (1866): Judicial discretion is "an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not impede or defeat the ends of substantial justice."

finding of good cause.[167] The court can overturn a school board's decision refusing to provide transportation for children in a remote area because the judgment (based on economic and safety concerns) was an abuse of discretion.[168] The courts can review any other discretionary act--whether embodied in a legislative rule or other form of decision--to see whether it rationally follows from the facts.[169]

The legislative history of the 1982 amendment to Government Code section 11350(b) makes clear that courts should review an agency's discretionary calls about whether a regulation is reasonably necessary.[170] Here again, some cases suggest that review of abuse of discretion entailed in quasi-legislative action is extremely perfunctory.[171] The amendment to section

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[167]Martin v. Alcoholic Beverage Control App. Bd. (Hayes), 55 Cal.2d 867, 13 Cal.Rptr. 513 (1961) (Appeals Board could overturn Department's finding that there was good cause to deny application for liquor license).

[168]Manjares v. Newton, note 139.

[169]A good example is the careful review given to discretionary decisions of public agencies under the California Environmental Quality Act. See Laurel Heights Improvement Ass'n, note 152.

[170]Assemblyman McCarthy wrote: "Such a standard [substantial evidence] permits necessity to be demonstrated even if another decision could also be reached. This standard does not mean that the particular regulation necessarily be 'right' or the best decision given the evidence in the record, but that it be a reasonable and rational choice. It does not mean that the only decision permitted is one that OAL or a court would make if they were making the initial decision. It does not negate the function of an agency to choose between two conflicting, supportable views." See note 155.

[171]Pitts v. Perluss, note 156 at 835: "The rendition of this regulation [concerning disability insurance] involved 'highly technical matters requiring the assistance of skilled and trained experts and economists and the gathering and study of large amounts of statistical data and information'...Under such circumstances, 'courts should let administrative boards and officers work out their problems with as little judicial interference as possible.' [citations omitted]

However, this language supported the uncontroversial

11,350(b) suggests that these cases should be disapproved. All agency discretionary action should be subject to judicial review for the rationality of the agency's call.

iii. Appellate court review of trial court's decision. An appellate court reviewing a trial court's decision exercises the same standard of review as did a trial court. Based on the evidence in the administrative record, was the agency's choice an abuse of discretion? Thus the scope of appellate judicial review in discretion cases is the same as in cases reviewing a trial court's decision under the substantial evidence test. This gives an appellate court considerably greater power than it has when reviewing a trial court judgment that applies independent judgment to the facts.[172]

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proposition that the court should not substitute its judgment for that of the agency. Id. at 832, 834-35. Therefore, it is unclear whether the Court meant to deny that it had power to overturn a regulation that seemed to make an unreasonable choice. In fact, the Court carefully evaluated all of the insurer's arguments before rejecting them. See also Calif. Ass'n of Prof. Employees v. County of Los Angeles, 74 Cal.App.3d 38, 43, 141 Cal.Rptr. 290 (1977).

Another court said: "An administrative rule, legislative in character, is subject to the same tests of validity as an act of the legislature." Tahoe-Sierra Preservation Council v. State Water Resources Control Bd., 210 Cal.App.3d 1421, 1439, 259 Cal.Rptr. 132 (1989). This is correct as to constitutional challenges, but incorrect with respect to other sorts of challenges; legislative rules are scrutinized for both legality and abuse of discretion in a way that statutes are not.

[172]This is so whether the trial court actually reviewed the agency fact findings under the independent judgment or the substantial evidence test. See Osburn v. Dep't of Transportation, 221 Cal.App.3d 1339, 270 Cal.Rptr. 761 (1990) (substantial evidence case); Williamson v. Bd. of Med. Qual. Assurance, 217 Cal.App.2d 1343. 266 Cal.Rptr. 520 (1990) (independent judgment case); Schmitt v. City of Rialto, 164 Cal.App.3d 494, 210 Cal.Rptr. 788 (1985) (independent judgment case). Schmitt expressed disagreement with Toyota of Visalia, Inc. v. Dep't of Motor Vehicles, 155 Cal.App.3d 315, 202 Cal.Rptr. 190 (1984) (trial court's decision reviewing the penalty in an independent judgment case must be affirmed if substantial evidence supported the trial court's determination).

3. Recommendations.

I believe the California law relating to abuse of discretion works well and should be simplified and codified.[173]

a. Unreviewability. I do not recommend that there be any specific provision concerning non-reviewability of discretionary decisions.[174]

b. Factual basis for exercise of discretion.

A new statute should establish a unified standard for reviewing the factual basis of discretionary decisions, regardless of whether the decision was quasi-adjudicative or quasi-legislative. It seems to me that the substantial evidence on

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[173]A new statute should dispense with the confusing treatment of discretion contained in existing CCP §1094.5. Because that section twisted the writ of mandamus into a form suitable for review of adjudication, it treats all of the various grounds on which a court might reverse an adjudicatory decision (such as errors of law or procedure or inadequate factual support for findings) as abuse of discretion. This is conceptually incorrect.

[174]As discussed in note 139, present California law makes all discretionary action reviewable for both legality of the decision and for abuse of discretion. Federal law contains a provision making action nonreviewable when "committed to agency discretion by law." APA §701(a)(2); Heckler v. Chaney, 470 U.S. 821 (1985) (unreviewability of agency's decision not to exercise enforcement discretion--in part because prosecutorial discretion is traditionally unreviewable). The federal statute has proved difficult to apply and I do not suggest that California's statute contain specific language immunizing any agency action from judicial review for abuse of discretion. See Andersen, note 74 at 536 (advising against generic exceptions to judicial review for discretionary actions).

