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ADMINISTRATIVE LAW

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INTRODUCTION

The central purpose of this section of the Survey is to review Administrative Law developments, in an attempt to aid the New Mexico Administrative Law practitioner. Primary focus will be given to the appellate cases decided during the year. The organization will follow the three central topics of administrative law: 1) the authority of agencies to act; 2) the proper exercise of the authority conferred; and 3) the scope and timing of judicial review afforded agency action. The three appendices developed in last year's survey of administrative law[1] have been retained to aid the reader in the use of this portion of the Survey. Not every administrative law case decided during the year is given treatment in the text,[2] and no attempt is made to review the substantive law of the agencies.[3]

A number of important issues were raised during the Survey year in each of the three broad areas of administrative law which are of importance. Under the first topic—authority of agencies to act—one non-delegation case sheds some light on the developing attitude of our court to the legislative prerogative.[4] Also, several ultra vires

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1. Appendix A contains an alphabetical index of the administrative law cases decided during the survey year. Appendix B indexes the cases by government agency, and Appendix C indexes them topically by resort to the outline used in the text.

2. Textual treatment is limited to those cases which either give substantial treatment to a particular area of the law or which suggest some addition to or deviation from existing law. Cases which touch upon several administrative law topics may be considered in more than one context. All the administrative law cases, however, are listed in the appendices.

3. No treatment is given to the cases brought against state and local governmental entities under the New Mexico Tort Claims Act. N.M. Stat. Ann. §§41-4-1 to -29 (1978 and Supp. 1981). Similarly, no effort has been made to cover the state and federal cases brought against New Mexico governmental entities to recover damages for civil rights violations pursuant to 42 U.S.C. §1983 (1976). These statutorily authorized tort cases rarely consider administrative law principles. Furthermore, federal cases arising in New Mexico, but dealing with federal agencies or principles of federal administrative law, are not covered.

4. *See* text accompanying notes 17-51 *infra*.

cases decided during the survey period suggest that our courts will continue to scrutinize administrative agencies to insure that they follow the literal mandates of the statutes which create them.[5]

Under the second major topic—the exercise of administrative authority—there were some significant cases concerning rule-making[6] and adjudications.[7] The highlight of the year in these two areas, however, must be the legislative changes in the Uniform Licensing Act,[8] which are given substantial treatment in the body of this article.[9] Under the third major topic—judicial review—the cases decided during the Survey year demonstrate that the courts continue to struggle with the problems of standards,[10] the construction of law in the face of agency interpretation,[11] and the appropriate application of the substantial evidence standard.[12] In addition, the court decided a significant case applying the "legal residuum rule."[13] Finally, the year was marked by some judicial discussion of the exhaustion doctrine[14] as well as continued use of prerogative writs[15] and declaratory and injunctive actions[16] in the administrative law context.

I. AUTHORITY OF AGENCIES TO ACT

A. Non-Delegation Doctrine

The first question which must be faced when considering the authority of an administrative agency to act, is to what extent the legislature could constitutionally delegate power to that agency. The non-delegation doctrine exists at both the federal and state levels in order to restrain the legislature in delegating its legislative power to administrative agencies.[17] The doctrine is founded on two principles which

5. *See* text accompanying notes 52-99 *infra.*
6. *See* text accompanying notes 128-155 *infra.*
7. *See* text accompanying notes 204-220 *infra.*
8. N.M. Stat. Ann. §§61-1-1 to -33 (Repl. Pamp. 1981).
9. *See* text accompanying notes 156-179 and 221-237 *infra.*
10. *See* text accompanying notes 346-362 *infra.*
11. *See* text accompanying notes 363-400 *infra.*
12. *See* text accompanying notes 401-426 *infra.*
13. *See* text accompanying notes 257-269 and 418-422 *infra.*
14. *See* text accompanying notes 448-476 *infra.*
15. *See* text accompanying notes 478-493 *infra.*
16. *See* text accompanying notes 494-513 *infra.*
17. Justice Rehnquist, concurring in Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980), articulated the three fundamental bases for the non-delegation doctrine:

> First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will (citations omitted). Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion (citations omitted). Third, and derivative of the second, the doctrine ensures that

are embodied in our republican form of government. First is the notion, borrowed from agency theory, that the power of the legislature is derived from an initial delegation of authority by the people through the adoption of the Constitution,[18] and cannot be further delegated.[19] Second, and perhaps more important, is the principle, rooted in separation of powers,[20] that powers which are constitutionally conferred on the legislature[21] may not be delegated by the legislature to agencies, which are part of and subject to the control of the executive branch.[22]

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courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards (citations omitted).

448 U.S. at 685-86 (Rehnquist, J., concurring).

18. This compact theory of government derives from the 17th century thought of John Locke:

> The power of the legislature, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws and not to make legislators, the legislature can have no power to transfer their authority of making laws and place in in other hands. . . . The legislature cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass at once to others.

J. Locke, Second Treatise of Civil Government ¶141 (1690).

19. *Cf.* Shankland v. Mayor of Washington, 30 U.S. (5 Pet.) 390, 393 (1831) ("a delegated authority cannot be delegated").

20. The fear of centralized power in one department was a major concern of the National Constitutional Convention of 1787. The notion of separation of powers, following the pattern of pre-existing state constitutions, was the major device settled upon to protect against centralized power. *See* The Federalist Nos. 47-48 (J. Madison). The New Mexico Constitution is more explicit than the federal model about the separation of powers, expressly mandating that "no person . . . charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others . . ." N.M. Const. art. 3, §1.

21. A correlative non-delegation principle is that the legislature has no power to confer judicial or executive powers on other than the judiciary or executive, respectively. Delegations of dispute-resolution authority to administrative agencies, however, have generally been upheld when the power of enforcement is left to the courts or if sufficient judicial review is provided. *See* Brown, *Administrative Commissions and the Judicial Power,* 19 Minn. L. Rev. 261, 304 (1935). *But see,* State *ex rel.* Hovey Concrete Prod. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957); *In re* Opinion of the Justices, 87 N.H. 492, 179 A. 344 (1935).

22. Unlike the federal Constitution, the New Mexico Constitution creates certain administrative agencies and confers upon them certain constitutionally mandated duties and responsibilities. *See, e.g.,* N.M. Const. art. 11 (State Corporation Commission); *id.* at art. 13 (Commission of Public Lands); *id.* at art. 12, §6 (Department of Public Education); *id.* at art. 17, §1 (State Mine Inspector). With respect to these agencies, the non-delegation doctrine cannot apply. There is, however, another constitutional check on excessive legislative grants of power to these agencies. Any legislation seeking to confer on these agencies authority inconsistent with the constitutional provision creating the agency would be ultra vires, *see* text accompanying notes 52-99 *infra,* and therefore unconstitutional. *See* San Juan Coal & Coke Co. v. Santa Fe, S.J. & N. Ry., 35 N.M. 512, 516, 2 P.2d 305, 307 (1931). Even this principle ought not, however, preclude the legislature from conferring on a constitutionally created agency powers and duties broader than, but not inconsistent with, the constitutionally conferred powers. *Cf.* Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 90 N.M. 325, 341, 563 P.2d 588, 604 (1977) (retrospective regulation invalid because provided neither by applicable

The non-delegation doctrine was recognized early in the history of American jurisprudence, although the early federal cases resorted to various verbal machinations to allow important Congressional grants of power to stand.[23] It was not until 1935 that the Supreme Court struck down a congressional grant of power as violative of the non-delegation doctrine. The two landmark cases, *Panama Refining Co. v. Ryan*[24] and *A.L.A. Schechter Poultry Corp. v. United States,*[25] invalidated two legislative cornerstones of the New Deal, and they remain as the high water marks of non-delegation law. They also serve as historical indications of the legislative-judicial battle of that era.[26]

The complexities of the post-New Deal era mandated the extension of governmental power beyond the scope of what Congress could do directly. The courts, since that time, have therefore upheld wholesale delegations of legislative authority to administrative agencies.[27] In the post-*Schechter* cases, the Court has consistently ex-

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constitutional provisions nor the pertinent statutes). *But see,* Mountain States Tel. & Tel. Co. v. State Corp. Comm'n, 65 N.M. 365, 372, 337 P.2d 943, 948 (1959) (Commission as a constitutional body is limited to powers granted by the constitution and may only be enlarged by vote of the people).

23. The early federal cases, in chronological order, were as follows: The Cargo of the Brig Aurora v. United States, 11 U.S. 240, 243-44, 7 Cranch 382, 387-88 (1812) (Act authorizing President to terminate a foreign trade embargo under certain conditions did not delegate too much discretion); Field v. Clark, 143 U.S. 649, 694 (1892) (power granted to President was not legislative but merely power to "ascertain and declare the event" upon which legislation was to become effective); United States v. Grimaud, 220 U.S. 506 (1911) (statute authorizing Secretary of Agriculture to protect against forest fires merely conferred power to fill up details to carry out clear legislative policy); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (Tariff Act power to the President to adjust tariffs under certain conditions not unlawful delegation because of an "intelligible principle" set by Congress to guide the exercise of his discretion).

24. 293 U.S. 388 (1935) (Hughes, C. J.) *Ryan* struck down as an invalid delegation of legislative power Section 9(c) of National Industrial Recovery Act (NRA), which authorized the President to prohibit shipment of oil produced in excess of law or regulations. Only Justice Cardozo dissented, finding a sufficient legislative "standard" in the clause which limited the President's power to prohibit shipment only to products produced in excess of state authority. *Id.* at 433.

25. 295 U.S. 495 (1935) (Hughes, C. J.). In *Schechter* the legislative grant of code-making authority under § 37 of NRA was held to be an unconstitutional delegation of legislative authority because of the lack of adequate standards. Even Justice Cardozo was constrained to concur: "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing." *Id.* at 551 (Cardozo, J., concurring).

26. *See* R. Jackson, The Struggle for Judicial Supremacy 75-123 (1941).

27. One commentator states:

> Whatever the doctrinal formulation—"contingency," "ascertainment of a fact," "power to fill up the details," "mere administrative functions," "primary standard," "intelligible principle," or otherwise—the fact of course is that the power to make law has been lodged in non-legislative hands. The obvious reason why the Supreme Court consistently sanctioned this practice is that the necessities of government demanded delegation. The Court correctly perceived

tended itself in search of validating standards.[28] The Court has held that it will uphold delegations so long as it can find that "the will of Congress has been obeyed."[29] In searching for that will, it will even rely upon acceptance of prior administrative practices to find adequate standards for the exercise of the authority granted.[30]

It may be argued that the non-delegation doctrine is all but a dead letter at the federal level.[31] This is not the case, however, at the state

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that to invalidate transferences of law making authority to executive and administrative officials would be to deprive the federal government of the only effective means of exercising powers delegated to it by the Constitution.

W. Gellhorn, C. Byse & P. Strauss, Administrative Law 55-56 (7th ed. 1979) (hereinafter referred to as W. Gellhorn).

28. Modern courts do not dispute the underlying principles upon which the delegation doctrine is based, *see* note 17 *supra,* but rather contend that the same governmental values may be fostered by resort to more flexible control mechanisms. *See, e.g.,* Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three judge court) (Leventhal, J.) (other controls include legislative will, historical context, legislative history, and administrative standards).

29. Yakus v. United States, 321 U.S. 414, 425 (1944) (upholding Emergency Price Control Act of 1942). This approach has been criticized as utilizing the ultra vires notion that the court must be able to determine whether the agency has acted consistent with the power conferred, thereby begging the non-delegation question. A. Bickel, The Least Dangerous Branch 160-161 (1962).

The later cases do link non-delegation with judicial review considerations. The concern for judicial restraint, and deference to congressional judgment, has in some sense precluded application of the non-delegation doctrine. *Compare* the majority's opinion in Arizona v. California, 373 U.S. 546, 594 (1963) ("Congress still has broad powers over this navigable international stream [the Colorado River]. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes. Unless and until it does, we leave [it] in the hands of the Secretary, where Congress has placed it. . . .") *with* the dissenting opinion (Harlan, J., dissenting) ("Under the Court's construction of the Act, in other words, Congress has made a gift to the Secretary of almost 1,500,000 acre-feet of water a year, to allocate virtually as he pleases in the event of any shortage. . . . The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts.") *Id.* at 625-27.

30. Fahey v. Mallonee, 332 U.S. 245 (1947) (Home Owners Loan Act upheld on basis of well-known and generally acceptable standards in the regulation of banking). *See* Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (Economic Stabilization Act upheld in light of substantial background of prior law and practice).

31. "[T]he steady course of Supreme Court decisions since the Schechter case underscores the improbability that a federal statute regulating business practice and not threatening a fundamental personal liberty will be found defective on the ground that it violates the delegation doctrine." W. Gellhorn, *supra* note 27, at 81. However, the debate continues among the commentators. Many of them call for a revival of the delegation doctrine as a meaningful control mechanism against run-away government. *E.g.,* J. Ely, Democracy and Distrust, A Theory of Judicial Review 131-34 (1980); J. Freedman, Crisis and Legitimacy, 78-94 (1978); Wright, *Beyond Discretionary Justice,* 81 Yale L.J. 575, 582-87 (1972). Others believe that the complexity of problems faced by modern agencies, coupled with the fluidity of the political process, which may preclude the crystallization of a firm legislative policy, often forecloses a clear and specific standard. Stewart, *The Reformation of American Administrative Law,* 88 Harv. L. Rev. 1667, 1700-01 (1975). *See also,* Jaffee, *The Illusion of the Ideal Administration,* 86 Harv. L. Rev. 1183, 1190, n. 37 (1973).

However, "so long as Panama and Schechter are not overruled, they serve as a warning that there are some limits and they remain in the judicial armory against the day when some unusual

level. For a variety of complex and interrelated reasons,[32] the non-delegation doctrine is more readily used by state courts as a tool to control grants of unfettered discretion to administrative agencies.[33]

In New Mexico there has been some use of the non-delegation principle, because of our strong separation of powers tradition,[34]

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circumstances might call for their utilization." W. Gellhorn, *supra* note 27, at 68. Some compelling minority opinions invoking non-delegation principles have at least kept the doctrine alive. *See, e.g.,* Industrial Union Dep't. v. American Petroleum Inst., 488 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring); Zemel v. Rusk, 381 U.S. 1, 20 (1965) (Black, J., dissenting).

32. One group of commentators suggests the following reasons for greater use of the non-delegation doctrine at the state level:

> (i) The typical paucity of legislative history of state laws makes resort to it less promising, and more haphazard and unreliable when attempted. (ii) While federal law is recognized to be almost wholly statutory, counsel and judges in state courts tend to approach a public law case from a common law background of practice and with common law rather than statute law methods of briefing and argument. (iii) There may be a different degree of institutional respect and deference toward the legislative branch and its products; in any event, state courts are far less reluctant to hold that a legislature has misconstrued and exceeded its powers than federal courts are to hold that Congress has done so. (iv) Similarly, state courts may have a different, and realistic, view of the professional capacity and impartiality of many agencies to whom power is delegated in the states as compared with federal agencies. Often "excessive delegation" seems to be employed by courts to strike down actions that they deem unreasonable impositions on private parties.

H. Linde, G. Bunn, F. Paff & W. Church, Legislative and Administrative Processes 477 (2d ed. 1981) (hereinafter cited as H. Linde). Another commentator believes that the results in state delegation cases can generally be explained in terms of the following factors:

> (1) delegation sustained, where reference to established legal concepts has effect of limiting discretion; (2) the tradition in a particular field may control decision; (3) discretion must be more strictly limited where substantial property interests are involved; (4) broad discretionary powers may be delegated, where judicial review is available to correct abuses; (5) broad delegations sustained where statute requires notice and hearing and fair administrative procedure; (6) broad delegations are upheld where there is an obvious need for expertise; (7) delegation of power to private groups is frowned upon; (8) broad discretionary powers may be delegated where public health, safety, or morals are significantly involved; (9) delegations of power to fix penalties are not favored; (10) courts insist on preserving essential independence of the departments of government; (11) broad discretionary powers may be delegated where proprietary functions are involved.

I. Cooper, State Administrative Law 73-91 (1965).

33. *E.g.,* Allen v. California Bd. of Barber Examiners, 25 Cal. App. 3d 1014, 102 Cal. Rptr. 368 (Ct. App. 1972) (Minimum price schedules *held* invalid delegation lacking in standards); Thygesen v. Callahan, 74 Ill. 2d 404, 385 N.E.2d 699 (1979) (Bank regulation statute *held* invalid for lack of standards and clear expression of harm statute was intended to prevent); Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N.W.2d 227 (1960) (Act granting administrative power to promulgate regulations governing milk production, violation of which resulted in a criminal penalty *held* an unconstitutional delegation of legislative authority to set crime).