Nevertheless, it might be appropriate to recognize in a comment that a court can decline to exercise review of discretionary action on the ground that the legislature so intended or because there are simply no standards by which a court can conduct review.

the whole record approach is appropriate in all cases.[175] This means that a reasonable person would find that there is a sufficient factual basis in the record (after viewing data both supporting and undercutting the decision) for the discretionary action that was taken.

However, the comment should make clear that the court should grant greater deference to agency action based on factual material that is highly technical or which relates to generalized facts, especially if such facts necessarily involves a certain amount of economic or scientific guesswork.[176] Very often, agencies must make educated guesses about many matters of fact because the available data does not permit greater certainty. Courts must respect this constraint.

c. Abuse of discretion

The statute should make clear that a court can review for abuse of discretion: the agency's balance of the relevant factors must fall within the bounds of reasonableness. This standard is quite deferential; a court must not substitute its judgment about the wisdom of the agency's course, but the agency action must be rational.

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[175]See Levin, note 143 at 275. The ABA's Restatement of Scope of Review uses the term "substantial support in the administrative record viewed as a whole" for non-adjudicatory action, and the term "substantial evidence in the record as a whole" for adjudicatory action. Levin concedes that the distinction was preserved for historic reasons and there is no significant difference between them. It seems preferable to move to a single standard to avoid unproductive hassles about which standard applies and what, if anything, is the difference between them.

[176]See text at notes 160-63.

The drafters of the 1981 MSAPA were uncertain whether to authorize review for abuse of discretion. As a result, the applicable provision in the MSAPA is bracketed, meaning that the drafters left it to states to decide whether to allow courts to scrutinize agency action on this ground.[177] The MSAPA was influenced by the Florida statute which abolished judicial review for abuse of discretion because of concern that it would lead courts to substitute judgment.[178] Some states also eschew any review of the rationality of rules beyond the very minimal level of scrutiny accorded to statutes under substantive due process.[179]

I see no indication that California courts have intruded on agency discretion through their power under existing law to review agency action on the grounds of abuse of discretion. On the contrary, the courts have been appropriately deferential to

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[177]1981 MSAPA §5-116, Comment.

[178]See Stephen T. Maher, "We're No Angels: Rulemaking and Judicial Review in Florida," 18 Fla. St. Univ. L. Rev. 767, 792-99 (1991); Brodie & Linde, note 138 at 548, 558-64 (words "arbitrary, capricious, and abuse of discretion" in statute permit judicial review by epithet--justifiably dispensed with in Florida). Similarly, see Dave Frohnmayer, "National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act," 3 BYU J. of Pub. L. 1, 23-25 (1989). Frohnmayer argues that giving courts power to review for abuse of discretion creates a free-floating censorial power and will contribute unnecessarily to judicial workload.

[179]E.g., Borden, Inc. v. Commissioner of Public Health, 388 Mass.707, 448 N.E.2d 367 (1983), app. dism'd, 464 U.S. 923 (1983).

agency policy decisions.[180] Therefore, the risk that courts might abuse this power does not seem like a good argument for abolishing the power entirely. On the contrary, in my opinion judicial review of the rationality of agency discretion is valuable and should be preserved, just as we preserve judicial review of fact, law and procedure despite the possibility that it will be abused by courts.[181] Agencies should not be allowed to impose unreasonable judgments, rules or policies on the general public, whether in the course of adjudication, rulemaking, or in any other function. And the knowledge that a court will scrutinize a decision for reasonableness imposes a desirable discipline on agency decisionmakers.[182] Consequently, I be-

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[180]Nevertheless, this is a valid concern. Numerous studies of "hard look" judicial review at the federal level have documented the fact that overly intrusive review can discourage agencies from pursuing rulemaking at all. See, e.g., Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," 41 Duke L.J. 1385, 1410-26, 1451-54 (1992), which reviews the extensive literature on the question.

[181]See generally Funk, note 139, at 160-79. Funk's argument in favor of rationality review is very compelling. He convincingly rebuts the arguments that (i) agency rules should be reviewed the same as statutes, (ii) that rationality review will introduce excessive formality into agency decisionmaking, (iii) that rationality review necessarily entails judicial substitution of judgment, or (iv) that federal rationality review should not be imported into state law since state government differs from federal government.

[182]William Pedersen, "Formal Records and Informal Rulemaking," 85 Yale L.J. 38, 60 (1975) (the fact that a court will assess rationality of rules gives those inside the agency "who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.") As Funk points out, in the federal bureaucracy, everyone takes environmental impact statements seriously because they know that agency action will be judicially scrutinized in light of the reports. But they treat regulatory flexibility analysis (also required by statute) with contempt because it is not judicially reviewable. Funk, note 139 at 171.

lieve it is appropriate to preserve judicial review for abuse of discretion.

d. Review statute for discretion

The 1981 MSAPA provision seems well drafted. It provides:[183]

> (c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced[184] by any one or more of the following:...
>
> (7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in the light of the whole record before the court...[185]
>
> (8) The agency action is:
>
> (i) outside the range of discretion delegated to the agency by any provision of law;
>
> (ii) agency action, other than a rule, that is inconsistent with a rule of the agency;
>
> (iii) agency action, other than a rule, that is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency;[186]

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[183] §5-116(c).

[184] It is important to preserve a rule of prejudicial error. Existing law so provides. CCP §1094.5(b) ("prejudicial abuse of discretion").