34. Several recent cases have struck down various attempts by the legislature to confer or exercise authority touching on the judicial power. *E.g.,* Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980) (hiring court employee); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 301, 551 P.2d 1354 (1976) (establishing rules of evidence); *In re* Sedillo, 66 N.M. 267, 347 P.2d 162 (1959) (admission to the bar).

and the firm position of our court against conferring adjudicatory power over private disputes on administrative agencies.[35] In the latest non-delegation case, *Montoya v. O'Toole,*[36] the court incorrectly suggested, however, that the court had in the past "applied a restrictive approach to the delegation doctrine."[37] In fact, the modern New Mexico courts have consistently taken a liberal approach, and in federal-like fashion have used scanty statutory standards to uphold broad delegations.[38]

Montoya involved a criminal charge under the Controlled Substance Act. Counsel for defendant creatively argued that the Act,[39] which allows the Board of Pharmacy to classify drugs resulting in differing criminal penalties, is unconstitutional as an unlawful delegation of legislative power to define criminal activity.[40] The court referred to a list of statutorily required considerations,[41] and to the statutory language, which requires scheduling if certain findings are made.[42]

The court also referred to the Board's "expertise . . . and vigilance in dealing with new and dangerous drugs," as well as the burden it would place on the legislature if it had "to consider each of the

35. State *ex rel.* Hovey Concrete Prod. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957); *see* note 21 *supra.*

36. 94 N.M. 303, 610 P.2d 190 (1980).

37. *Id.* at 305, 610 P.2d at 192.

38. Several of those decisions were cited as authority in *Montoya:* City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975) (upholding motorcycle helmet ordinance); State *ex rel.* State Park and Recreation Comm'n v. New Mexico State Authority, 76 N.M. 1, 411 P.2d 984 (1966) (upholding power of bonding authority); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964) (upholding historical zoning code provision on size of windows); Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P.2d 779 (1941) (upholding Barbers Price-fixing Act). *See also* State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

39. N.M. Stat. Ann. §§ 30-31-1 to -40 (1978).

40. 94 N.M. at 303, 610 P.2d at 190.

41. [In determining whether a substance has the potential for abuse,] the board *shall* consider the following:
(1) the actual or relative abuse of the substance;
(2) the scientific evidence of the pharmacological effect of the substance, if known;
(3) the state of current scientific knowledge regarding the substance;
(4) the history and current pattern of abuse;
(5) the scope, duration and significance of abuse;
(6) the risk to the public health;
(7) the potential of the substance to produce psychic or physiological dependence liability; and
(8) whether the substance is an immediate precursor of a substance already controlled under the Controlled Substance Act.

Id. at 304, 610 P.2d at 191 (emphasis by the court), *citing* N.M. Stat. Ann. § 30-31-3 (1978).

42. The statute also creates five schedules of controlled substances and requires scheduling under the respective categories when the board finds that the drug meets the specific requirements of a given category. N.M. Stat. Ann. § 30-31-5 (1978).

thousands of new substances that are marketed each year. . . ."[43] To this was added the consideration that the shortness of our legislative sessions would make legislative overseeing difficult, creating critical gaps in effective drug control.[44]

The court concluded that "[t]his legislative scheme . . . allows the Board of Pharmacy only minimal discretion in its fact-finding function and no discretion in enacting substantive law."[45] The court therefore held that "the legislature has not abrogated its responsibilities, but has defined and confined the role of the Board of Pharmacy to that of a fact-finder."[46]

Montoya does not represent a departure from prior New Mexico case law.[47] Prior cases spoke of the need for some legislative "standard,"[48] or "intelligible principle"[49] to guide the agency in the exercise of its powers. The delegation of power must provide a framework within which the agency can "determine facts upon which the law makes its own action depend."[50] In *Montoya,* the scope of the Board's power to schedule drugs is defined by its fact-finding expertise. *Montoya* therefore blends nicely into the liberal delegation tradition of modern New Mexico jurisprudence.[51]

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43. 94 N.M. at 305, 610 P.2d at 192, *quoting* State v. Edwards, 572 S.W.2d 917, 919 (Tenn. 1978).

44. *Id.*

45. 94 N.M. at 305, 610 P.2d at 192.

46. *Id.* The court also concluded that the scheduling scheme did not violate the fair notice requirement of due process, in part because the Controlled Substances Act requires notice and a public hearing prior to the scheduling of a new drug. *Id.* In addition to the other underpinnings of the non-delegation doctrine, *see* note 17 *supra,* the doctrine is supported by consideration of fair notice and legislative guidance which protects against arbitrary action. *See* H. Linde, *supra* note 32, at 459.

47. It is the "restrictive approach" cases mentioned in *Montoya*—State *ex rel.* Sofeico v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1936) and State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936) that depart from established New Mexico law. *Heffernan* struck down the authority of the State Game Commission to define game animals, but it has been so undercut by later decisions as to be of questionable validity. *See e.g.,* cases cited at note 38 *supra. Roy* dealt with the inherent power of the court to establish its own rules. In discussing the statute, which apparently conferred that power, the court concluded that the statute granting rule-making power to the court was not an unconstitutional delegation of legislative power. Because the holding in the case was based on the inherent power of the court, rather than the delegated power, *Roy* is hardly firm authority for a restrictive application of the non-delegation doctrine.

48. State *ex rel.* Lee v. Hartman, 69 N.M. 419, 367 P.2d 918 (1961).

49. State *ex rel.* State Park and Recreation Comm'n v. New Mexico State Authority, 76 N.M. 1, 411 P.2d 984 (1966).

50. *Id.* at 13, 411 P.2d at 993.

51. In State v. Dougall, 89 Wash.2d 118, 570 P.2d 135 (1977) the Washington Supreme Court reversed, on non-delegation principles, a conviction for possession of the same controlled substance (valium) that was at issue in *Montoya.* In *Dougall,* however, the scheduling did not take place by way of statutory procedure used in *Montoya* and available under the Washington statute. The drug was scheduled through a provision of state law which allowed for state acquiesence in future federal agency action resulting in the scheduling of drugs. The

B. Statutory Authority

In light of our liberal tradition concerning non-delegation law,[52] it is clear that the crucial inquiry concerning agency authority is not whether the legislature was able to confer the questioned power on the agency, but rather, whether in fact it did so, and whether the specific exercise of authority was consistent with the legislative grant.[53] Last year's survey gave substantial treatment to statutory authority and the ultra vires doctrine which provides the judicial check against the exercise of authority outside the bounds of the conferring statute.[54] The cases reviewed last year illustrate that the power conferred may be general in nature, that the agency action is considered in light of the purposes of the statute granting the authority and that, in considering the scope of authority, due regard is given to an agency's interpretation of its authorizing statute.[55]

This year's cases provide some interesting variations on the same basic themes. Two of the cases demonstrate how difficult the search for legislative intent or policy can be without the benefit of a clear legislative statement or a thorough legislative record.[56] Another duo of cases, involving the application of the ultra vires doctrine at the local level, demonstrates how power conferred by the legislature may be conditional in nature and subject to control, or even divestment, by subsequent administrative action.[57]

In *New Mexico Board of Pharmacy v. New Mexico Board of Osteopathic Medical Examiners,*[58] the court considered the validity of an Osteopathic Medical Examiners Regulation authorizing physi-

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reference to *future* federal agency action creates an even more serious delegation problem as the Washington court made clear: "While the legislature may enact statutes which adopt existing federal rules, regulations or statutes, legislation which attempts to adopt or acquiesce in future federal rules, regulations or statutes is an unconstitutional delegation of power and thus void." *Id.* at 138. New Mexico law does not allow federal scheduling to obviate state board decision-making. *See* N.M. Stat. Ann. §30-31-3(D) (Repl. Pamp. 1980).

52. *See* text accompanying notes 34-51 *supra.*

53. In this regard, New Mexico law is similar to federal administrative law, and the advice concerning the latter would also obtain here: "The issue that can be effectively litigated with respect to federal administrative action . . . is not whether Congress *could* delegate authority to take the action, but whether Congress *did* delegate such authority, and whether the action taken was within the scope of the discretion granted." H. Linde, *supra* note 32, at 477.

54. Browde, *Administrative Law,* 11 N.M. L. Rev. 1, 2-5 (1980-81) [hereinafter referred to as 1979-80 Administrative Law Survey].

55. *Id.*

56. *Compare* Katz v. New Mexico Department of Human Services, 95 N.M. 530, 624 P.2d 39 (1981) (*see* text accompanying notes 73-78 *infra*) *with* New Mexico Board of Pharmacy v. New Mexico Board of Osteopathic Medical Examiners, 95 N.M. 780, 626 P.2d 854 (Ct. App. 1981) (*see* text accompanying notes 58-72 *infra*).

57. *See* Board of County Comm'rs. v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980); *In re* Horn, 95 N.M. 38, 618 P.2d 382 (Ct. App. 1980); text accompanying notes 79-99 *infra.*

58. 95 N.M. 780, 626 P.2d 854 (Ct. App. 1981).

cian's assistants to *prescribe* drugs.[59] The statute creating the Board of Osteopathic Medical Examiners conferred upon the Board the power to make "reasonable rules and regulations . . . provided, however, the board shall not adopt any rule or regulation allowing an osteopathic physician's assistant to *dispense* dangerous drugs . . . ."[60] The question before the court was whether the statute prohibiting the Board from enacting rules on the *dispensing* of drugs by assistants included a prohibition on the authority to enact rules governing the *prescribing* of drugs by assistants.

The court concluded that the rule exceeded the Board's authority and set it aside as an ultra vires act.[61] The court reasoned that the word "dispense" in the Osteopathic Physician's Assistant Act[62] was to be interpreted by reference to the definition of that term contained in the pre-existing Controlled Substances Act.[63] Because that definition specifically included "prescribing,"[64] the court was constrained to find that the limitation of the rule-making power of the Board included a prohibition against prescription rules. The court relied upon two related rationales: 1) that the legislature in enacting the subsequent Physician's Assistant Act "is presumed to have enacted law with existing law [the Controlled Substances Act] in mind,"[65] and that the "court has the duty to construe a statute so as to render it consistent with previously enacted statutes, if that is possible."[66] The court also found solace in the general policy behind the Controlled Substances Act to control the drug abuse problem, and the more specific policy of limiting the category of persons able to dispense drugs.[67] The court reasoned that to rule otherwise "would

59. The applicable rule reads, in pertinent part, as follows:

> 1. An osteopathic physician may delegate to a physician's assistant the authority to prescribe any drugs controlled by the Schedules II through V, of the New Mexico Controlled Substances Act, provided that the physician's assistant has worked for the supervising physician for at least 6 months. Such delegations may be for all drugs in Schedules II through V, or only for certain drugs, or only for drugs in one or more of the Schedules.

Id. at 781, 626 P.2d at 855, *quoting* Rules of N.M. Board of Osteopathic Medical Examiners, art. XIV, §M.

60. N.M. Stat. Ann. §61-10A-6(C) (Repl. Pamp. 1981) (emphasis added).

61. 95 N.M. at 782, 626 P.2d at 856.

62. N.M. Stat. Ann. §§61-10A-1 to -7 (Repl. Pamp. 1981).

63. N.M. Stat. Ann. §30-31-2(H) (Repl. Pamp. 1981).

64. " 'Dispense' means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, *prescribing*, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery." *Id.* (emphasis added).

65. 95 N.M. at 782, 626 P.2d at 856.

66. *Id.*

67. Nowhere in the Controlled Substances Act is the policy behind the Act expressly stated. *See* N.M. Stat. Ann. §§30-31-1 to -40 (1978). A reading of the entire statute, however, clearly

constitute an impermissible enlargement of the class of persons authorized by the Act to dispense those substances, whether 'dangerous' or not."[68]

In deciding ultra vires questions generally, the court is probing for the legislative intent or policy which can inform and define the scope of the legislative mandate. Because there is no legislative record in New Mexico, and often our statutes state no express intent or policy, the court must turn to rules of construction, as illustrated in *New Mexico Board of Pharmacy*. When there are competing rules of construction, however, the choice of the rule to be applied may in fact dictate the result,[69] and mask what is in reality a judicial policy choice rather than a fair pursuit of legislative intent. When the legislative purpose behind the enactment is not expressed,[70] the court

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demonstrates an overwhelming legislative concern about drug abuse, and the educational programs and research authorized under the Act address the problem of abuse directly. *See Id.* at §§30-31-39, -40. The drug dispensing provisions may be read as relating primarily to the abuse problem, although they could also be justified as assuring the competence and training of those authorized to perform the tasks. *See id.* at §§30-31-2(H)(N), -12, -18(A).

68. 95 N.M. at 782, 626 P.2d at 856. The Osteopathic Physician's Act only prohibits the Board from allowing assistants to dispense "dangerous drugs," *see* text accompanying note 60 *supra*. The rule struck down by the court only allowed the assistants to prescribe drugs controlled by Schedules II through V of the Controlled Substances Act. If the Board deemed those drugs non-dangerous, they arguably fell outside the statutory limitation. In any event, the rationale used by the court—that the Controlled Substances Act was intended to narrowly define who could dispense or prescribe drugs "whether dangerous or not"—is too broad a policy to apply in light of the specific language of the statute which only sought to limit rule-making power in the area of "dangerous drugs."

69. The problem of resorting to rules of construction in the absence of legislative history or a clear statement of legislative purpose is most clearly displayed in the area of judicial review of questions of law. There, for example, resort may be had to interpretive agency opinions only if the statute is ambiguous. Even where the interpretive agency rulings are clearly one way, they fail to come into play unless the court reads the statute as containing ambiguities. For a discussion of this year's cases which raise this problem, *see* text accompanying notes 363-400 *infra*. *See also,* 1979-80 Administrative Law Survey, *supra* note 54, at 24.

In *New Mexico Board of Pharmacy* the court could have viewed the statute as unambiguous in limiting the prohibition on rule-making to dispensing, as opposed to prescribing, and then only to dangerous drugs. It could then have coupled that with a reading of statutory purpose behind the Osteopathic Physician Assistant's Act as being different from that in the Controlled Substances Act. Because a specific later statute takes precedence over the general earlier statute, the court could have then upheld the regulation as a valid exercise of the power conferred. *See* City of Albuquerque v. New Mexico State Corp. Comm'n., 93 N.M. 719, 721, 605 P.2d 227, 229 (1979). This alternative analysis suggests the ways in which the choice of rules of construction can control the result. Perhaps *New Mexico Board of Pharmacy* relies on the notion that the policy behind drug abuse control must outweigh the convenience to doctors which results from their supervised assistants' being able to prescribe certain drugs.

70. In the context of *New Mexico Board of Pharmacy,* it has already been suggested that it is not altogether clear whether the drug dispensing/prescribing provisions of the Controlled Substances Act were actually enacted as drug abuse control devices. *See* note 67 *supra*. The question of the distinction between dispensing and prescribing also arose this year in a criminal law case, State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App. 1981) which is discussed in Dabney, Holt, and Smith, *Criminal Law,* 12 N.M. L. Rev. 229 (1982).

may be left free to formulate a policy of its own in the guise of uncovering the policy of the legislature.[71]

Complex federal regulatory schemes, are more likely however, to contain declarations of underlying policy or purpose.[72] Therefore, New Mexico courts handle scope of authority questions in the federal administrative context much differently. This year in *Katz v. New Mexico Department of Human Services,*[73] that difference was illustrated. In *Katz* the petitioner sought medicaid benefits for services provided by a chiropractor. She was denied the benefits, and among the questions presented on appeal[74] was whether denial of the

71. If the use of rules of construction (in the absence of legislative history) can dictate a result which deviates from legislative purpose, and, if the lack of a clear statement of legislative policy opens the door for the court to choose its own, then the potential for the abuse of judicial discretion certainly exists. On the other hand, as with all areas of statutory construction, the ultimate legislative check remains. If it is displeased with the court's interpretation, the legislature can always clarify its meaning through amendatory language. *Cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (stare decisis less honored in constitutional matters because "correction through legislative action is practically impossible.").