[185] The omitted language is: "which includes the agency record for judicial review, supplemented by any additional evidence received b the court under this Act." In Part E, I will recommend that judicial review be on a closed, rather than an open record, so I have deleted this language.

[186] See Paulsen v. Golden Gate Univ., 25 Cal.3d 803, 809, 159 Cal.Rptr. 858 (1979) (inconsistent treatment may show abuse of discretion if it was result of arbitrary or bad faith decision, but not shown in this case); Court House Plaza Co. v. City of Palo Alto, 117 Cal.App.3d 871, 881-82, 173 Cal.Rptr. 161 (1981) (reviewing claim of inconsistent treatment under constitutional standards). While I found no California precedents declaring agency action to be an abuse of discretion because of unexplained inconsistent decisionmaking, this ground is well developed under federal law. See Levin, note 143 at 257.

(iv) otherwise [an abuse of discretion]."[187]

The ABA's Restatement provides more detail about the meaning of the term "abuse of discretion." The Restatement's text is too detailed to place in the statute, but might be useful in a comment. The ABA's version provides:

> *Grounds for reversal.* The court shall set aside an agency action if it finds that--...
>
> (2) The agency has relied on factors that may not be taken into account under, or has ignored factors that must be taken into account under, any of the sources of law listed in subsection (b)(1).[188]
>
> (3) The action rests on a policy judgment that is so unacceptable as to render the action arbitrary.
>
> (4) The action rests upon reasoning that is so illogical as to render the action arbitrary.
>
> (5) The asserted or necessary factual premises of the action do not withstand scrutiny under the standards stated in section (g).[189]
>
> (6) The action is, without good reason, inconsistent with prior agency policies or precedents.
>
> (7) The agency arbitrarily failed to adopt an alternative solution to the problem addressed in the action.
>
> (8) The agency fails in other respects to rest upon reasoned decisionmaking.

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[187]MSAPA uses the words "unreasonable, arbitrary, or capricious." In line with the customary California usage, I have substituted the term "abuse of discretion" for these words since I believe they are synonomous.

[188]Subsection (b)(1) refers to the Constitution, a statute, an agency rule having the force of law, common law, or any other source of law that is binding upon the agency.

[189]The provisions of subsection (g) are discussed in note 175. Essentially this is the familiar substantial evidence on the whole record test.

D. Judicial review of procedure used by the agency.

Courts enforce the procedural requirements of statutes or the constitution; they have power to substitute judgment on procedural issues.[190] However, courts should normally accord considerable deference to agency decisions about how to implement statutory mandates. Agencies, after all, are often in a better position than are courts to adapt general statutory procedural norms to their own particular processes.[191]

However, it is unclear whether a court can impose what it regards as fair procedure where neither a statute nor the constitution prescribes any particular agency procedure or where statutory procedures are viewed as inadequately protective of private interests. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,[192] the United States Supreme Court held that lower courts cannot normally require agencies engaged in rulemaking to take any procedural steps not required

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[190]The federal APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be--(D) without observance of procedure required by law." §706(2)(D). The Model Act provides that a court shall grant relief if the "agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure." §5-116(c)(5).

[191]See Mathews v. Eldridge, 424 U.S. 319, 349 (1976): "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." See Koch, note 139 at 541-45.

[192]435 U.S. 519 (1978).

by the federal APA or the constitution.[193] In a subsequent case, the Court extended this rule to informal adjudication as to which the APA provides for no procedure at all.[194]

The Vermont Yankee decision set off a sharp dispute among both judges and commentators. Professor Kenneth Culp Davis has been particularly harsh in denouncing the rule as improperly curbing judicial creativity.[195] Yet Vermont Yankee has some advantages. It makes the law much more predictable. It means that agencies need not lard up their processes with every procedural gimmick that a litigant requests in fear of judicial reversal. But the decision created confusion about which existing judicial rules were invalidated and which could survive as permissible interpretations of existing administrative procedure statutes.[196] In short, Vermont Yankee seems to unduly

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[193]The Court left some loopholes, indicating that a court could mandate super-statutory procedure in "extremely rare" cases or when confronted by "extremely compelling circumstances." It might correct totally unjustified departures from well settled agency procedures of long standing.

[194]Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990).

[195]1 Administrative Law Treatise §§6.35-6.37 (2d ed. 1978 and 1989 Supp.). U. S. Court of Appeals judge Abner Mikva wrote: "I cannot think of any other decision that has done more to bollix up administrative law in the past decade. The Court tried to clean up a whole area of regulatory doctrine, and it succeeded only in making the mess worse." "The Changing Role of Judicial Review," 38 Admin. L. Rev. 115, 122 (1986). Of course, Mikva was on the D. C. Circuit whose procedural innovativeness was sharply curbed by the Supreme Court in Vermont Yankee.

[196]For example, Vermont Yankee itself seemed to preserve a piece of judicial administrative common law--the requirement that judicial review be based on a closed record and on the agency's own explanation for its actions.

inhibit judicial creativity to respond to real problems of unfairness and injustice while creating a good deal of unnecessary confusion.

Present California law does not follow Vermont Yankee. The California courts have often mandated administrative procedures not required by any statute, either in the interest of fair procedures[197] or in order to facilitate judicial review.[198] My view is that California is right to preserve judicial discretion to mandate procedures, and I do not therefore recommend that Vermont Yankee be incorporated into a new APA.