72. There may be other problems in attempting to understand the meaning or scope of federal legislation. For example, the availability of a transcript of proceedings on the floor of Congress means that legislative compromises at the federal level may play themselves out over agreed-upon colloquies concerning the "intent" of the sponsor of a bill, rather than clear intent or purpose language in the statute. *See e.g.,* Arizona Public Service Co. v. Snead, 441 U.S. 141, 147-48 (1979) (intent of bill to reach the New Mexico Electrical Energy tax despite unclear language). The result may be that the "intent" of Congress found in the comments made during debates on the floor often fails to provide firm ground upon which to stand. For example, in Industrial Union Dep't. v. American Petroleum Inst., 448 U.S. 607 (1980), the issue was whether Congress had mandated the application of cost-benefit analysis in the drafting of regulations under the Occupational Safety and Health Act of 1970 (OSHA). Given the mammoth legislative record, the Justices were able to find various portions of the legislative record to support their differing views. *Compare, id.* at 646-652 (opinion of Stevens, J.), and *id.* 676-82 (Rehnquist, J. concurring in judgment) with *id.* at 691-95 (Marshall, J., dissenting). *See generally,* F. Newman and S. Surrey, Legislation 158-78 (1955).

In many instances resort to federal legislative history is nothing more than makeweight for judicial policy-making or policy-choosing. *E.g., compare* Maine v. Thiboutot, 448 U.S. 1, 7 (1980) (Brennan, J.) *with, id.* at 15 (Powell, J., dissenting). This use of federal legislative history may result in the same exercise of unbridled judicial discretion which can come from the New Mexico approach of resorting to rules of construction in the absence of legislative history. *See* note 69 *supra.*

At least one noted authority has suggested that the judiciary ought to *make* the policy decisions that were unresolved by a congressional statement of purpose. *See* Dworkin, *How to Read the Civil Rights Act,* 26 N.Y. Rev. of Books 37 (December 20, 1979). Professor Dworkin believes these questions are appropriately left for the courts in their application of the underlying principles of the particular statute. In his view the compromising nature of the legislative process often does not allow for the deliberative decision-making which some tough policy questions require. If Congress disagrees with the policy choice made by the Court, it can reverse or alter it by amending the statute. *See, id.* at 37.

73. 95 N.M. 530, 624 P.2d 39 (1981).

74. The claims on appeal were whether the denial of benefits violated the federal Act and regulations, *see* text accompanying notes 117-23 *infra;* whether the denial violated equal protection, and whether the appellant had been given adequate notice and an opportunity to be heard as required by due process. *Id.* at 534-35, 624 P.2d at 43-44.

benefits was "inconsistent with congressional intent and the purposes and policies of the [Medicaid] program."[75]

The court rejected petitioner's argument that the statutory reference to "necessary medical services" included *all* necessary services. The court concluded that the "necessary medical services" found in the statement of legislative purpose referred only to the five mandatory categories of service specified in the Act,[76] which did not include chiropractic services. In the federal medicaid program, therefore, the scope of legislative authority for administrative action is not resolved by resort to rules of construction.[77] Rather, it is determined by judicial analysis of the statutory scheme in light of its expressly stated purposes, as well as its extensive legislative history.[78]

In two cases decided during the Survey year, the courts also dealt with the application of the ultra vires principle at the local level.[79] In *Board of County Commissioners v. City of Las Vegas*[80] San Miguel County enacted an ordinance regulating land use,[81] and then sought

75. *Id.* at 533, 624 P.2d at 42.

76. *Id.* at 532, 624 P.2d at 41. The federal medicaid program, established under Title XIX of the Social Security Act, has as one of its stated purposes: "[to enable] each State, as far as practicable . . . , to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396 (1976). The court read the precatory purpose language as only applying to the specific categories which the statute requires the state to fund. *See id.* at § 1396a(a)(13)(B), and § 1396d(a)(1)-(5).

77. The *Katz* court also supported its reasoning by resort to one rule of construction. The court found that Katz's position would have obliterated the statutory distinction between mandatory and optional categories of medical services. The court's reasoning maintained the distinction in part on the ground that "[a] statute must be construed so that no part . . . is rendered surplusage or superfluous." 95 N.M. at 534, 624 P.2d at 43.

78. The medicaid program is one with some clear mandates and a very full legislative history. *See e.g.*, Schweiker v. Gray Panthers, 101 S.Ct. 2633 (1981); Harris v. McRae, 448 U.S. 297 (1980).

79. There was a third case decided during the Survey period in which the court applied the ultra vires doctrine to an administrative action by a local body. In Mitchell v. Hedden, 94 N.M. 348, 610 P.2d 752 (1980), the appellants challenged the legality of the City's approval of a subdivision adjacent to their property. The approval came by way of a summary proceeding of the City Planning Commission. Because "[t]he Planning Commission is a creature of the City Council," *id.* at 349, 610 P.2d at 753, and because the city council had limited the power of the planning commission to enact procedures subject to the approval of the council, the court held that the commission had no authority to enforce a procedure not approved by the council. The court reversed the summary judgment and remanded for a determination of the fundamental fact question of whether the city council had approved the summary procedure. 94 N.M. at 349, 610 P.2d at 753.

80. 95 N.M. 387, 622 P.2d 695 (1980).

81. A substantial issue in the case was whether the ordinance was enacted pursuant to the zoning authority of the county, N.M. Stat. Ann. §§ 3-21-1 to -6 (1978 & Supp. 1981) or under the county's general police power, N.M. Stat. Ann. §§ 4-37-1 to -9 (Repl. Pamp. 1980 & Supp. 1981). This issue was critical to the remainder of the case because the governmental powers to be exercised and the enactment procedures of the two statutory schemes differ greatly.

The court viewed the ordinance as falling within the hornbook definition of zoning adopted by the court in a previous decision: "Zoning is defined as 'governmental regulation of the uses

to apply it to the City of Las Vegas Landfill. The landfill existed outside of the city, but within the county. The state zoning statute confers extraterritorial zoning power on the city for an area which includes land within one mile of the city limits, thereby precluding zoning by the county in that area.[82] As to that portion of the city's landfill lying within the one-mile zone, the court quite easily found that "[t]he statute does not grant zoning authority over this one mile area to the County . . ."[83] and struck down that portion of the zoning ordinance on ultra vires grounds.[84]

More interesting, however, was the court's consideration of the area of the city landfill which fell outside the one-mile zone. The court found that another portion of the state zoning law requires that zoning regulations must be adopted in accordance with a "comprehensive plan."[85] Because the county had not adopted such a plan,[86] the court concluded that the ordinance must fail for lack of compliance with the requirements of the statute.[87]

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of land and buildings according to districts or zones.' " Miller v. City of Albuquerque, 89 N.M. 503, 505, 554 P.2d 665, 667 (1976), *quoting* 8 E. McQuillin, The Law of Municipal Corporations §25.01 at 12 (3d ed. 1965). The court concluded that the ordinance was enacted pursuant to the county's zoning authority, and analyzed the authority question in the context of the state zoning statute.

82. N.M. Stat. Ann. §3-21-2(B) (1978) provides, in pertinent part, that:

> a municipal zoning authority may adopt a zoning ordinance . . . within its extraterritorial zoning jurisdiction which is within:
>
> . . .
>
> (3) one mile of the boundary of any municipality having a population of one thousand five hundred or more but less than twenty thousand persons, provided such territory is not within the boundaries of another municipality. . . .

Other subsections of this statute define differing areas of extraterritorial zoning authority depending on the size of the municipalities involved. *See id.* at §3-21-2(B)(1)-(5).

A previous section of the same statute specifically limits the zoning authority of a county to "territory within the county that is not within the zoning jurisdiction of a municipality." N.M. Stat. Ann. §3-21-2(A) (1978).

83. 95 N.M. at 390, 622 P.2d at 698.

84. The court found support for its conclusion in the statutory construction principle that: "[s]tatutes are to be read and given effect as written, with the words used to be given their ordinary and usual meaning, unless a contrary intent is clearly shown." *Id.*

85. *Id.* at 390–91, 622 P.2d at 698–99.

86. The court noted that comprehensive plans serve to prevent isolated land use determinations of small pockets of a given community without consideration of the impact on the whole. *Id.* at 390, 622 P.2d at 698. The court read a host of specific requirements into the statutory requirement. *See* N.M. Stat. Ann. §3-21-5 (1978). Borrowing from a noted treatise in the area, the court adopted the common definitional requirements of a master or comprehensive plan to include "a verbal and graphic statement of (1) the physical and human resources of the community, (2) the goals sought by the community, (3) plans for the mobilization of the resources to achieve the goals, and (4) means for implementing the plans." 95 N.M. at 390, 622 P.2d at 698, citing 3 R. Anderson, American Law of Zoning §21.03 (2d ed. 1976).

87. The court conceded that the comprehensive plan could be self-contained or contained within the particular zoning ordinance itself. The court found that "the county did not formally adopt a comprehensive plan," and that "[t]here was no evidence before the court demonstrating that the ordinance included a comprehensive plan." 95 N.M. at 391, 622 P.2d at 699.

In effect, then, the zoning statute as interpreted in *Board of County Commissioners* may place a critical ultra vires question in the hands of the very body exercising the questioned authority. Local zoning authorities can only act consistently with state law governing zoning. That law, as interpreted by the *Board of County Commissioners* court, places upon the county a comprehensive planning responsibility as a pre-condition to a zoning action. The county may therefore have ultimate control over whether its zoning actions would be subject to attack. Failure to follow the comprehensive plan requirement may render actions of the county invalid on ultra vires grounds just as certainly as did the violation of the one-mile limit provision of state law.[88]

Board of County Commissioners may be viewed as a case in which the local body controls, to some extent, its own authority to act. *In re Horn*[89] presents another situation in which the actions of an administrator may govern the authority of the agency. In *Horn* the owners of a shopping center protested the assessor's valuation of certain land.[90] The protest hearing was set before the Valuation Protest Board in accordance with the law.[91] Prior to the hearing, and pursuant to state law and regulations,[92] an informal conference was

88. The extraterritorial authority question represents the more traditional ultra vires question. *See* B. Schwartz, Administrative Law 143 (1976). The *Board of County Commissioners* court, however, saw that issue in jurisdictional terms: "[T]he . . . zoning statutes [do not] give the County jurisdiction to adopt a zoning ordinance within one mile of the Las Vegas City limits." 95 N.M. at 390, 622 P.2d at 698.

The master plan question can be viewed as a matter of process—the law requires that A be done as a precondition to enacting B, and the county's failure to do A renders B invalid for failing to follow the required procedure. This view of the comprehensive plan issue can also be found in *Board of County Commissioners:* "We find no statute which prohibits the County's authority to zone that area. However, any such zoning ordinance must be properly enacted." *Id.*

The master plan question can also be viewed in ultra vires terms. Because the statute seems to require a master plan as a precondition to zoning, that requirement can be seen as conferring power or jurisdiction to zone only after or contemporaneously with creation of a master plan. Zoning in the absence of the precondition may exceed the power conferred and is therefore ultra vires.

89. 95 N.M. 38, 618 P.2d 382 (Ct. App. 1980).

90. The protest involved the assessor's valuation of the land and not his valuation of improvements associated with the shopping center. Also at issue in the case was whether testimony of the value of vacant land is competent evidence to establish the value of land upon which there are improvements, but this question was not reached. *Id.*

91. The assessor's statutory duty is to value property in accordance with the Property Tax Code and regulations thereunder. *See* N.M. Stat. Ann. §§7-35-1 to -38-93 (1978). A landowner has the right to protest the valuation by the assessor. *See* N.M. Stat. Ann. §7-38-24 (1978). When the landowner does so, the authority to hear the protest is conferred by law on the County Valuation Protest Board. N.M. Stat. Ann. §7-38-25(D) (1978).

92. The statute allows the assessor to hold an informal conference "after setting a hearing on the protest but before the date of the hearing." N.M. Stat. Ann. §7-38-24(D) (1978). The regulation promulgated under that statute by the property tax division of the Taxation and Revenue Department recites the statutory language and provides for withdrawal of the protest

held during which protester and assessor agreed to a settlement. When the settlement was presented to the Board for approval, pursuant to regulation, the Board refused to accept it and mandated a protest hearing.[93] On appeal, the court concluded that "[n]either the regulation nor §7-38-25 authorize the Board to reject the assessor's agreement as to value."[94] The court found that the Board acted in excess of its authority, and reversed and remanded for entry of the stipulation.

In *Horn* the court focused on the authority of the Board with respect to the stipulation. In so doing, the court may have been led to the right result for the wrong reason. The court suggested that neither the law nor the regulation confers authority on the Board to reject the settlement when the regulation is reasonably subject to a contrary reading.[95]

Judge Sutin, in a concurring opinion, would have reached the same result by finding that the settlement agreement vitiates the initial protest, thereby depriving the Board of jurisdiction.[96] The case is

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if the protest is fully resolved with no reduction in the taxpayer's notice of valuation. The regulation then goes on to contemplate the reverse whereby the assessor rather than the taxpayer relents:

> If the protest is resolved with the assessor agreeing that the taxpayer's notice of valuation is incorrect, then this settlement must be implemented by presenting to the county valuation protests board a proposed order agreed to in writing by both the assessor and the protesting taxpayer and presenting to the board an explanation of the settlement.

Property Tax Dep't. Regulation 31-24(D):1. N.M. Tax. Rep. (CCH 1981) ¶25-730.

93. The board rejected the stipulation, ordered an evidentiary hearing, and in support of its ruling upholding the original valuation, concluded that the "stipulation placed an 'unreasonably low' value on the land on the basis of [a] comparable sales approach." 95 N.M. at 39, 618 P.2d at 383.

94. 95 N.M. at 40, 618 P.2d at 384.

95. The regulation expressly requires the presentation of the settlement and an explanation of the settlement to the Board. *See* note 92 *supra*. It is at least implicit in these two requirements that the Board has authority to consider the merits of the settlement and to reject it if the Board concludes that it fails to meet statutorily approved methods of valuation. Any other reading of the regulation would mean that the explicit requirements of the regulation have little or no meaning. If the Board has no power to consider and reject the stipulation, there is really no reason to require the proposed order and explanation to the Board.

96. Judge Sutin said: "An agreement having been made with the protestant, the protest ended and was no longer in existence. Without a protest, the Board lacked jurisdiction to hold a hearing." 95 N.M. at 40, 618 P.2d at 384 (Sutin, J., concurring). The lack of jurisdiction resolved the matter for Judge Sutin, but he felt constrained to discuss two additional issues raised by the appeal.

First, in support of his jurisdictional reading of the statute, Judge Sutin argued that any other result would create a conflicting and improper role for the assessor. Having agreed with protestant as to the valuation, he was required by the Board to abandon his own agreement and become the protestant's adversary. Borrowing from the ethical constraints placed on lawyers involved in the representation of clients in the adversarial system, Judge Sutin would have held that "it was his [the assessor's] duty as a public official to abide by the sanctity of the agreement." 95 N.M. at 41, 618 P.2d at 385.

Second, Judge Sutin would have struck down the regulation on void-for-vagueness grounds.

most clearly viewed in jurisdictional terms—whether the Board had the power to consider the case at all in light of the agreement. If, however, the Board did not have jurisdiction, then it seems that the regulation must fall on ultra vires grounds. The only fair reading of the regulation which would not render it meaningless would be one which views it as conferring review power on the Board. If the fact of a settlement renders review beyond the power (jurisdiction) conferred by statute, then the regulation must fall as an ultra vires act of the Department of Taxation and Revenue.[97]

In choosing not to follow the Sutin lack-of-jurisdiction approach, the court avoided striking down the regulation on ultra vires grounds.[98] In doing so, however, it failed to follow a coherent rationale. The opinion did not explain what purposes are served under a reading of the regulation which would preserve its validity,[99] although such an explanation should have been an important underpinning of the court's decision.

C. *Federal Authority in State Administered Federal Programs*

Last year's Survey outlined the principle of "cooperative federalism"[100] and explained how, in the administration of federally created programs, the authority of state administrators must ultimately be judged, under principles of federal supremacy,[101] by reference to

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Id. at 41-42, 618 P.2d at 385-386. For a discussion of the void-for-vagueness doctrine and its application to administrative regulations, *see* 1979-80 Administrative Law Survey, *supra* note 54, at 12-13.

97. *See* note 92 *supra.*

98. *See* note 96 *supra.*

99. Notice may be a purpose for the statute which would be consistent with the majority position. The mere placing of the stipulation and the explanation on the public record before the Board serves a valid purpose of insuring that the assessor's agreements with protesting property owners will not be hidden from public scrutiny. The court did not take that approach. The court conceded that its decision vitiated any check on assessor discretion which the regulation may have served, but relied on other official checks on the assessor's authority: "This does not mean that there is no check on stipulations by the assessor. The assessor is supervised by the property tax division, §7-35-3, and may be suspended for failure to comply with the Property Tax Code or regulations. . . ." 95 N.M. at 40, 618 P.2d at 384.

100. This term was first coined by the United States Supreme Court in King v. Smith, 392 U.S. 309 (1968) to describe the nature of federal-state programs. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 5-6. This year, in Katz. v. New Mexico Dep't. of Human Serv., 95 N.M. 530, 532, 624 P.2d 39, 41 (1981) the court described the nature of "cooperative federalism," with particular reference to the Model Assistance Program, better known as Medicaid:

> The New Mexico Medical Assistance Program is operated by the DHS [the Department of Human Services] as part of a joint federal-state program established by Title XIX of the Social Security Act. Compliance with the federal requirements is a condition to the receipt of federal funds. . . . [it is therefore required] that the DHS must operate the program consistent with the federal act.

101. Emanating from the supremacy clause, U.S. Const. art. VI, the doctrine mandates that state laws or regulations must fall to conflicting or pre-emptive federal law and regulations. *See, e.g.,* Lewis v. Martin, 397 U.S. 552 (1970).

the authority conferred by federal law and regulations.[102] In two companion welfare cases decided this year,[103] the court made explicit that while federal supremacy may require the invalidity of state administrative regulations for some purposes, it does not affect the validity of those state laws for other purposes. Another welfare case,[104] which upheld a state administrative practice against a federal challenge,[105] illustrates how a question of controlling federal law may, at times, come full circle to be decided by reference to state law, thereby reducing federal supremacy to a matter of state statutory authority.

Harper v. New Mexico Department of Human Services[106] and *Duran v. New Mexico Department of Human Services*[107] held invalid the Department's community property regulation, which conclusively presumed that one-half of a non-adoptive parent's income was available to meet the needs of his or her welfare-eligible stepchildren.[108] The *Harper* court stated the constitutional principle to be applied: "Under the supremacy clause of the United States Constitution, if federal regulations have preempted an area and there are conflicting state regulations, the federal regulations prevail."[109] The court found "a clear conflict between the state and federal regulations."[110] The court further found that the federal regulation "was intended to preempt state law and control the determination of

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102. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 5-7.

103. Harper v. New Mexico Dep't. of Human Serv., 95 N.M. 471, 623 P.2d 985 (1980); Duran v. New Mexico Dep't. of Human Serv., 95 N.M. 188, 619 P.2d 1232 (1980). For a further discussion of these cases, *see* Kelsey and Montoya, *Domestic Relations,* 12 N.M. L. Rev. 325 (1982).

104. Katz v. New Mexico Dep't. of Human Serv., 95 N.M. 530, 624 P.2d 39 (1981).

105. No specific state law or regulation was under attack in *Katz.* Rather the challenge was to an administrative practice of not reimbursing claims for chiropractic services under Medicaid. Another way of characterizing the challenge, however, is to say that the state regulations were being challenged on federal supremacy grounds for failure to include reimbursement for chiropractic services.

106. 95 N.M. 471, 623 P.2d 985 (1980).

107. 95 N.M. 188, 619 P.2d 1233 (1980).

108. New Mexico Dep't. of Human Serv. Manual §221.832(A)(1) (Rev. March 3, 1977). The holdings in *Harper* and *Duran,* merely followed the precedent of two earlier cases which dealt with the same subject. *See* Nolan v. C. de Baca, 603 F.2d 810 (10th Cir. 1979), *cert. denied,* 446 U.S. 956 (1980); Barela v. New Mexico Dep't. of Human Serv., 94 N.M. 288, 609 P.2d 1244 (Ct. App. 1979). *See generally,* 1979-80 Administrative Law Survey, *supra* note 54, at 5-7. The holdings in these cases have been superseded by a change in the controlling federal law. *See* note 116 *infra.*

109. 95 N.M. at 473, 623 P.2d at 987.

110. The then existing federal regulation, 45 C.F.R. §233.90(a) required a showing that the income is *actually available* to the children and if the "parent" is not legally obligated to support the children there must be "proof of actual contributions." . . . The state's regulations conclusively presume that the community income earned by the non-adoptive stepfather is available to the children, without a showing of actual contributions. *Id.*

AFDC benefits."[111] The court held the state regulation invalid "to the extent that . . . [it] create[s] a conclusive presumption that the non-adoptive stepfather's income is available to the children."[112]

The *Harper* court took great pains to reaffirm New Mexico's "long standing and constitutionally mandated commitment to the community property concept, that a spouse has a present and vested property interest in one-half of the community income, and that this income can be used to meet that spouse's obligations."[113] The court explained that it struck down the application of the regulation only because of its conflict with the controlling federal regulation.[114] As succinctly put in the companion *Duran* case: even "correctly stated community [property] law principles . . . could not be applied where the result conflicts with a controlling federal regulation."[115] Thus, even when state administrative regulations are accurately tailored to valid provisions of state law, if the application of those regulations would conflict with controlling federal law, the principle of federal supremacy requires that the state regulations give way.[116]

111. *Id.*

112. *Id.* at 471, 623 P.2d at 985. The court found that the conflict arose because of the conclusive nature of the regulation's presumption. The court expressly reserved the question of whether a rebuttable presumption—one that placed the burden of proving lack of "actual availability" on the recipient—would be inconsistent with the federal regulation. *Id.* at 473, 623 P.2d at 987.

113. *Id.* at 472, 623 P.2d at 986.

114. The unstated rationale, again rooted in principles of federalism, is that in enacting the federal program and conferring rule-making power on the federal agency, Congress also delegated the choice of regulatory means to that agency. So long as the regulatory choice is not inconsistent with the statutory mandate, it remains a question for the agency and must be upheld even if considered "illogical or unreasonable" in the face of state law. Federal supremacy in this instance dictates that the judgment of the federal agency must be accorded supremacy over the judgment of state lawmakers and administrators—at least with respect to the administration of the federal program. *See, e.g.*, Van Lare v. Hurley, 421 U.S. 338 (1975); Lewis v. Martin, 397 U.S. 552 (1970).

115. 95 N.M. at 189, 619 P.2d at 1233. This principle is, of course, not limited to the welfare context. Most recently the United States Supreme Court held that federal law governing military retirement benefits precludes state courts from dividing those benefits in divorce proceedings pursuant to state community property laws. McCarty v. McCarty, 101 S.Ct. 2728 (1981). *See* Kelsey and Montoya, *Domestic Relations,* 12 N.M. L. Rev. 325 (1982).

116. The principle is so fundamental to the administration of federal-state programs that the state statutes which implement those programs often specifically adopt the principle as a matter of state law as well. *See* N.M. Stat. Ann. §27-2-12 (1978). As both *Harper* and *Duran* seek to make clear, the particular requirement cannot invalidate the state law in general. The requirement can only preclude the application of the particular state regulation when that application conflicts with controlling federal law.

The court in both *Harper* and *Duran* was careful to reaffirm the general community property law principles upon which the offending state regulation was premised. 95 N.M. at 473, 623 P.2d at 987; 95 N.M. at 189, 619 P.2d at 1233. The logic of *Harper* would clearly allow the application of community property principles in the attribution of step-parent income if the federal regulation had been permissive rather than mandatory. The federal statute on this subject has now been changed to *require* the attribution of some amount of step-parent income to the non-adopted welfare-eligible stepchildren. *See* 42 U.S.C. §602(a)(31) (Supp. 1981).

In *Katz v. New Mexico Department of Human Services,*[117] the court considered a challenge to the state administrative denial of Medicaid benefits for chiropractic services. Petitioner challenged the denial, in part, on the theory that chiropractic services fell within the category of "physician services" mandated by the federal act as one of the five basic services to be provided by each state.[118] The court rejected this argument on two grounds. First, it read the provision of federal law as having "explicitly excluded chiropractors."[119] Second, it read the implementing federal regulation, which referred back to the definition of the practice of medicine contained in state law,[120] to exclude chiropractic practices.[121] On the basis of both reasons the court concluded "that chiropractors' services are not physicians' services under the Medicaid program."[122]

Katz, therefore, brings full circle the matter of state administrative compliance with federal program directives. The state administrator must act in conformity with the authority conferred by federal law. Where the federal authority conferred is defined by reference to state law, however, the question of conformity with federal law can again become a question of state law, not unlike a traditional state law ultra vires question.[123]

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117. 95 N.M. 530, 624 P.2d 39 (1981). For a discussion of the ultra vires aspect of *Katz, see* text accompanying notes 73-78 *supra.*

118. "Participating states are required to provide financial assistance to qualified individuals in five general categories of medical services: inpatient hospital services; outpatient hospital services; other laboratory and X-ray services; skilled nursing facility services, specified screening services and family planning services; and physicians' services. 42 U.S.C. Section 1396(a)(13)(B), 1396d(a)(1)-(5)." 95 N.M. at 532, 624 P.2d at 41.

119. *Id.* The court pointed to the fact that "Physician's Services" as used in the section listing the five required categories, is "limited to those services furnished by a physician," and that "physician" is elsewhere defined as "a doctor of medicine or osteopathy . . ." *Id.* The court therefore relied on the lack of any specific mention of chiropractors in the definition of physician to exclude these services for coverage. Such an exclusion seems more implicit than explicit.

120. The applicable federal regulation defined physician's services as those provided "[w]ithin the scope of practice of medicine or osteopathy as defined by State law. . . ." *Id.* (*quoting* 42 C.F.R. §440.50(a) (1979)).

121. Here the court found a clear and explicit section of the state statute which excluded chiropractic from the definition of the practice of medicine. *See* N.M. Stat. Ann. §61-6-16 (1978).

122. 95 N.M. at 532, 624 P.2d at 41.

123. There are, in reality, two ways to perceive the matter. When the controlling federal law refers back to state law definitions, it could be viewed as an incorporation by reference of state law. Under this analysis, the state law, for purposes of the federal program, has become engrafted upon and therefore, is part of, the federal law which controls. On the other hand, such a federally mandated practice recognizes the potential for different results in different states. The law represents, therefore, a federal deference to state policy choices. In that sense, reference to state law returns the matter to what is authorized by state law. Under this approach, inconsistency of the administrative regulation with the federal law is measured by reference to state law, thereby coloring the matter with traditional ultra vires considerations.

Federalism principles add additional dimensions to traditional questions of agency authority in the context of federal state programs. First, federal supremacy adds a higher level of statutory authority against which state administrative actions must be measured. *Harper* and *Duran* make it clear, however, that the federal scheme controls only the federal program involved and leaves state law principles intact for other non-federal program purposes. Second, as illustrated in *Katz,* if federal provisions incorporate by reference state standards or definitions, the question of federal authority again becomes a consideration of the authority conferred by state law.

II. THE EXERCISE OF ADMINISTRATIVE AUTHORITY

A. Rules and Rule-Making

Rule-making is one of the two basic functions of administrative agencies.[124] The promulgation of rules and regulations is a legislative-like function by which the agency lays down substantive requirements, which are general in nature and prospective in application.[125] This year there were two cases of particular interest in the area of rule-making.[126] Perhaps more important, there were statutory changes during the 1981 legislative session which will have a significant impact on the rule-making practices of several state agencies.[127]

1. The Cases.

In *State v. Joyce*[128] the Court was confronted with the question of what steps beyond actual promulgation[129] a state agency must take

124. The other basic function of administrative agencies is the application of agency rules and regulations to particular parties which come before the agency. This adjudicatory function is discussed in the immediately following subsection. *See* text accompanying notes 196-237 *infra.*

125. For a general discussion of rule-making as distinguished from adjudication, and the consequences which flow from each, *see* W. Gellhorn, *supra* note 27, at 147-210. *See also,* 1979-80 Administrative Law Survey, *supra* note 54 at 11.

126. State *ex rel.* Edwards v. City of Clovis, 94 N.M. 136, 607 P.2d 1154 (1980); State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980).

127. *See* N.M. Stat. Ann. §9-8-6 (Supp. 1981) (rule-making by the Department of Human Services); N.M. Stat. Ann. §§61-1-29, 30, 32 and 33 (Repl. Pamp. 1981) (rule-making by the Professional Licensing Boards); N.M. Stat. Ann. §60-4B-5 (Repl. Pamp. 1981) (rule-making by the Dept. of Alcoholic Beverage Control).

128. 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980).

129. In any challenge to agency rule-making, the initial question is often whether the agency followed proper procedures in the promulgation of the challenged rule or regulation. *See* Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (Ct. App. 1979). *See generally,* K. Davis, Administrative Law Text 137 (3d ed. 1972).

Procedural requirements may vary from agency to agency. *Compare* N.M. Stat. Ann. §9-1-6 (1978) (cabinet department rule-making requires notice and public hearing unless otherwise

to give force and effect to its regulations. The case arose when Joyce was charged with criminal trespass[130] for seeking to occupy space to sell his wares under the portal of the Palace of the Governors in Santa Fe in violation of a written policy of the Museum of New Mexico.[131] Defendant was convicted. On appeal,[132] he challenged the validity of the written policy on the ground that the Museum had failed to file it with the state records center as required by the State Rules Act.[133]

The court reversed the conviction and ordered the defendant discharged, holding that the Museum's failure to file the policy with the state records center as required by the State Rules Act rendered the policy unenforceable for lack of "compliance with a State procedural requirement."[134] In so holding, the court cursorily rejected arguments that the policy was not a rule, within the meaning of the Act,[135] and that because the policy predated the statute, its en-

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provided by law), *and* N.M. Stat. Ann. §9-8-6 (Supp. 1981) (Department of Human Services may promulgate interim rules without hearing), *with* N.M. Stat. Ann. §12-8-4 (1978) (State Administrative Procedures Act requires only notice and comment). No matter what the particular procedural requirements imposed by law, failure to follow those requirements in promulgating a regulation renders the regulation invalid. *See id.* §12-8-22(A)(3) (1978). *See generally,* K. Davis, Administrative Law of the Seventies, §6.01-4 at 182 (1976).

130. *See* N.M. Stat. Ann. §30-20-13(c) (1978).

131. The written policy of the Board of Regents of the Museum of New Mexico reserved the area of the portal in front of the Palace of the Governors exclusively for Indian merchants selling genuine handmade Indian arts and crafts. Defendant Joyce, a non-Indian, was informed of the policy and when he refused to leave the area, he was arrested. 94 N.M. at 619-620, 614 P.2d at 31-32.

The Museum policy had previously withstood a federal constitutional claim that it discriminated against non-Indians. *See* Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978), *aff'd,* 601 F.2d 1110 (10th Cir. 1979), *cert. denied,* 444 U.S. 870 (1979). The *Joyce* court made clear that "substantive lawfulness" did not dispel "the necessity of procedural compliance" with state law. 94 N.M. at 621, 614 P.2d at 33.

132. The procedural claim here discussed was made for the first time on appeal. When the case reached the appellate court, however, for the first time, the defendant successfully moved for summary dismissal of his own appeal without prejudice. He then moved for a new trial in the trial court on the procedural claim. On the subsequent appeal, the court deemed the point to have been preserved by the motion for new trial and also considered it to be a "question of fundamental error" which could be raised at any time. *Id.*

133. N.M. Stat. Ann. §§14-4-1 to -9 (1978). Defendant claimed that if the policy was unenforceable for failure to comply with the requirements of the Rules Act, violation of the policy could not validly form the basis for a criminal trespass charge.

134. 94 N.M. at 621, 614 P.2d at 33.

135. The court stated that: "The state's argument that the policy established by the Board of Regents is not a "rule" within the meaning of the Act is frivolous. It is without question that the statement of policy by the Board of Regents was a 'rule.' " *Id.* at 620, 614 P.2d at 32.