A great deal of California's administrative procedure would be untouched by a new APA. For example, it will not apply to local government decisionmaking and it will not affect state agency adjudication in which no hearing is required by statute or constitution. Nor does it affect a vast number of other administrative functions which are neither adjudication nor rulemaking. Nor will it contain provisions requiring agencies to use rulemaking instead of adjudication or adjudication instead of rulemaking.

Thus a large area of administrative process will probably remain unregulated by administrative procedure legislation.

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[197]See, e.g., Ettinger v. Bd. of Med. Qual. Assur.. 135 Cal.App.3d 853, 185 Cal.Rptr. 601 (1982) (requirement of clear and convincing evidence to revoke professional license).

[198]Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 113 Cal.Rptr. 836 (1974) (requirement that local government adjudicators explain decisions).

Yet when agencies discharge these functions, there is real potential for unfairness to regulated parties; courts should retain power, I believe, to create procedures that are designed to solve these problems.[199] Similarly, despite our best efforts, a new APA will contain gaps and the courts should be able to fill them with appropriate procedures rather than being constrained by the notion that they cannot exercise creativity. All this is the common law process. It has served us well. I see no compelling need to abandon it.

Obviously, if courts err in mandating procedures, the legislature can overturn such decisions and return procedural discretion to the agencies. In contrast, Vermont Yankee precludes courts from taking the first step; the legislature must intervene to correct procedural injustices. But I think it is better to let the courts take the first step, since it is so difficult for regulated parties to get the legislature interested in their procedural problems. In contrast, it is relatively easy for agencies to get the legislature's attention to get rid of procedural rules mandated by courts that the agen-

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[199]An example of a potential judicial innovation: requiring agencies to use rulemaking rather than adjudication to solve regulatory problems across the board rather than case by case. In Oregon, for example, the court has required the use of rulemaking rather than adjudication in establishing new offenses for which professional licensees can be disciplined. See Megdal v. Oregon State Bd. of Dental Examiners, 288 Ore. 293, 605 P.2d 273 (1980). The Model State APA has a provision implementing Megdal as does Florida. §2-104(3), (4); FL.Stats. Ann. §120.535 (West, 1992 Supp.). I am not persuaded that statutory provisions on this point are a good idea, but I believe the judiciary should be able to experiment with carefully focussed mandatory rulemaking requirements without concern that this would be impermissible judicial innovation.

cies believe are misdirected.[200] Thus allowing the courts to take the first step in innovating procedure seems more likely than the Vermont Yankee rule to produce the ultimately optimal balance between procedural formality and agency discretion to act informally.

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[200]For example, after Anton v. San Antonio Community Hospital, 19 Cal.3d 802, 822, 140 Cal. Rptr. 453 (1977) imposed independent judgment judicial review on decisions by private hospital staffs, the legislature overturned the decision. CCP §1094.5(d). Similarly, the Board of Equalization and Franchise Tax Board persuaded the legislature to exempt their legal rulings or instructions from the rulemaking provisions of the APA. Gov't C. §11342(b).

E. Related issues: the record for judicial review, explanation requirement, burden of proof.

Several important procedural issues are related to scope of review and should be resolved. First, should a decision be reviewed on a closed or an open record? Second, should the agency be required to explain discretionary action? Third, who has the burden of proof on judicial review.

1. Existing law

a. Closed record

Under existing section 1094.5, the openness of the record in review of agency adjudication depends on whether the court is exercising independent judgment or using the substantial evidence test. In substantial evidence cases, the superior court receives no additional evidence. If there is evidence that with reasonable diligence could not have been produced, or which was improperly excluded by the agency, the court can remand to the agency to reconsider the case light of that evidence.[201] Where independent judgment applies, the court can either remand to the agency for reconsideration of such evidence or admit the evidence itself.[202]

As to non-adjudicatory action reviewed under traditional mandamus or declaratory judgment, California law is unclear as to whether additional evidence can be introduced in court. In such cases, the agency action often will not be supported by

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[201]CCP §1094.5(e), (f).

[202]CCP §1094.5(e).

the well organized records typical of adjudication. Instead, the record is likely to be poorly organized; it may be a couple of files or a cardboard box into various documents have been collected.

Most California decisions preclude introduction of new evidence in such cases; the court considers only the materials that were before the agency when it made the decision under review.[203] The federal courts also preclude introduction of additional evidence.[204] In the case of judicial review of regulations, the California statute seems fairly clear in establishing a closed record.[205]

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[203]See Ford Dealers Ass'n v. DMV, note 117 at 365 n.11; Shapell Industries, note 157 (challenger offered expert's report at trial--not admissible); Guidotti v. County of Yolo, note 137 (inquiry limited to facts before Board on which its determination was predicated); City of Santa Cruz v. Local Agency Formation Comm'n, 76 Cal.App.3d 381, 391-92, 142 Cal.Rptr. 873 (1978) (Commission's entire file is record for review whether or not actually presented at the public hearing); Lewin v. St. Joseph Hospital of Orange, 82 Cal.App.3d 368, 387 n.13, 388, 146 Cal.Rptr. 892 (1978); Schenley Affil. Brands Corp. v. Kirby, 21 Cal.App.3d 177, 196-98, 98 Cal.Rptr. 609 (1971); Brock v. Superior Court, 109 Cal.App.2d 594, 607-09, 241 P.2d 283 (1952) (improper to remand to agency to take additional evidence since judicial review should be on the record existing at the time of the agency decision).