The court could have explained this portion of its ruling by reference to its detailed discussion of the broad definitional scope of the Rules Act in Bokum Resources Corp. v. New Mexico Water Quality Comm'n, 93 N.M. 546, 603 P.2d 285 (1979). *See* 1979-80 Administrative Law Survey, *supra* note 54 at 11-12.

forceability was grandfathered under the current Rules Act.[136]

More difficult for the court was the fact that defendant Joyce had actual notice of the content of the policy prior to his arrest. The court agreed "that the purpose of the State Rules Act is to provide notice and that the defendant did have actual notice,"[137] but rejected the actual notice exception argument of the State by resort to a rule of construction. The court reasoned that the current law excluded an actual notice exception contained in the prior law. "We must assume that the legislature understood the effect and significance of the amendment."[138] If, however, the purpose of the Act is to provide notice, and the defendant had actual notice, it is hard to see why the Act should be read to protect him.[139] The court must have found some other purpose in the law. The court must have read the Rules Act to have some prophylatic value, requiring strict adherence to its provisions even with respect to those individuals who do not need its protection. This reading of the Act is justified by the societal value in ensuring that *all* state policies, rules and regulations are collected in one repository open and available to the public.[140] An actual notice

136. The court refused to imply a grandfather clause: "Any argument that there is a 'grandfather clause' is without merit, since no such clause exists in the State Rules Act. The fact that the policy was of ancient lineage does not exempt it from the State Rules Act." 94 N.M. at 620, 614 P.2d at 32. In these few cryptic words the court seems to have resolved a significant issue: All state agency rules and regulations, whenever they may have been passed, are subject to the current State Rules Act, and, if not filed in compliance therewith, are invalid and unenforceable. *See* N.M. Stat. Ann. § 14-4-5 (1978). *Joyce* indicates to the litigant challenging any state agency regulation that the first avenue of inquiry (after a determination of whether it was validly promulgated) ought to be whether the regulation was properly filed under the State Records Act.

The *Joyce* court was careful to couch the issue in terms of the enforceability of the policy as distinguished from the validity of its promulgation. The court could have reached the same result by considering the Rules Act filing requirement as part of the promulgation process. Under the court's analysis, the policy need not be re-enacted by the Museum Board. The regulation will be enforceable once it is filed in accordance with the Act.

137. 94 N.M. at 620, 614 P.2d at 33.

138. *Id.*

139. Federal administrative filing requirements provide an exception for cases in which the party has actual notice, *See* 5 U.S.C. § 552(a)(1) (1976). The federal law also includes a publication requirement, and if there were not actual notice exception, the federal government would be hamstrung by the printing delay in the Federal Register system when emergency regulations are required. *See e.g.,* 44 Fed. Reg. 33,389 (1979) (emergency regulation grounding all DC-10 aircraft after Chicago crash given effect without publication but on actual notice to airlines).

This problem might arise at the state level, but could be easily cured. The need for enforceable emergency state regulations may at some time be hampered by the inability to file the regulation, but nothing in the State Rules Act precludes the opening of the records center for the filing of emergency regulations in the middle of the night or on weekends.

140. A policy which encourages the central filing of every state agency "rule, regulation, order, standard [and] statement of policy," N.M. Stat. Ann. § 14-4-2(C) (1978), is an important first step toward the efficient reporting of governmental rule-making. Publication and codification of those rules in some systematic and generally available format are the next essential steps. *See* 5 U.S.C. § 552 (1976 & Supp. III 1979).

exception would allow agencies to undermine that value so long as they are willing to run the risk of being unable to enforce their rules against individuals who do not have actual notice.

State ex rel. Edwards v. City of Clovis[141] also involved the application of a state law principle collateral to the rule-making process. In *Edwards* the appellant sought a writ of mandamus in the district court to compel the city to enforce its swine ordinance which precluded the keeping of swine within 300 feet of a residence.[142] The lower court denied the writ because it deemed the keeping of the swine at issue in the case to be a legally protected "nonconforming use."[143] On appeal the court rejected that position,[144] and held that the writ requiring the city to enforce its ordinance[145] should issue.

The court also decided that the amendment to the swine ordinance[146]—allowing the keeping of swine close to residences in petitioner's neighborhood[147] and passed by the Clovis City Council *after* the initiation of the action[148]—could not constitutionally be applied

141. 94 N.M. 136, 607 P.2d 1154 (1980). This case was decided at the end of the last survey year. It is treated here because it merits treatment and was overlooked last year.

142. There was some confusion concerning the history of swine regulations by the City of Clovis, but the supreme court determined that at all times pertinent to the lawsuit, the keeping of swine near residences had always been prohibited. 94 N.M. at 138, 607 P.2d at 1156.

143. A nonconforming use is a lawful use existing on the effective date of the new zoning ordinance, but which does not conform to the new ordinance. *See* Ferris v. Las Vegas, 620 P.2d 864 (Nev. 1980). Such use is constitutionally protected and will be permitted to continue notwithstanding contrary provisions of the new ordinance. *See* Dolomite Products v. Kipers, 42 Misc. 2d 11, 247 N.Y.S.2d 396 (Sup. Ct. 1964).

144. *See* note 142 *supra*. The court's conclusion that the swine were never "lawfully" kept under any prior city ordinances allowed the court to reject the argument that it was inequitable to permit petitioner, a latecomer to the neighborhood, to complain of the preexisting land use. *See* 94 N.M. at 138-39, 607 P.2d at 1156-57.

145. *Id.* at 139, 607 P.2d at 1157. The court also concluded that mandamus was proper because the city had a clear ministerial (nondiscretionary) duty to enforce its own ordinance which is "subject to enforcement by mandamus." *Id. See generally,* DuMars and Browde, *Mandamus in New Mexico,* 4 N.M. L. Rev. 177-84 (1974) (hereinafter cited as *Mandamus in New Mexico*).

146. The court indicated that the passage of the amendment to the ordinance was irrelevant to the trial court's decision. 94 N.M. at 138, 607 P.2d at 1156. Reversal was compelled by the supreme court's disagreement with the district court over the early status of swine regulation within the City. *See* note 142 *supra*. Although not necessary to the decision, the applicability of the amended ordinance had been raised on appeal. Resolution of the question allowed the court to *order* the lower court to afford relief to plaintiff, rather than merely remanding the case. *See* 94 N.M. at 139, 607 P.2d at 1157.

147. The ordinance in effect at the time the case was filed precluded the keeping of swine within the corporate limits of the city, except in the "J zone" (the stockyards area of the city). In the "J zone" swine were permitted, but not within 300 feet of any residence. The new ordinance lifted the 300-foot limitation in the "J zone." *See* 94 N.M. at 138, 607 P.2d at 1156.

148. The new ordinance (No. 1120-79) had been proposed two months after the filing of the suit, and was adopted by the City Commission one day prior to the entry of the district court order. *See* 94 N.M. at 137, 607 P.2d at 1155.

to petitioner's case.[149] The court applied art. 4, §34 of the New Mexico Constitution, which provides that: "No act of the legislature shall effect the right or remedy of either party . . . in any pending case."[150] The court's application of §34 to the facts of this case clearly extended the language of the provision. The language of the constitutional provision applies on its face only to an "act of the legislature." *Edwards,* however, *sub silentio* extends its application to the rule-making function of any governmental body.[151]

A second difficulty arises in the application of §34 to the particular facts of *Edwards.* The court's decision may make sense with respect to normal, retrospective adjudication.[152] *Edwards,* however,

149. The court stated:

> [I]t is our opinion that a City cannot, by enacting an ordinance, affect or change what would be the result of a pending action before the City Council or Commission or the result of a pending case in court, based upon valid ordinances existing at the time of the application or suit. N.M. Const., Art. IV §§24 and 34. . . . Article IV, §34 of the New Mexico Constitution prohibits the application of any such newly enacted legislation or ordinance so as to affect the outcome of a pending action.

94 N.M. at 138, 607 P.2d at 1156.

150. The full provision reads: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." N.M. Const., art. 4, §34. *Edwards* deals only with the first clause of the provision. The case does not apply to the amendment of procedural or evidentiary rules. *See* Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969). Nor is there any doubt that this was a "pending case" within the meaning of the Constitution, although the New Mexico Supreme Court has held that the filing of a complaint does not necessarily create a "pending case." Rutherford v. Buhler, 89 N.M. 594, 555 P.2d 715 (Ct. App. 1976), *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976).

The *Edwards* court also cited art. 4, §24, the constitutional prohibition against special legislation, as authority for its conclusion that the amended ordinance could not be enforced. Under an alternative analysis, §24 could have disposed of the case. Section 24 could have been cited to say that allowing the keeping of swine near residences only in the J zone was accomplishing something by special legislation which could have been accomplished through general legislation. *See e.g.,* Keiderling v. Sanchez, 91 N.M. 198, 572 P.2d 545 (1977); Vigil v. State, 56 N.M. 411, 244 P.2d 1110 (1952). Had the court followed that line of reasoning, the amendment to the ordinance would have been declared void, obviating the §34 question of whether it could be applied to the pending case. *See e.g.,* Keiderling v. Sanchez, 91 N.M. 198, 572 P.2d 545 (1977); Lucero v. New Mexico State Highway Dept., 55 N.M. 157, 228 P.2d 945 (1951).

151. Perhaps a distinction could be made between the City Commission's acting in a "legislative" capacity as distinguished from its acting in a rule-making "administrative" capacity. The logic of the court's extension of art. 4, §34 to the former, however, certainly compels the same result in the latter circumstance as well.

152. Clearly, art. 4, §34 seeks to ensure that substantive law and rules of procedure which are to apply must remain fixed for purposes of "pending" cases, and therefore judgment should be rendered in accordance with those fixed principles. In actions for damages based on some statutory entitlement, the result could not, consistent with art. 4, §34, be altered by a change in the statutory entitlement during a pendency of the case.

This provision of the Constitution applies only to legislative acts. The provision does not come into play when the change in right or remedy is occasioned by judicial rather than legislative action. The court has discretion concerning the applicability of those changes. *Compare* Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975) (abolished doctrine of sovereign immunity prospectively) *with* Scott v. Rizzo, 20 N.M. St. B. Bull. 77 (March 12, 1981), (adopted the doctrine of comparative negligence with "compromise retroactivity").

concerned a prospective ruling. The result of the court's decision is that swine may not be kept within 300 feet of petitioner's residence. The new legislation however, would have allowed them. Under *Edwards* this particular petitioner could keep swine from his door, but other similarly situated residents of his neighborhood could not. The result of this "pending" adjudication, therefore, has been to require the prospective readjustment of a legal relationship in a way which is not in accordance with existing law.[153] Such a precedent could be used to avoid following agency rules. In other cases involving prospective rulings, *Edwards* can provide authority to exempt parties from following newly promulgated rules. Under *Edwards,* art. IV, § 34 of the Constitution could be used to hold litigating parties immune from the amendment of laws or rules which are changed during litigation concerning those laws or rules. This result is far broader than the purpose of the constitutional provision.[154] It would

153. In *Edwards* the result of the supreme court order was that the lower court issued the writ, and the city, pursuant to that writ, enforced its *prior ordinance* against swine-keeping neighbors of the petitioners. Conversation with Richard N. Snell, attorney for Petitioners, on October 1, 1981. This result obtained despite the fact that other residents in the "J zone" can, under the presently effective ordinance, keep swine within 300 feet of residences. The question is now whether another close neighbor of the petitioners could, under the new ordinance, keep new swine within 300 feet of petitioners. It is at least petitioner's view that § 34, as applied to this case, means that no one can keep swine within 300 feet of petitioner's residence. In effect, pendency of the case at the time of the change in the ordinance would, under his argument, grant him immunity from the application of the new ordinance.

Perhaps, the answer should lie in a N.M. R. Civ. P. 60(b)(5) motion for relief from judgment on the ground that "it is no longer equitable that the judgment should have prospective application."

154. The purpose of art. 4, § 34 was to preserve the integrity of the adjudicative process so that litigants may be confident that the dispute resolution process of the court will not be externally tampered with during the process of the case.

> This provision of the Constitution was inserted for the purpose of curing a well-known method, too often used in the days when New Mexico was under a territorial form of government, to win cases in the courts by legislation which changed the rules of evidence and procedure in cases which were then being adjudicated by the various courts of the state.

Stockard v. Hamilton, 25 N.M. 240, 245, 180 P.2d 294, 295 (1919). To the extent that the ultimate result of the *Edwards* case was to control prospective activities of a swine-keeping resident in the J zone, in a manner inconsistent with the new ordinance, the application of § 34 seems more an encroachment on legislative rule-making than the intended check on legislative encroachment on adjudications.

This constitutional provision also serves to insure that the legislature performs its essential function of enacting generally applicable prospective rules of law and prevents it from seeking to impact specific, retrospective adjudications. In that sense this provision of the Constitution is an operational correlative to the separation of powers provisions contained in art. 3, § 1.

The federal Constitution creates no such legislative power limitation. With respect to federal law, the Supreme Court has indicated a preference for the application of newly enacted statutes to pending cases except where to do so would infringe upon a vested or unconditional right. *See* Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974): "a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.

One New Mexico federal case decided just last year demonstrates the contrast between the

undermine the rule-making function, and undercut principles of fair administration of the laws.[155]

Joyce and *Edwards* both demonstrate that collateral considerations can significantly affect the rule-making process. An agency seeking to create legally enforceable rules must, according to *Joyce,* pay close attention not only to its internal rule-making procedure, but must also assiduously follow the dictates of the State Rules Act. *Edwards* makes clear that when litigation is pending which may amend an existing rule or regulation, an agency may have difficulty enforcing the actual rule.

2. Statutory Changes

During the Survey year the legislature passed a series of amendments to the Uniform Licensing Act.[156] Most of those changes affected the adjudicative provisions of the Act,[157] and will be discussed in the next section of this article. Some changes were also made on the rule-making side. The first of the rule-making changes requires greater agency attention to the rule-making process.[158] The second adds a new method of initiating agency rule-making.[159] The third allows for the promulgation of declaratory rulings.[160] Although these alterations to existing law may ultimately lead to meaningful change, each represents only a tentative step. As with most tentative process changes, much will depend on implementation and how far the affected agencies[161] choose to go.

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federal and state approaches to changes in the law during litigation. In State *ex rel.* New Mexico State Highway Dep't. v. Goldschmidt, 629 F.2d 665 (10th Cir. 1980), the district court granted relief against the Secretary of Transportation, ordering him to allocate previously withheld federal highway funds. The court of appeals held that a subsequent act of Congress rendered the challenge moot, as the appellate court review "must be in the light of the law as it now stands, not as it stood when the judgment below was entered." *Id.* at 667. The opposite rule would obtain in New Mexico state court under principles of state law as articulated in *Edwards.*

155. The end result in *Edwards* seems to create a troublesome example of the unequal application of the laws, which does little to enhance respect for the process of the law.

156. *See* N.M. Stat. Ann. §§61-1-1 to -33 (Repl. Pamp. 1981).

157. *See* text accompanying notes 221-237 *infra.*

158. *See* N.M. Stat. Ann. §61-1-29 (Repl. Pamp. 1981).

159. *See id.* §61-1-32.

160. *See id.* §61-1-33. A fourth rule-making change relates to the promulgation of emergency regulations. The amendment to §61-1-30 allows an emergency regulation to remain effective beyond the previous 45-day limit *if* the agency begins the process of permanent adoption prior to the expiration of that period. In that event, the emergency regulation may remain effective until "a permanent regulation takes effect or until the procedures are otherwise completed," but the emergency regulation may not "remain in effect for more than one hundred twenty days." *Id.*

161. The Uniform Licensing Act applies to a number of independent boards, *see* N.M. Stat. Ann. §61-1-2 (Repl. Pamp. 1981). The application of the statutory changes, however, could differ significantly from board to board. Uniform legal counsel from the Office of the Attorney General may mitigate against conflicting procedures, but some deviations are bound to occur.

The rule-making amendments to the Licensing Act make explicit what was only implicit in the prior law,[162] that all of the procedures which touch upon rule-making in the Act,[163] apply to all "proceedings by a board to adopt, amend or repeal rules or regulations . . . ."[164] The amendments require that, in addition to public notice of rule-making by publication, boards must "make reasonable efforts to give notice of any rule-making proceedings to licensees and to members of the public."[165]

The statutory purpose of encouraging additional notice to licensees is clear.[166] The "reasonable efforts" language, however, adds some confusion. Due process arguably requires reasonable notice of rule-making to affected individuals.[167] Furthermore, because prior law provided for notice by publication, it was clearly the position of

162. The old statute explicitly required only notice of the time, place, and subject of the hearing, with a reasonable opportunity for "interested persons to submit their views." N.M. Stat. Ann. §61-1-29 (1978).

163. N.M. Stat. Ann. §§61-1-29 to -31 (Repl. Pamp. 1981).

164. *Id.* §61-1-29. The rule-making procedures are not applicable to internal policies, declaratory rulings, rulings made in the context of disciplinary adjudications, and attorney general opinions. *Id.* §61-1-29(A)(1) - (4). The third category—rulings made in the course of disciplinary proceedings—presents potential problems for future litigants. Under this exception to formal rule-making procedures, a board may be able to make a ruling in the context of a particular case and then apply that ruling in subsequent proceedings against other licensees. The effect of such a practice would be the formulation of rules without following the formal rule-making requirements. There is, of course, some safeguard in the fact that a subsequent licensee can relitigate the question in the context of his hearing, but the problem points out the almost inevitable confluence of rule-making and adjudication in some contexts. *See e.g.,* W. Gellhorn, *supra* note 27, at 147-210. *See generally,* Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking,* 1980 Duke L. J. 103; Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court,* 1978 Sup. Ct. Rev. 345.

The better approach when rulings or interpretations of general applicability arise in the context of adjudications, would be for the agency to make its ruling for purposes of the particular case, and then set the matter for formal rule-making pursuant to §61-1-29. Some further problems may result if the subsequently adopted rule differs from the adjudicatory ruling. In that event, the licensee in the original adjudication may be aggrieved at having had a different rule applied against him. In the context of the prior adjudication, however, the licensee would have had the right of judicial review as a check against an erroneous ruling. *See e.g.,* Pharmaceutical Manufacturers Association v. New Mexico Board of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974) (agency interpretation will be overturned only if clearly erroneous). *See generally,* 1979-80 Administrative Law Survey, *supra* note 54, at 23-25.

165. N.M. Stat. Ann. §61-1-29(C) (Repl. Pamp. 1981).

166. "The board shall make reasonable efforts to give notice of any rule-making proceedings to its licensees and to the members of the public." N.M. Stat. Ann. §61-1-29(C) (Repl. Pamp. 1981).

167. Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974); *cert. denied,* 922 U.S. 1026; Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973). *But see,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). *See generally,* Comment, *Due Process in FTC Rulemaking,* 1979 Ariz. St. L. J. 543.

As a matter of policy, notice and comment should always be required as a precondition to rule-making. Attorney General's Report on Administrative Procedures 101-02 (1941).

the state before the 1981 amendments, that notice by publication met the "reasonable" due process standard. The 1981 amendments mandate publication as a minimum,[168] and in so doing suggest that more may be necessary with respect to some individuals. By leaving any additional notice to the discretion of the respective boards, however, the legislature may have opened the door for litigation concerning the adequacy of notice. Under the new law if an agency does nothing more than publish its rule-making notice, it is now subject to question whether its failure to specifically notify a licensee was "reasonable" within the meaning of the Act.[169]

The second of the rule-making amendments allows "[a]ny interested person"[170] to initiate rule-making consideration by a board. This provision is in harmony with the growing sentiment that agency processes should be open to citizen input.[171] The provision is premised on the theory that those being regulated, as well as those being protected by the regulation, may meaningfully inform regulatory decisions by licensing boards. This section provides only a small step in the direction of citizen input in the decision to conduct rule-making. Favorable action on the petition results in a full-blown rule-making proceeding, but unfavorable action only requires a statement of reasons, and "[t]he denial of such a request is not subject to judicial review."[172]

The result of the citizen petition provision is to open the agency door to public ideas about subjects for rule-making. By allowing unreviewable agency discretion on the matter of whether or not the agency must proceed,[173] however, the law encroaches very little on past practice. If the decision is unreviewable, the requirement of "a

168. "The notice of the public hearing shall include but not necessarily be limited to publishing the notice in a newspaper of general circulation in the state. . . ." N.M. Stat. Ann. §61-1-29(C) (Repl. Pamp. 1981).

169. This problem may not arise if all licensees request notice, because the statute requires notice "to all persons who have made a written request to the board for advance notice." *Id.*

170. The "interested person" provision would most likely be given a liberal interpretation by reference to the "[a]ny person who is or may be affected" standard contained in the judicial review provision of the Act. *See* N.M. Stat. Ann. §61-1-31 (Repl. Pamp. 1981). *See generally,* Utton, *Through a Glass Darkly: The Law of Standing to Challenge Governmental Action in New Mexico (or) All You Wanted to Know About Standing But Were Afraid to Ask,* 2 N.M. L. Rev. 171 (1972).

171. *See e.g.,* 21 U.S.C. §371(e)(B) (1976) (F.D.A. citizens petition procedure). *See generally,* Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability,* 7 Pepperdine L. Rev. 553 (1980); Chambers, *Increasing Citizen Participation in Administrative Proceedings: Can Federal Financing Bridge the Costs Barrier?,* 30 Case West Res. L. Rev. 33 (1979).

172. N.M. Stat. Ann. §61-1-32 (Repl. Pamp. 1981).

173. *See* text accompanying note 172 *supra.*

concise written statement of its reasons for denial of the request"[174] is a hollow requirement.[175]

The 1981 amendments also add a provision allowing for declaratory rulings by the board to provide licensees guidance in the conduct of their affairs. This provision may avoid the problem of licensees' acting at their own peril with respect to questionable conduct.[176] The declaratory ruling must be in writing and it must concern the applicability of a law or rule "to a particular set of facts."[177] The statute is oddly unclear on whether the declaratory rulings will have precedential effect in later cases,[178] and, if they will have precedential effect, how potential litigants are to gain access to the rulings in a systematic way which would facilitate their use.[179] These rulings are not formally reported, and so are not practically accessible. The language of the new provision suggests that *board-initiated* declaratory rulings are of general precedential effect, but does not answer the question of whether rulings initiated by licensees are binding on later licensees. The language could be read to imply that while the board is forever bound by its declaratory rulings, declaratory rulings initiated by a licensee cannot be given precedential effect as against another licensee.

The rule-making changes in the Uniform Licensing Act may be tentative steps in the direction of a more formal and yet a more accessible rule-making process. More formalized rule-making is the inexorable result of growing societal complexity. As the rule-making

174. N.M. Stat. Ann. §61-1-32 (Repl. Pamp. 1981).

175. It may be possible to obtain judicial review by attacking the adequacy of the statement. If a citzen's petition for a new rule is not granted, and a writing is issued by the agency which, in the citizen's opinion, does not fulfill the statutory requirement of a "statement," he may sue to compel a statement which meets the requirement of the law. The writing might be inadequate because it fails to state reasons for rejecting the rule, or because the reasons it states are improper or illegal. In either case, the board's reasons could be reviewed by a court under its extraordinary writ power, opening the door to potential review of the merits of the reasons given.

176. Solving this problem may create others. For example, if good faith was ever of use as a defense to a statutory charge or as a defense to the imposition of a sanction after the finding of a violation, this section may obviate that defense, at least where the licensee failed to seek a declaratory ruling. The existence of the declaratory ruling procedure makes it difficult for a licensee to assert that he was in good faith when he engaged in questionable conduct. He could have cured any questions by going to the board for a ruling.

177. N.M. Stat. Ann. §61-1-33 (Repl. Pamp. 1981).

178. The procedure is available to licensees, *id.* §61-1-33(A) and "[t]he board may also issue declaratory rulings on its own motion." *Id.* §61-1-33(B). The provision then goes on to say that the effect of such rulings "shall be limited to the board and to the licensee, *if any*, who requested the declaratory ruling." *Id.* §61-1-33(C) (emphasis added). This could be read to mean that where the licensee requests the ruling, it is only binding on the board with respect to that licensee, which would then undermine its utility.

179. If the board is to be bound in future cases, then it is absolutely essential that access to the rulings be made available to future litigants so that the applicability or non-applicability of the prior rulings can be made the basis for argument.

processes become more formalized, alternate avenues for public input become more important. Because rule-making can take place in the context of adjudications, mechanisms for open rulings become essential to sound policy-setting actions. The boards must accept their new responsibilities and seek to make the new mechanisms work, recognizing that the benefits to them may be better processes, and better rules.

The 1981 legislature also altered the rule-making power of the Department of Human Services. Under prior law the Department could only promulgate rules and regulations after a public hearing.[180] The 1981 amendment retained the bulk of that law,[181] but added a subsection which allows the Secretary, under certain limited circumstances, to promulgate interim regulations without a hearing.

The interim regulation provision can only be used in the event that there is a need for the promulgation of a regulation because of "a cancellation, reduction or suspension of federal funds or order by a court of complete jurisdiction. . . ."[182] When this happens, the Secretary may resort to an interim regulation, but only if "he is notified by appropriate federal officials or court less than sixty days prior to the effective date" of the federal agency or court action.[183] The interim regulation procedure requires: 1) "written notice twenty days in advance [of promulgation] to . . . providers . . . and beneficiaries of department programs," and 2) notice of formal

180. N.M. Stat. Ann. §9-8-6(E) (1978). This statutorily imposed rule-making procedure was similar to that imposed on all of the departments, which under state governmental reorganization were headed by members of the Governor's cabinet. *See id.* §9-2-5(E) (Commerce and Industry Dept.); *Id.* §9-3-5(E) (Corrections Dept.); *Id.* §9-5-6(E) (Energy and Minerals Dept.); *Id.* §9-6-5(E) (Dept. of Finance and Admin.); *Id.* §9-7-6(F) (Health and Environment Dept.); *Id.* §9-10-5(E) (Natural Resources Dept.); *Id.* §9-11-6(E) (Taxation and Revenue Dept.); *Id.* §9-12-5(E) (Transportation Dept.).

Public hearings may be the exception rather than the rule in traditional rule-making. *See* 5 U.S.C. §553(c) (1976). Prior to state government reorganization, however, the cabinet departments were headed by policy-setting public boards. These boards held that rule-making power and the adoption of rules and regulations could only be done at a public meeting. *See e.g.*, 1953 N.M. Laws ch. 39. When, under reorganization, the policy-setting role was transferred to the Department Secretaries and the public boards were abolished, the public hearing rule-making requirement was added as a means of maintaining some level of face-to-face public input into official decision-making.

181. The normal rule-making process for cabinet departments requires thirty days' prior notice by publication, which includes the time, place, and subject matter of the hearing, and a public hearing at which interested persons may make their views known. *See e.g.*, N.M. Stat. Ann. §9-8-6(E) (1978).

182. N.M. Stat. Ann. §9-8-6(F) (Supp. 1981). Prior to this amendment the department had no power to promulgate emergency regulations. After this change, its emergency power is limited only to loss of federal funds on short notice, while the other state cabinet departments continue to operate without the power to promulgate any emergency regulations.

183. N.M. Stat. Ann. §9-8-6(F)(2) (Supp. 1981).

rule-making on the final regulations at the time of promulgation of the interim regulation.[184]

The cabinet departments may need authority to promulgate emergency rules and regulations under certain limited circumstances.[185] This issue surfaced, however, in only one department, when a seeming emergency arose over the potential loss of federal funds. The procedure may be inappropriate to that kind of "emergency." Cutbacks inevitably come either with sufficient notice to proceed with normal rule-making, or with a federally authorized grace-period. The language used in the amendment makes it clear that the legislature intended the interim regulation power to be narrowly circumscribed. Only the most exigent of circumstances can justify the failure to conduct deliberative rule-making under statutorily mandated public hearing procedures. The safeguards normally built into federal cut-backs mean that they will rarely amount to an emergency. If future inroads are made into normal rule-making it can only be hoped that it will be for true emergencies concerning health and safety, rather than for unfounded concerns about the protection of the state fisc.[186]

Finally, some rule-making changes were made in the new Liquor

184. *Id.* While the law seems to require a two-stage process—notice followed by promulgation—the Department, in its first use of the statute capsulated the process into one step by promulgating regulations which were to take effect after the expiration of twenty days. *See* 4 N.M. Human Services Register No. 70 (August 28, 1981) (Interim Regulation on Gross Income Eligibility for food stamps).

185. Emergency conditions involving the health and safety of citizens are the most appropriate uses for emergency regulatory authority. Under the federal APA, circumscribed emergency authority is conferred on administrative agencies. *See* 5 U.S.C. §553(d) (1976). There is a greater state legislative concern, however, that the granting of emergency powers to agencies will lead to agency abuse and the circumvention of normal process of rule-making. *See* 1 F. Cooper, State Administrative Law 200–03 (1965).

186. The October 1981 federal cut-backs in public assistance which occasioned the first use of the interim regulation procedure is a case in point. The federal legislation mandating the cutbacks effective October 1, 1981 was enacted into law on August 13, 1981. The federal notice to the states was therefore received less than 60 days prior to the effective date, allowing the Secretary of Human Services to use the interim regulation provision. However, the federal act also contained an escape clause for states which could not comply by October 1, 1981:

> If a State agency . . . demonstrates, . . . that it cannot, by reason of State law, comply with the requirements of an amendment made by this chapter . . . [by October 1, 1981] the Secretary may prescribe that, in the case of such State, the amendment will become effective beginning with the first month beginning after the close of the first session of such State's legislature ending on or after October 1, 1981.

Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357 at 860 (August 13, 1981).

Thus, the use of interim regulation procedure was unnecessary. Furthermore, it may have done harm, in that federal funds were cut off sooner than they would have been if the federal escape clause had been used. Had there been no interim regulation provision, the state could have proceeded more deliberately under normal rule-making, at no cost to the state, and under circumstances which would have preserved for a time the flow of additional federal funds to needy state recipients.

Control Act.[187] The new statute altered the rule-making power of the director of the Department of Alcoholic Beverage Control (ABC). The statute established a commission responsible for agency policy,[188] and specifically required commission review and approval of all rules and regulations.[189] The statute further provided that the ABC must hold public hearings before regulations are finally promulgated.[190] Under the new law, the promulgation of ABC regulations is a four-stage process: 1) issuance of a proposed regulation by filing in the office of the director sixty days in advance of a public hearing;[191] 2) the holding of a public hearing;[192] 3) review and approval of the regulation by the commission and the Attorney General;[193] and 4) filing as required by law.[194] These steps appear more cumbersome than those placed on other departments.[195] The added complexity, however, necessarily flows from a system where responsibility for the promulgation of regulations is split between the department director and a board or commission.

B. Adjudication

Adjudication is the second of the two basic functions of administrative agencies.[196] The adjudicative function is often referred to as "quasi-judicial"[197] and has been described as one which "investi-

187. N.M. Stat. Ann. §§ 60-3A-1 to 60-8A-19 (Repl. Pamp. 1981).

188. *Id.* § 60-4C-3.

189. *Id.* § 60-4B-5(C) and 60-4C-3(B).

190. N.M. Stat. Ann. § 60-4B-5(D) (Repl. Pamp. 1981).

191. *Id.*

192. Section 60-4B-5(D) also requires distribution of the proposed regulation "to interested persons" together with an invitation for comments. The statute does not define interested persons and does not specify a specific method of notice. *Compare* N.M. Stat. Ann. § 61-1-29(C) (Repl. Pamp. 1981) requiring reasonable notice of licensing board rule-making to be given to "licensees and to members of the public").

193. This approval must be indicated on the face of the regulation. N.M. Stat. Ann. § 60-4B-5(C) (Repl. Pamp. 1981).

194. This final requirement of the law incorporates filing in accordance with the State Rules Act into the promulgation procedure of the Department. *See* State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980), and text accompanying notes 128–140 *supra.*

The statute does not make clear whether the commission *must* approve a proposed regulation, and, if it does, whether it must reconsider the regulation if any changes result from the hearing process. Perhaps the best way to assure that the statute is followed and the commission's essential role is preserved is to involve the commission at both stages. Certainly it is hard to argue against a policy-setting board's being closely involved in the process of rule-making when that process leads to the carrying out of its essential policy-making role.

195. *See* text accompanying notes 180 & 181 *supra.*

196. *See* note 125 *supra.*

197. The "quasi-judicial" label was arrived at as a means of avoiding what would otherwise be deemed the unconstitutional conferring of judicial power on an executive agency in violation of separation of powers. *See* B. Schwartz, Administrative Law § 11 at 32 (1976). *But see,* State v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957). Similarly, the rule-making function of administrative agencies has been deemed "quasi-legislative" to avoid the limitations of the non-delegation doctrine. *See* B. Schwartz, *supra,* § 25 at 59 and § 56 at 148.

gates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . .''[198] The distinction between adjudication and rule-making is a definitional one which has significant impact.[199] The distinction controls the nature of the notice and hearing requirements which must precede agency action,[200] the nature of the decision-making process which must be used[201] and the principal responsibilities for supervision over agency action.[202]

Many, if not most, administrative cases which reach the appellate courts arise in the adjudicative context, and yet little is said in them about the nature and scope of the adjudicative function. This Survey year was no exception in that regard, although one important case involved the notice requirement in licensing adjudications. In addition, there were some significant changes in the Uniform Licensing Act which governs adjudications in the professional licensing area.[203]

198. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908) (Holmes, J.).