[204]Camp v. Pitts, 411 U.S. 138, 142 (1973) ("focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) ("review is to be based on the full administrative record that was before the Secretary at the time he made his decision"). See Levin, note 143 at 274-75, pointing out that the contrary was probably true before the Overton Park decision. However, the federal rule has been riddled by numerous exceptions. See Steven Stark & Sarah Wald, "Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action," 36 Admin. L. Rev. 333 (1984).

[205]"For purposes of this section the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11,347.3." Gov't C. §11,350(b). See Ford Dealers Ass'n v. DMV, note 117 at 365 n.11.

Some California decisions appear to indicate the contrary; they permit introduction of new evidence at trial in reviewing both quasi-legislative decisions[206] and adjudicatory decisions where no hearing was provided.[207] In fact, California's mandamus statute appears to call for trials of factual issues including jury trials.[208]

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[206]See No Oil, Inc., v. City of Los Angeles, 13 Cal.3d 68, 79 n.6, 118 Cal.Rptr.34 (1974) (indicating that trial court can receive additional evidence in traditional mandamus action); Sierra Club v. Gilroy City Council, 222 Cal.App.3d 30, 38-42, 271 Cal.Rptr. 393 (1990); Western Mcpl. Water Dist. v. Superior Court, 187 Cal.App.3d 1106, 1112, 232 Cal.Rptr. 359 (1986). These decisions involve the California Environmental Quality Act and all rely on a footnote in No Oil which was not necessary to the decision in that case. None of the cases state a policy reason why CEQA cases should depart from the normal closed record rule. Federal environmental cases also have not adhered to a strict closed record standard. See Stark & Wald, note 204 at 351-53.

A case stating a broader open record principle is Bruce v. Gregory, 65 Cal.2d 666, 672-73, 423 P.2d 193 (1967), involving a challenge to a local regulation in which the trial court admitted evidence relating to the reasonableness of the regulation and of an amended regulation promulgated after the hearing. The Supreme Court upheld this procedure, stating that in mandamus "once the court reaches the merits of the case, it should consider all relevant facts, regardless of when they came into existence." I believe that in such cases the trial court should remand the matter to the agency to develop a record, including a revised regulation should the agency choose to adopt one, rather than conducting a trial on the reasonableness of the regulation.

[207]Manjares v. Newton, note 139, involved review of a school board decision refusing to supply transportation to children living in a remote area. The Court held that the decision was an abuse of discretion. The trial court took evidence both about the children's need for transportation and the board's reasons for refusing to provide it and the Supreme Court's decision was based partly on this evidence.

[208]CCP §§1090, 1091; English v. City of Long Beach, 114 Cal.App.2d 311, 250 P.2d 298 (1952). Of course, mandamus is used for a variety of purposes beyond judicial review of the action of state or local agencies. Hopefully, the Commission will propose an entirely new judicial review statute which will shed the peculiarities of mandamus; that writ would remain in effect, however, for purposes other than judicial review of administrative action. My next study will propose a unified review statute.

b. Requirement of findings and explanation.

Another important issue is whether an agency should be required to explain discretionary actions subject to judicial review. Present law requires findings in the case of state or local adjudicatory action reviewed under section 1094.5,[209] but does not require findings in the case of quasi-legislative action[210] nor for the discretionary facet of adjudicatory decisions, such as the choice of penalty.[211] However, where a statute requires a statement of findings or reasons, the courts aggressively enforce such requirements.[212]

2. Recommendations

a. Closed record

The new statute should define the record to be considered by the reviewing court. In cases involving formal or conference hearings under the new APA, the record should consist of the traditional elements of an adjudicatory record: pleadings, exhibits, transcripts, material officially noticed by ad-

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[209]Topanga Ass'n for a Scenic Community, note 198. Topanga was a common law decision requiring a local agency to explain how it got from the raw facts to its ultimate decision granting a zoning variance.

[210]California Aviation Council v. City of Ceres, note 158 (action adjudicatory not legislative so findings required); Shapell Industries, Inc., note 157 at 230-31; City of Santa Cruz v. Local Agency Formation Comm'n, note 203 at 386-91 (decisions of Commission are quasi-legislative-no findings required).

[211]Williamson v. Board of Med. Qual. Assurance, 217 Cal.App.3d 1243, 266 Cal.Rptr. 520 (1990).

[212]Calif. Hotel & Motel Ass'n, note 146 at 209-216 (order lacked statement of basis and purpose required by statute).

judicators, and the like. No new evidence should be admissible at the judicial review level; if evidence was erroneously excluded at the administrative level, the matter should be remanded to the agency for reconsideration in the light of the new evidence.[213]

In the case of agency action other than formal adjudication, the record should include all procedural documents such as public notices, submissions to the agency by outsiders, transcripts of hearings and similar materials. It should also include all data that agency decisionmakers (both agency heads and agency staff members) considered when they took the action in question, whether or not submitted to the agency by outsiders, and whether it supports or undercuts the agency's decision.[214] Section 11347.3 which defines the rulemaking file for purposes of judicial review (as well as OAL review) is a useful

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[213]§1094.5(e) now allows introduction of evidence on review in independent judgment cases. Even if that test is retained, contrary to my recommendation, courts should not entertain new evidence but should remand to the agency to receive it. Where the court's review is based on rationality instead of independent judgment, as discussed below I believe that in most cases no new evidence should be introduced in court.