199. *See* 1979-80 Administrative Law Survey, *supra* note 54 at 11.

200. There are clear due process problems which surround hearing questions in the context of adjudication. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 297 U.S. 254 (1970); McCoy v. New Mexico Real Estate Comm'n., 94 N.M. 602, 614 P.2d 14 (1980). Due process does not require a hearing in the rule-making process. *See* B. Schwartz, *supra* note 197 at § 55 at 143-44.

201. Rule-making hearings tend to be informal and investigative in nature, while adjudicatory hearings are more formal and require more trial-like safeguards. *See* B. Schwartz, *supra* note 197 at § 55 at 143-44.

202. Agency rule-making is generally supervised by the legislature in that the legislature has ultimate control over substantive rules by its power to amend the statutory authority under which the rules are promulgated. *See generally,* W. Gellhorn, *supra* note 27 at 103-26. Some jurisdictions have toyed with the notion of a direct legislative veto of administrative agency rules. *See* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981) (statute which vests power to veto administrative regulations in a legislative committee violates separation of powers); Opinion of the Justices, 431 A.2d 783 (N.H. 1981) (statute granting veto power over administrative regulations to legislative committee an unlawful delegation of legislative power). *But see,* Wis. Stat. 13.56(1) (1980-81) (statute providing for legislative veto by whole legislature). Adjudications, by contrast, are generally supervised by courts in appellate review, using a sufficient evidence standard.

203. Also during the last session of the legislature, the powers and duties of the Oil Conservation Commission were amended in ways which affected the adjudicative process within that agency. First, the 1981 amendments limit appellate rights from initial hearing examiner decision. *See* §§ 70-2-25(B), and 71-5-19(B). In support of that change the new statute removes the preponderance of the evidence test, and limits the exercise of district court power. The district court may now only affirm or vacate the commission order. *Id.*

Second, and most important, the 1981 amendments maintain de novo review of hearing examiner decisions by the commission, but strike the de novo language in the judicial review section, transforming district court review to a review on the record developed before the commission. *See id.* at §§ 70-2-25(B), and 71-5-19(B). In support of that change the new statute removes the preponderance of the evidence test, and limits the exercise of district court power. The district court may now only affirm or vacate the commission order. *Id.*

The effect of these amendments is to enhance commission power by limiting appeals to the parties of record before the commission. The amendments also limit appellate rights so that

1. The Cases

In *McCoy v. New Mexico Real Estate Comm'n,*[204] the court dealt at some length with the nature and extent of the notice required in classic administrative adjudication. The Commission had revoked McCoy's real estate broker's license for one year based on her convictions for conspiracy to import marijuana.[205] The Notice of Contemplated Action charged her with violating the Real Estate Brokers and Salesmen Act. This Act allows revocation based on a felony conviction "which is related to dealings as a real estate broker or a real estate salesman."[206] McCoy argued that this Act could not apply, because the felony was not in the course of her dealings as a broker. On appeal to the district court, the Commission successfully argued that, regardless of the validity of its decision under its governing statute, the action should be affirmed on the basis of the Criminal Offender Employment Act.[207] The latter Act permits, under certain circumstances, the revocation of a license for a felony conviction unrelated to the regulated business.[208] On appeal to the supreme court the Commission conceded that it revoked the license

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persons who might be aggrieved by actions of the agency must now become parties *of record* as a precondition to any appeal.

The new Liquor Control Act enacted during the 1981 Legislative Session made a number of minor changes in its adjudicative processes. *See e.g.,* N.M. Stat. Ann. §60- 6C-3 (Repl. Pamp. 1981) (change in hearing officer disqualification language); *id.* §60-6C-4 (eliminates language stating hearing officer need not make findings of fact); *id.* §60-6C-6 (eliminates language specifically denominating specific law rulings district court should make).

One adjudicative provision of the new law which may have substantial effect authorizes the director to suspend a license when he finds: 1) probable cause to believe "deliberate and willfull" violation of the Act or regulations has occurred, *or* 2) "that the public health, safety or welfare requires emergency action." N.M. Stat. Ann. §60-6C-7 (Repl. Pamp. 1981). Apparently, the legislature is more willing to provide emergency adjudicatory power than it is to grant comparable emergency rule-making power. *See* text accompanying notes 180–186 *supra.*

204. 94 N.M. 602, 614 P.2d 14 (1980). *See* Schowers, *Constitutional Law,* 12 N.M. L. Rev. 191 (1982) for a substantive review of this case.

205. The court stated: "[T]he only evidence taken concerned McCoy's entry of a plea of nolo contendere to the felony charge and whether this constituted grounds for revocation. . . . The Commission concluded that it did. . . ." *Id.* at 602-03, 614 P.2d at 14-15.

206. N.M. Stat. Ann. §61-29-12(F) (Repl. Pamp. 1979).

207. N.M. Stat. Ann. §§28-2-1 to -6 (1978) (hereinafter the COEA). The trial court was apparently convinced by the argument. The appellate court noted that the trial court's order affirming the decision "included a reference to the applicability of the COEA despite the facts that the Commission's decision had not been based on the COEA, that McCoy had not been given notice or a hearing on its relevance to her case, and that the court's decision made no pretense of complying with . . . [the COEA]." 94 N.M. at 603, 614 P.2d at 15.

208. Under the COEA an agency may revoke the license of someone engaged in a regulated trade or business for a felony "not directly relate[d]" to the trade or business, but *only* if the ". . . agency determines, after investigation, that the person so convicted has not been sufficiently rehabilitated to warrant the public trust," N.M. Stat. Ann. §28-2-4(A)(2) (1978). Upon such finding the agency "shall explicitly state in writing" the reasons for a decision which prohibits the licensee from engaging in business. *Id.* §28-2-4(B). Neither of these requirements was complied with in *McCoy.*

under the wrong statute,[209] but claimed that the charge under the wrong statute was not prejudicial and therefore its action should be affirmed.

The supreme court reversed the trial court's affirmance of the Commission, holding that the Commission failed to follow the procedures required by the Criminal Offender Employment Act,[210] and that the failure was prejudicial error.[211] In addition, the court held that the action of the Commission "fail[ed] to conform to the fundamental requirements of due process."[212]

The due process violation stemmed from the fact that a legally protected right—maintenance of one's professional license—was implicated by the adjudication.[213] The first tenet of procedural due process mandates the assurance of adequate notice and opportunity to be heard before such a right or interest is governmentally deprived.[214]

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209. 94 N.M. at 603, 614 P.2d at 15.

210. Under the COEA the Commission would have had to have held a hearing on whether McCoy "had been rehabilitated," and an adverse decision would have had to have been explained in writing. *See* note 208, *supra*.

211. The court correctly concluded that sufficient prejudice is found in the fact that had a proper hearing been held "[i]t is possible that McCoy could have demonstrated sufficient rehabilitation to warrant her retention of her broker's license." 94 N.M. at 603, 614 P.2d at 15.

212. *Id.*

213. McCoy's license is a legally protected property interest. *See e.g.*, Bell v. Burson, 402 U.S. 535 (1971); *In re* Ruffalo, 390 U.S. 544 (1968). Deprivation of a license because of past criminal conduct which may affect one's fitness for a position of "public trust," *see* N.M. Stat. Ann. §28-2-4(A)(2) (1978), also implicates a constitutionally protected "liberty" interest. *See* Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957); Mack v. Florida State Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *See also*, Board of Educ. of Alamogordo v. Bryant, 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980), *rev'd. on other grounds sub nom*, State Board of Educ. v. Board of Educ. of Alamogordo, 95 N.M. 588, 624 P.2d 530 (1981) (tenured teacher has legally protected property and liberty rights).

In ruling on the due process point the court relied on Matter of Guardianship of Arnall, 94 N.M. 306, 610 P.2d 193 (1980) a case begun as a custody dispute and transformed into a termination of parental rights proceeding without adequate notice to the parent involved. McCoy's interest in her license, is, by way of *Arnall*, afforded the same protection as a mother's interest in her parental status.

214. "Embodied in the term 'procedural due process' is reasonable notice and opportunity to be heard and present any claim or defense." 94 N.M. at 604, 614 P.2d at 16. In *McCoy* no notice was given at all because the COEA was not even suggested as a basis for revocation until the appeal to district court.

In another case decided this term an appellant claimed lack of "adequate" notice to allow for the preparation and presentation of her case. Katz v. New Mexico Dep't. of Human Servs., 95 N.M. 530, 624 P.2d 39 (1981). *Katz* is discussed in other contexts at text accompanying notes 73-78, and notes 117-123 *supra*. The court in Katz brushed aside the claim, finding that "Katz has had adequate opportunity to present her case for financial assistance," 95 N.M. at 535, 624 P.2d at 44. The case illustrates that procedural due process includes both notice and adequacy of the notice, and that both are critical in the context of being able to prepare and present a claim or defense. In *Katz* the issue was the adequacy of notice, while in *McCoy* the procedure was so defective as to afford virtually no notice of the charge, thereby foreclosing any defense.

McCoy makes it clear that in the adjudicative context an adequate opportunity to be heard can be had only where agency charges are made under the appropriate statute. When an agency is in doubt about the application of more than one statute, charges under all relevant statutes should be brought. It is *not* appropriate for an agency to recognize its error and then seek to sustain a charge brought under one statute by reference to another which was never at issue in the beginning. That kind of agency conduct ought always be dealt with harshly by our courts, and *McCoy* serves as a model for such strong judicial action.

Notice problems also arise when a statutory scheme requires a claimant to take certain steps to protect his or her statutory rights in the context of an adjudication. Where an agency fails in its duty to give notice to the claimant of the required steps, the claimant will not be penalized for that failure.[215] This principle was illustrated, during the survey year, in a case involving a personnel dispute.

In *Hernandez v. Home Education Livelihood Program, Inc.*,[216] the plaintiff sued a private non-profit corporation for damages resulting from her discharge from employment. The district court granted summary judgment to the defendant because the plaintiff had not exhausted her remedies. She had failed to seek a reconsideration of the decision as required by the applicable personnel manual.[217] The court of appeals reversed, concluding that "[p]laintiff did not avail herself of any of the grievance or appeal procedures because she was not notified of her rights. The fault lies with H.E.L.P., not plaintiff."[218]

The district court may have improperly characterized the matter as requiring the exhaustion of administrative remedies.[219] The court of appeals, however, focused on the threshold matter of notice. The lack of notice in *Hernandez* foreclosed the exhaustion defense just as certainly as the lack of notice in *McCoy* established the due process claim. The concept of "notice" underlies the exhaustion doctrine as certainly as it does due process.[220]

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215. *See* Hillman v. Health and Social Servs. Dep't., 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979), discussed in 1979-80 Administrative Law Survey, *supra* note 54 at 14-15.

216. 95 N.M. 281, 620 P.2d 1306 (Ct. App. 1980).

217. The personnel manual specifically provided that a notification of an adverse personnel action "will contain all particulars of the adverse action, including the rights of the employee to request reconsideration and the right to submit evidence in support of the request." H.E.L.P. Grievance Appeals Procedure § XIXB(2). The termination letter did not comply with this provision. 95 N.M. at 282, 620 P.2d at 1307.

218. *Id.*

219. *See* text accompanying notes 473-76 *infra*.

220. The comparison of these cases illustrates that due process and exhaustion may represent two sides of the same coin. Lack of notice defeated an exhaustion defense in *Hernandez*.

2. The Statutes

Several amendments to the Uniform Licensing Act will affect the adjudicative process in professional licensing and disciplinary proceedings. These amendments relate to the hearing requirement. The amendments concern when a hearing is required,[221] how the hearing mechanism is initiated,[222] and post-hearing considerations prior to full judicial review.[223] None of these changes alter adjudicatory hearings in any fundamental way. They do, however, address various practical problems which had arisen under the old law.

The first change removes a limitation on hearing rights which existed in the prior law. The old statute expressly excluded applicants for reinstatement from the definitions of "licensee or applicants for a license" who must be afforded notice and an opportunity for a hearing prior to board action.[224] By removing this limitation, the Act requires a hearing in reinstatement cases as well as in cases of denials, suspensions, and revocations. This amendment removes what was a major element of unfairness[225] under modern equal protection[226] and due process[227] principles.

The 1981 Licensing Act Amendments alter the method of initiating hearings in certain circumstances. The new law imposes for the first time a statute of limitations on the bringing of disciplinary proceedings.[228] This assures that the licensing board will not be troubled

221. N.M. Stat. Ann. §61-1-3 (Repl. Pamp. 1981) (hearings now required in applications for reinstatement).

222. N.M. Stat. Ann. §§61-1-3.1, 4 & 5 (Repl. Pamp. 1981) (providing a statute of limitations, new service rules and additional notice requirements).

223. N.M. Stat. Ann. §61-1-19 (Repl. Pamp. 1981) (requiring notice to the Board of judicial applications for stays pending appeal).

224. Every licensee or applicant for a license, *except applicants for reinstatement after revocation,* shall be afforded notice and an opportunity to be heard. . . ." N.M. Stat. Ann. §61-1-3 (1978).

225. It is hard to fathom how a board could function equitably, if, after having revoked a license from someone, after a hearing it need not afford a hearing to the same person as an applicant for reinstatement. Certainly the subjective, post-revocation considerations are equally susceptible to the truth-testing mechanism of an adjudicatory hearing as the facts and circumstances giving rise to the revocation in the first instance. *See* McCoy v. New Mexico Real Estate Comm'n, 94 N.M. 602, 614 P.2d 14 (1980) (license revocation based upon Criminal Offender Employment Act requires hearing on sufficiency of rehabilitation).

226. If an initial applicant is afforded hearing rights when denied a license, N.M. Stat. Ann. §61-1-3(B) (Repl. Pamp. 1981), it is hard to see a rational basis for denying a reinstatement hearing to one who has had his license revoked on similar grounds. The two are in a sufficiently similar situation to invoke an equal protection analysis.

227. Similarly, if the initial applicant has a legally protected property or liberty interest in the denial of a license, *see* note 213 *supra,* then an applicant who has suffered a revocation ought to be similarly protected by due process.

228. The two-year statute of limitations does not apply to initial licensing proceedings, but only to actions by the board which suspend or revoke a license. *See* N.M. Stat. Ann. §61-1-3.1 (Repl. Pamp. 1981).

with stale claims, which are often hard to investigate and difficult to prove.[229]

The amendments change the nature of providing notice of contemplated agency action.[230] The rather quaint notion of "giv[ing] to the applicant [or licensee] a written notice . . . ,"[231] which implies in-hand service, gives way in the amendments, to the modern notion of service of process.[232] This provision insures that disciplinary action cannot be avoided by a licensee who can successfully dodge in-hand service.[233]

Finally, the amendments to the 1981 Licensing Act mandate the use of the Rules of Civil Procedure motion practice when a licensee seeks a judicial stay of a board order.[234] This has the effect of requiring notice to the administrative agency concerned. The provision seeks to assure fair notice to the board of any judicial action, although avenues may still remain whereby ex parte stays are available.[235] To assure a balanced and fair approach, the courts would do well to strengthen the new provision by affording it exclusivity of

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229. The limitation reads "no action . . . may be initiated by a board later than two years after the conduct which would be the basis of the action." *Id.* §61-1-3.1(A). It is tolled by any civil or criminal action "arising from substantially the same facts, conduct, [or] transaction. . . ." *Id.* §61-1-3.1(B).

The statute of limitation does not preclude board action with respect to continuing violations which began more than two years prior to board action. It is unclear, however, whether evidence of conduct which took place more than two years prior to the initiation can be used for any purpose.

230. In addition, the amended notice provision requires that the board, in response to a request for a hearing "shall . . . notify the licensee or applicant of . . . the name or names of the person or persons who shall conduct the hearing . . . ," N.M. Stat. Ann. §61-1-4(D) (Repl. Pamp. 1981). This requirement expedites appropriate disqualifications. *See* text accompanying notes 284-295 *infra*.

231. N.M. Stat. Ann. §61-1-4 (1978).

232. The new statute reads: "When a board contemplates taking any action . . . it shall serve upon the applicant, [or licensee] a written notice." N.M. Stat. Ann. §§61-1-4(A) and (B) (Repl. Pamp. 1981). N.M. Stat. Ann. §61-1-5 (Repl. Pamp. 1981), however, requires that service be made either in person "in the same manner as is provided for service by the Rules of Civil Procedure . . ." or "by certified mail."