[214]An obvious concern is that agency counsel in assembling the record may omit material that might hurt the agency's case. Federal cases allow challengers, upon making a prima facie case that the agency excluded adverse materials from the record, to engage in discovery to assist the court in supervising the compilation of the record. The ABA's Restatement of Scope of Review law permits such discovery. See Levin, note 143 at 275-77. A comment to a new California statute should give the court discretion to permit such discovery--not to probe the minds of the agency decisionmakers but to assure that the record presented to the court is complete. Courts should require a preliminary showing that there is reason to believe that the record is incomplete before allowing such discovery.

model, although some agency actions will lack certain items that are generated during the rulemaking process.[215] However, the record need not include documents relating to the internal decisionmaking process of the agency or other privileged materials.[216]

The question is whether that record should be exclusive or whether it can be supplemented by materials prepared or obtained by the agency after the decision in question occurred or by additional evidence that either party wishes to present in court. I believe that judicial review of agency action should

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[215]In addition to the obvious items, §11347.3 includes in the rulemaking file: "(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation..." It also calls for the agency to prepare an index or table of contents which identifies each item contained in the rulemaking file. §11347.5(a)(12). The Commission should consider whether agencies should be obligated to prepare such an index in all cases, since agency records of non-adjudicatory action tend to be quite disorganized. Cf. State Bd. of Equalization v. Superior Court, 10 Cal.App.4th 1177, 13 Cal.Rptr. 342, 350-51 (1992) (court can order agency to make index of documents requested under Public Records Act).

[216]See Levin, note 143 at 277. For example, memoranda from advisers to decisionmakers which would normally be privileged need not be included in the record unless the agency chooses to include them. See Gov't C. §6254(a) (intra-agency memoranda), (k) (privileged materials). I am uncertain whether there is a broadly applicable privilege for agency deliberative materials in California law (as there is in federal law). If there is none, it may be necessary to draft one in the provision relating to the record for review. For a model, see Gov't C. §6254(p) which is applicable to state labor relations agencies.

The comment should make clear that this provision will not require agencies to prepare documents that otherwise do not exist such as summaries of oral ex parte contacts where such contacts are permissible and no other documentation ruequirement exists.

be exclusively on the record that was before the agency when the decision was taken with only a few narrow exceptions.

Since the issue before the court is the rationality of the agency's decision when it made that decision, the court should not permit the introduction of evidence that was not or could not have been presented to the agency at the time of its decision, such as subsequently completed studies. If the decision is not supportable by the materials considered by the agency decisionmakers, the decision should be set aside by the court. If it is necessary to take additional evidence, normally the matter should be remanded to the agency for reconsideration in light of the new evidence.[217]

One appropriate exception to the closed record requirement applies to procedural objections that could not be resolved by reference to the record.[218] Alternatively, however, the court

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[217]The Florida provision requires a closed record but also provides for remand: "Where there has been no hearing prior to agency action and the reviewing court firds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt, factfinding proceeding under this act after having a reasonable opportunity to reconsider its determination on the record of the proceedings." Fla. Stats. Ann. §120.68(3),(6),(11) (1982). This provision contemplates a trial-type fact-finding hearing before an administrative law judge. See id. §120.57(1); L. Harold Levinson, "The Florida Administrative Procedure Act After 15 Years," 18 Fla.St.Univ.L.Rev. 749, 759 (1991).

[218]See 1981 MSAPA §5-114(a)(1) and (2) allowing new evidence of "improper constitution as a decision-making body, or improper motive or grounds for disqualification, of those taking the agency action; (2) unlawfulness of procedure or of decision-making process..."

For example, if the agency violated the separation of functions provision of the APA, this would not be apparent from the rulemaking record and proof in court might be appropriate. However, such claims are difficult to establish since it is normally inappropriate to require agency decisionmakers or their staff to testify about their decisionmaking process, absent some well-founded basis for believing that a violation occurred. See United States v. Morgan, 313 U.S. 409 (1941); City of Fairfield v. Superior Court, 14 Cal.3d 768, 122 Cal.Rptr. 543 (1975); State of California v. Superior Court (Veta), 12

could remand the case to the agency to find the necessary facts.[219] Probably, there should be an additional exception, allowing courts to admit new evidence in exceptional circumstances.[220]

The Model Act opts for an open record approach. It allows introduction of evidence, in addition to that contained in the record,[221] of "any material fact that was not required by any

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Cal.3d 237,256-58, 115 Cal.Rptr. 497 (1974). In cases involving alleged improper ex parte contacts, federal courts have often required the taking of evidence by a special master. See, e.g., Prof. Air Traffic Controllers Org. v. FLRA, 685 F.2d 547 (D.C.Cir. 1982). Perhaps a claim of unlawful discrimination or conspiracy among officials to deny a permit would qualify under this rubric also. Court House Plaza Co. v. City of Palo Alto, 117 Cal.App.3d 871, 887, 173 Cal.Rptr. 161 (1981).

[219]See Grolier, Inc. v. FTC, 615 F.2d 1215 (9th Cir. 1980) (remand to agency to resolve factual question of separation of functions violation).

[220]See Stark & Wald, note 204, pointing out that federal courts have paid lip service to the closed record rule, but have developed a number of exceptions to it. One example is the situation in which an agency is challenged for having failed to act. In such cases, there may well be no record at all that explains why the agency did not act. See Stark & Wald 350-51. Another is the situation in which subsequent events make the petition for judicial review moot. See Bruce v. Gregory, 65 Cal.2d 666, 670-73, 423 P.2d 193 (1967); Callie v. Bd. of Superv., 1 Cal.App.3d 13, 18-19, 81 Cal.Rptr. 440 (1969).

[221]The Model Act defines the record differently for different types of action. The agency record for review of adjudication is defined in §4-221; it is the exclusive basis for agency action and for judicial review. The record in rulemaking review is defined in §3-112; it need not be the exclusive basis for agency action on the rule or for judicial review. The agency is limited, however, to the reasons contained in its explanatory statement as justifications for the rule. §3-110(b). In all other cases, the record consists of agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this Act as the agency record for the type of agency action at issue. §5-115.

provision or law to be determined exclusively on an agency record of a type reasonably suitable for judicial review."[222] Thus in the review of rules, or of any other type of agency action (except for adjudicatory decisions covered by the APA adjudication sections), either party can freely introduce additional evidence in court. This is contrary to the federal rule[223] and apparently to the California rule as well.[224]

The rationale for the Model Act provision is to avoid requiring an agency to build a file to support every detail of every action. This is obviously expensive and would involve unnecessary busywork if the action is never challenged in court. A closed record approach also imposes a significant burden on outsiders to muster every possible bit of evidence in support of their position and to get it before agency decisionmakers prior to the agency decision (if there is even any opportunity for them to do so). Moreover, if the agency has failed to assemble such a record while considering the issue, it may be costly or even impossible to pull it together later at the judicial review stage.[225] And the record ultimately as-

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[222]§5-114(a)(3). For a survey of the law of the states on the openness of the record, see Andersen, note 143 at 543-45.

[223]See note 204.

[224]See text at notes 203-06.

[225]See Arthur Bonfield, State Administrative Rulemaking 351-62 (1986); Kenneth Culp Davis, Administrative Law Treatise §29.01.-6 (1982 Supp.). In the Overton Park case, note 204, the Supreme Court held that review of the decision of the Secretary of Transportation to build a road through a park should be on the administrative record already made. However, because the Secretary's decision was unexplained, the Court held that the district court could conduct a trial to ascertain the basis on which the Secretary acted. It took the Department more than four months to assemble the record. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873. 877 (W.D.Tenn. 1972). The trial lasted 25 days. Id. at 878.

sembled by the agency may omit materials that undercut the decision, but this would be difficult for outsiders to detect.[226]

However on the other side, the Model Act's open record approach has some negative effects. It virtually insures long, costly trials at the judicial review stage in which either side is free to bring in new expert witnesses or economic analyses to buttress its position. In this era of controversial and technical agency decisions in the areas of land use, environmental control and economic regulation, retrial of factual issues in court would certainly impose a significant and highly unwelcome burden on an already overburdened judiciary.[227]

Moreover, to the extent that the trial court entertains new evidence, its fundamental role is subtly altered; the question is no longer the rationality of the agency's decision based on the materials before the agency at the time the agency made the decision. Instead, the issue becomes the rationality of the decision in light of the evidence presented at the trial. And an open record approach inevitably transfers a substantial amount of the discretionary function from the agency to the court. By taking and considering new evidence which it can choose to believe or disbelieve, the court supplants the agency's function and exercises independent judgment on the

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[226]Stark & Wald, note 204, at 342-43, 358-62. Because of this problem, outsiders should have limited discovery rights where there is suspicion that the agency has pruned the record. See note 214.

[227]See discussion of the sequel to the Overton Park decision in note 225.

evidence instead of rationality review. This is highly inappropriate in connection with review of discretionary action.

On a practical level, an open record approach encourages private litigants and agencies to engage in strategic behavior by holding back evidence at the time of the agency decisional phase so that it will be available at the judicial review phase. If, for example, evidence is presented to and discredited by an agency, it might be much less effective than if presented for the first time to a court which is less qualified to pick out defects in that evidence.

Thus my recommendation is that the new act follow the federal consensus and that of most recent California cases and limit the judicial review record to materials that were considered by the agency at the time it took the action under review. There should be an exception for procedural defects of the sort that would not be apparent from the agency's record and, as a safety valve, an additional provision allowing new evidence in exceptional situations. As discussed below, if the decision is inadequately explained, the court should remand to the agency to provide the necessary explanation.

b. Findings and explanations

This report does not recommend that agencies be required in all cases to make findings of fact or give reasons. Such a requirement would apply to a broad array of local government decisionmaking, but the Commission has not sought to determine the local government procedure. Moreover, a requirement that every agency render formal findings and reasons seems in-

appropriate for many types of informal discretionary action. Indeed, the Commission has already voted (against my recommendation) not to require a state adjudicating agency to explain its choice of penalties.

I suggest that the statute impose an explanation requirement where an explanation is necessary for informed judicial review of discretionary agency action. If agency action is unexplained, the explanation is not obvious, and the court needs an explanation to review for abuse of discretion, it should be empowered to remand the decision to the agency to supply the necessary explanation.[228] Otherwise, a court might uphold the agency action on the basis of some rationale that the court might invent after combing through the record or that might be suggested by agency counsel. This contradicts fundamental principles of judicial review that require a court to assess the rationality of the agency's decision, not to supply its own rationale for an unexplained decision.[229]

In many cases, a discretionary decision must be explained; otherwise it cannot be reviewed for abuse of discretion.[230] It

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[228]The explanation requirement must be conditioned by a rule of prejudicial error so that courts will not be required to reverse an agency decision lacking an explanation when the explanation is obvious.

[229]See, e.g., SEC v. Chenery Corp., 318 U.S. 80 (1943) (court can uphold agency decision solely on the basis of agency's articulated rationale--not on some other rationale that the court might develop); Levin, supra note 143 at 261-63.

[230]Brodie & Linde, note 138 at 555-56. See Saleeby v. State Bar, note 139 at 566-68 (State Bar must explain discretionary decision not to grant award from client security fund "in order to permit review for abuse of discretion"); Calif. Hotel & Motel Ass'n v. Industrial Welfare Comm'n, note 146 at 209-216 (statement of basis for Commission's action facilitates meaningful judicial review).

is difficult to decide whether an agency made a reasonable choice between alternatives when it fails to explain why it made that choice. In addition, where an agency is required to explain what it is doing, this imposes a certain discipline that may lessen the odds that an agency will act arbitrarily.[231] A reasons statement helps persuade parties that an agency's decision was careful and equitable, and it helps parties decide whether or not to seek judicial review. It enhances the accountability of agency action by subjecting the agency to more informed scrutiny.[232] And a generalized reasons requirement would remove a confusing aspect of existing California law--since no explanation is presently required for quasi-legislative action, courts often have to struggle with deciding whether a particular decision is adjudicative or legislative.[233]

In opposition to this recommendation, it could be argued that a reasons requirement is misdirected when applied to non-

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[231]See Topanga Ass'n for a Scenic Community, note 198 at 516 (findings likely to prevent arbitrary land use decision).

[232]"Third, the exposition requirement subjects the agency, its decision-making processes, and its decisions to more informed scrutiny by the Legislature, the regulated public, lobbying and public interest groups, the media, and the citizenry at large...Fifth, by publicizing the policies, considerations and facts that the agency finds significant, the agency introduces an element of predictability into the administrative process. This enables the regulated public to anticipate agency action and to shape its conduct accordingly...Sixth, requiring an agency to publicly justify its orders, rules, regulations, and policies stimulates public confidence in agency decision by promoting both the reality and the appearance of rational decisionmaking in government." Calif. Hotel, note 146 at 211.

[233]See note 158 for discussion of this elusive distinction.

adjudicatory action; after all, legislatures need not state reasons for their actions. Moreover, it could be argued that such requirements would impose an undue burden on understaffed state or local agencies and that the reasons for many policy judgments cannot be adequately articulated, especially in collegial agencies.[234]

However, these arguments seem unconvincing. There is every reason to hold politically unaccountable agencies to higher standards than legislatures.[235] In addition, California law already requires findings and reasons in all adjudicatory decisions reviewable under section 1094.5 and this has not imposed an undue burden. Similarly, agencies must provide detailed explanations in the case of rules.[236] Agency decisionmakers must have had reasons for their actions; they should be required to state, rather than to conceal them. The reasons requirement has greatly facilitated judicial review of such action.[237] Given that courts will have power to review agency

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[234]Dave Frohnmayer, "National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and the New Utah Administrative Procedure Act," 3 BYU J. of Pub. L. 1, 9-12 (1989).

[235]See Funk, supra note 139 at 161-64.

[236]See Michael Asimow, California Underground Regulations, 44 Admin. L. Rev. 43, 48-51 (1992).

[237]*"An orderly system that would facilitate judicial review of informal action (whether informal adjudication, notice and comment rulemaking, any other informal rulemaking, or a decision about such activities as investigating or prosecuting) would require a statement of reasons, with appropriate references to supporting factual materials in a record prepared by the agency...The 'statement of ... basis and purpose' required by §553 for rules is precisely what is usually needed. Courts can elaborate that requirement, and they can apply a similar requirement to other informal action."* Davis, note 225 at 567 (1982 Supp.) (emphasis in original).

action for abuse of discretion, some sort of explanation requirement is simply a necessity.[238]

In order to be credited by the court, such explanations must be formally provided by the agency heads, not by counsel on judicial review. Federal courts do not allow post-hoc explanations by counsel to substitute for explanations that should have been provided by agency heads. Only explanations provided by the agency heads should be considered by courts reviewing agency exercises of discretion. Ideally such explanations should be rendered contemporaneously with the decision under review. However, where a decision was inadequately explained at the time it was made, a court may review the rationality of an agency decision by crediting an explanation given by the agency heads after making the decision.[239] The agency should not be required to decide a matter from scratch just because it failed to furnish an adequate explanation the first time, but a

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[238]Under federal law, findings are not required absent a statutory requirement. However, on review, if a court is uncertain of why the agency did what it did, it can remand to the agency to provide the necessary explanation. Levin, note 143 at 262.

[239]I disagree with No Oil, Inc. v. City of Los Angeles, note 206 at 81. That case concerned a statutory requirement that an agency find that a project would have no environmental impact before authorizing action without first preparing an environmental impact statement. The case held that the City Council could not satisfy the requirement by making the finding after it made the disputed decision to proceed with the project. While perhaps justifiable in a CEQA case which has an explicit and vital findings requirement, this seems unrealistic if applied generally.

court may be justified in viewing its subsequently-supplied explanation with some suspicion.[240]

c. Burden of proof. The statute should make clear, in accordance with existing California law, that the petitioner on judicial review has the burden of proof to establish the invalidity of the challenged administrative decision.[241]

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[240]See Overton Park, note 204 at 420 (1971), allowing the agency to supply a non-contemporaneous explanation of its decision to grant funds to build a highway through a park but noting that to some extent such explanations would be post hoc rationalizations which should be viewed critically.

[241]See CEB, Calif. Administrative Mandamus §§4.157, 12.7 (2d ed. 1989). The Model Act agrees. §5-116(a)(1). Levin argues that no explicit provision on burden of proof is required since no additional evidence is offered at the judicial review stage. See Levin, note 143 at 244-46 (1986). While technically true, it is probably useful to make clear that the challenger has the burden of persuasion whether the issue involves fact, law, or discretion.