233. The service by certified mail provision places a burden on the applicant or licensee to keep the board apprised of his current address if he wishes to receive actual notice. Even if the board serves by way of certified mail, and the receipt is returned showing non-delivery, there may be due process problems if the board overlooked some other readily available means of effectuating actual notice. *Cf.* City of Albuquerque v. Juarez, 93 N.M. 188, 598 P.2d 650 (Ct. App. 1979); *see* 1979-80 Administrative Law Survey *supra* note 53 at 18-19. Also, the personal service provision of the Rules of Civil Procedure includes means other than in-hand service. *See* N.M. R. Civ. P. 4(e).

234. *See* N.M. Stat. Ann. §61-1-19 (Repl. Pamp. 1981).

235. An alternate writ of mandamus, which is obtainable ex parte while setting the petition for hearing on the entry of a preemptory writ, could also stay the board order pending the hearing. *See Mandamus in New Mexico, supra* note 145 at 161-62.

remedy status when litigants seek to avoid notice to the board by use of extraordinary remedies.[236]

The provisions of the 1981 Licensing Act Amendments which affect the right of applicants and licensees to adjudicatory hearings,[237] represent small adjustments which seek to close loopholes for unfairness and abuse in the prior law. They may add more formality to the process, but added formality which serves to ensure fairer proceedings is always to be applauded.

C. *The Process of Proof*

Last year's survey touched upon "the process by which information is assembled to form the record upon which a final administrative decision must rest."[238] This year in one major case, the court of appeals grappled rather unsuccessfully with this question in the context of the burden of proof.[239] In another significant opinion the supreme court reaffirmed its requirement that in certain kinds of adjudicatory hearings, the proof required will be measured by standards of legal admissibility.[240] In a third case the court ignored strong policy considerations to the contrary and permitted the consideration of evidence of illegal conduct to support the granting of a license.[241]

In *Duke City Lumber Co. v. New Mexico Environmental Improvement Board,*[242] the court considered the evidence necessary to support the granting of a variance from air quality control regulations. The applicable statute allows the granting of a variance when two things are found. It must be shown that the imposed limitation would "result in an arbitrary and unreasonable taking of property or will impose an undue economic burden . . . *and* . . . the granting of the variance will not result in a condition injurious to health and safety."[243] On appeal the court was faced with the suffi-

236. To the extent that N.M. Stat. Ann. §61-1-19 (Repl. Pamp. 1981) can be read as a statute allowing for a stay pending appeal, it may provide an adequate remedy at law which would preclude the granting of an extraordinary writ. *See Mandamus in New Mexico, supra* note 145 at 173-77.

237. Other provisions of the amendments affect the process of proof at the hearing, *see* note 267 *infra,* and the process of decision-making itself. *See* text accompanying notes 284-296 *infra.*

238. 1979-80 Administrative Law Survey, *supra* note 54 at 13.

239. Duke City Lumber Co. v. N.M. Environmental Improv. Bd., 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), *cert. denied,* 95 N.M. 426, 622 P.2d 1046 (1981).

240. Trujillo v. Employment Security Comm'n., 94 N.M. 343, 610 P.2d 747 (1980).

241. Greyhound Lines, Inc. v. New Mexico State Corp. Comm'n, 94 N.M. 496, 612 P.2d 1307 (1980).

242. 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), *cert. denied,* 95 N.M. 426, 622 P.2d 1046 (1981).

243. N.M. Stat. Ann. §74-2-8(A) (Repl. Pamp. 1981) (emphasis added).

ciency of the evidence on both prongs of the statutory standard because the Board had denied the variance on the vague and general ground that "the hearing record does not support the variance petition."[244]

With respect to the first element of the statutory test—arbitrary and unreasonable taking or undue economic burden—the court easily concluded that the applicant had met its evidentiary burden. The court found that the company had made a prima facie showing of undue economic burden sufficient to meet its initial burden of going forward,[245] thereby shifting the burden to the Board.[246] Thus, when the court concluded that the Board's rebuttal evidence on that point consisted of "surmise and conjecture" the court was able to conclude that the Board's evidence was insufficient to "rebut appellant's showing of undue economic burden."[247]

The second prong of the statutory standard—proof that granting the variance would not injure health or safety—was more difficult for the court. First, the court concluded that the factors of amount of smoke and percentage of opacity, taken alone, could not establish danger to health and safety.[248] Second, the court examined the proof of the absence of danger to health and safety. The court acknowledged that in negative averment situations it is sufficient for the proponent to introduce evidence which renders the existence of the negative probable in the absence of proof to the contrary.[249] Also, the court noted that where the other party has special knowledge " 'the burden rests on the latter to produce such evidence. If the expert party fails to produce affirmative evidence, the negative will be presumed to have been established.' "[250] Rather than working through this analysis to reach a reasoned conclusion, however, the court left these principles dangling and merely remanded the case to the Board

244. 95 N.M. at 402, 622 P.2d at 710. The board also grounded its denial on community objections to emissions from the Espanola sawmill, and because the record showed "that other alternatives are available." *Id.* Under the statutory standard, it is hard to see how either of these grounds were relevant considerations.

245. An applicant for a variance has the burden of proving an entitlement to the variance. N.M. Stat. Ann. §74-2-8(D) (Repl. Pamp. 1981); *see* International Min. & Chem. Corp. v. New Mexico Public Serv. Comm'n., 81 N.M. 280, 466 P.2d 557 (1970).

246. 95 N.M. at 402-03, 622 P.2d at 710-11, citing with approval Willingham v. Secretary of HEW, 377 F. Supp. 1254 (S.D. Fla. 1974). *See* Ambrose v. Wheatly, 321 F. Supp. 1220 (D. Del. 1971); Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

247. 95 N.M. at 405, 622 P.2d at 713.

248. The court stated: "Smoke, in a given situation, may be composed of elements which at a given density or opacity may be 'injurious to health or safety' but something more than the percentage of opacity must be shown." *Id.* at 406, 622 P.2d at 714.

249. *Id.* at 405, 622 P.2d at 713.

250. *Id.* at 405-06, 622 P.2d at 713-14, quoting Allstate Finance Corp. v. Zimmerman, 330 F.2d 740 (5th Cir. 1964).

"to determine whether the wood smoke . . . is injurious to health and safety."[251]

The court's lack of reasoning confused an already difficult area of the law[252] in three important respects. First, the opinion is unclear where the burden on the negative averment really lies, thereby providing little guidance to the Board on remand. Second, if the court meant to say, as its opinion suggests, that the burden is on the Board, then its result was inconsistent with its conclusion. If the burden is on the Board to establish that granting the variance will result in injury to health and safety, then its failure to meet that burden should, according to authorities cited by the court, presume the establishment of the negative—i.e., that the granting of the variance would *not* endanger health and safety.[253] This conclusion, coupled with the court's conclusion that economic burden was established, logically should have led the court to reverse the denial of the variance and order the Board to grant the variance, rather than to remand for further fact-finding.

Finally, there is no indication why burden-shifting ought to take place in the context of this case merely because the health and safety issue happens to be a negative averment. The court fails to explain why, in the context of this case, the Board "has particular knowledge or control of the evidence" such that the burden of proof ought to shift. It is just as likely that in the context of this case, the company, which has special knowledge of emissions of its plant, and at least equal access to general data about the Española air quality, ought to retain the traditional burden of proof of any proponent seeking a variance.[254]

It may be that proper regard for the role of the court in reviewing

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251. 95 N.M. at 407, 622 P.2d at 715. Judge Sutin dissented, claiming that "the order of the Board should be reversed and vacated because it was not rendered in accordance with law." *Id.* His opinion would be more appropriately labeled a concurrence, because the majority reached the same result, albeit on a question of substantial evidence rather than an error of law. Judge Sutin questioned the authority of the Board, the process used by the Board, as well as the sufficiency of its findings. His opinion also reiterates the familiar Sutin lament over the inapplicability of the state APA:

> [u]ntil the legislature makes the [Administrative Procedures] Act applicable to every agency, the conduct of state agencies will continue to be . . . an affront to persons, firms and corporations subjected to the whim and caprice of those who administer . . . [them]."

Id. at 410, 622 P.2d 718 (Sutin, J., dissenting). *See e.g.,* Hawthorne v. Dir. of the Revenue Div., 94 N.M. 480, 485, 612 P.2d 710, 715 (Ct. App. 1980) (Sutin, J., dissenting); J. W. Jones Construction Co. v. Revenue Division, 94 N.M. 39, 45, 607 P.2d 126, 132 (Ct. App. 1979) (Sutin, J., concurring); Pharmaceutical Manufacturers Ass'n. v. New Mexico Board of Pharmacy, 86 N.M. 571, 578, 525 P.2d 931, 938 (Ct. App. 1974) (Sutin, J., dissenting).

252. *See generally,* Jones on Evidence §178 (1972).

253. *See* 95 N.M. at 405-06, 622 P.2d at 713-14.

254. *See generally,* B. Schwartz, *supra* note 197 at §121; 1 K. Davis, Administrative Law Treatise, at §6.15 (1958).

an agency decision warranted the remand in this case. The applicable appellate review statute gives the court express power only to "set aside" the denial of a variance.[255] This statute arguably precludes the court from taking on the task of making the complex variance decision delegated by the legislature to the Board.[256] In remanding the case, however, the court seemed at odds with the logical consequences of its own analysis.

In *Trujillo v. Employment Security Commission*[257] the supreme court also considered an evidentiary question in the context of an adjudicatory hearing. *Trujillo* involved the denial of unemployment compensation benefits[258] on grounds of emloyee misconduct. The only evidence to support the charge was hearsay testimony which was controverted by appellant.[259] Confronted with the issue of whether such evidence was sufficient to support the charge of misconduct, the court reversed the denial of benefits holding that "controverted hearsay under these facts does not qualify as substantial evidence."[260]

The *Trujillo* court applied the legal residuum rule to reverse the denial of benefits. The rule requires that an administrative finding must be set aside under the substantial evidence test if it is not supported by "at least a residuum of evidence competent under the exclusory rules."[261] The court acknowledged that the rule is of questionable validity in many circumstances,[262] but it expressly retained

255. N.M. Stat. Ann. §74-2-9 (1978).

256. *Cf.* Singleterry v. City of Albuquerque, 20 N.M. St. B. Bull. 453, 632 P.2d 345 (1981); Coe v. City of Albuquerque, 76 N.M. 771, 418 P.2d 545 (1966) (reviewing court may not substitute its judgment for that of the zoning authority).

The judicial review authority in §74-2-9 provides the best rationale for the court's decision. Had such a route been taken and coupled with clear direction to the board on how to handle the negative averment burdens, *Duke City Lumber* could have become a model of the appropriate tension between the court and agency—the former deferring to the latter on substantive decisions while affording guidance on how the law is to be applied and by what processes.

257. 94 N.M. 343, 610 P.2d 747 (1980).

258. The benefits were granted initially but the Employment Security Commission (ESC) Appeals Tribunal reversed the award. The district court affirmed the tribunal and *Trujillo* appealed from that court decision. *Id.*

259. The charge of misconduct for which benefits were denied was that "Trujillo conspired to align members of an advisory council against his Superior. . . ." *Id.* at 344, 610 P.2d at 748. The only evidence on the charge was the supervisor's testimony of what members of the council had told him. *Id.*

260. *Id.*

261. Young v. Board of Pharmacy, 81 N.M. 5, 8, 462 P.2d 139, 142 (1969). *See* K. Davis, Administrative Law Treatise §14.10 (1958). *See also,* 1979-80 Administrative Law Survey, *supra* note 54, at 29-30, n. 200.

262. The court acknowledged Professor Davis' criticism that rigid application of the residuum rule undercuts administrative flexibility, and that rejection of the rule would not preclude the use of the substantial evidence test to overturn findings not supported by reliable evidence. 94 N.M. at 344, 610 P.2d at 748, quoting K. Davis, Administrative Law Treatise §14.10 (1958). *See also,* Utton, *The Use of the Substantial Evidence Rule To Review Administrative Findings of Fact in New Mexico,* 10 N.M. L. Rev. 103, 109-17 (1979-80).

the rule as the law in New Mexico "in those administrative proceedings where a substantial right, such as one's ability to earn a livelihood, is at stake."[263] In retaining the rule, *Trujillo* seems to require more than a mere residuum of evidence to support the verdict.

The decision is significant on several levels. First, while affirming the validity of the legal residuum rule in certain circumstances, it implicitly rejects it in others. Second, in one stroke the court establishes both workmen's compensation benefits and "one's ability to earn a livelihood" as "substantial right[s] as a matter of [the] public policy" of the state of New Mexico.[264] Finally, for those circumstances where "substantial rights" are involved, *Trujillo* transforms the rule from a "residuum" rule to one of requiring as much "substantial evidence as would support a verdict in a court of law."[265]

Trujillo reemphasizes that in adjudicatory hearings involving the potential deprivation of rights and entitlements, administrative informality and flexibility must give way to the more structured and formal configurations normally associated with courtroom trials. When limited to those circumstances where important personal rights are involved, the added formality and structure properly serves to insure that more attention is paid to the protection of those important rights. Added formality, however, has negative implications for bodies such as professional licensing boards which are comprised of lay persons unfamiliar with the law. Additional trial-like elements which require rulings on complex issues of law make administrative adjudication increasingly more difficult for lay-person adjudicators.[266] The *Trujillo* ruling and the new provisions of the Licensing Act,[267] are only two examples of this trend. The trend may result in a need for state administrative law judges[268] to handle at least those trial-like adjudications involving the potential depriva-

263. 94 N.M. at 344, 610 P.2d at 748.

264. *Id.* Such a conclusion necessitates that the full panoply of due process rights must be afforded to individuals threatened with state-sanctioned termination. *See e.g.,* Mackey v. Montrym, 443 U.S. 1, 10 (1978); Codd v. Velger, 429 U.S. 624, 627-28 (1977).

265. 94 N.M. at 344, 610 P.2d at 748, quoting Young v. Board of Pharmacy, 81 N.M. 5, 9, 462 P.2d 139, 142 (1969).

266. For example, *Trujillo* requires that lay person hearing officers make decisions about whether certain evidence is legally admissible under the Rules of Evidence.

267. The Licensing Act allows for the taking of depositions in accordance with the Rules of Civil Procedure, N.M. Stat. Ann. §61-1-8 (Repl. Pamp. 1981), and, in addition to the requirement of making complex evidentiary rulings, *see id.* §§61-1-9 & 11, the board or hearing officer now has power to impose "appropriate evidentiary sanction[s]," *id.* §§61-1-9(C), not unlike a trial judge's power under N.M. R. Civ. P. 37.

268. Liquor Control Act violations have for many years been heard by private attorneys appointed independently of the department. That same procedure has been retained in the 1981 Act. *See* N.M. Stat. Ann. §60-6C-3 (Repl. Pamp. 1981).

tion of important state created rights and entitlements. Such a development would have some advantages.[269]

In *Greyhound Lines, Inc. v. New Mexico State Corporation Commission,*[270] the court was confronted with a challenge by Greyhound to a certificate of public convenience and necessity awarded to Trailways Bus Lines to operate intrastate bus service between Las Cruces and the New Mexico-Arizona border. The district court upheld the Commission's award of the certificate to Trailways and the supreme court affirmed, finding substantial evidence to support the award.[271]

In reaching its conclusion, the supreme court considered the issue of "whether Trailways can rely on its prior illegal operations over the subject route as a basis for establishing a need for its proposed services."[272] The court noted the persuasive authority precluding consideration of such evidence. There are strong policy reasons for the agency, as a regulator of competitive business, not to reward unfair or illegal business practices by allowing their use as evidence.[273] The court merely slapped Trailways on the wrist, however,[274] and then ruled that such evidence is not barred as a matter of law.[275] Concluding that there was no evidence that the illegal operations

269. Those advantages lie especially in the context of professional disciplinary proceedings and the threatened deprivation of statutory entitlements. Where fault related fact-finding is critical much can be said for independent, legally trained professional hearing officers. Disciplinary cases do not normally depend on agency expertise, and they are often fraught with serious questions about unfairness and bias. In statutory entitlement cases, bias in favor of the agency by agency hearing officers is a constant complaint. *See, e.g.,* Cruz v. Schweiker, 645 F.2d 812 (9th Cir. 1981). Professional boards, comprised of professionals sitting in judgment on their peers, also raise concerns about personal bias and pecuniary interest. *See, e.g.,* Gibson v. Berryhill, 411 U.S. 564 (1973); Reid v. New Mexico Bd. of Examiners, 92 N.M. 414, 589 P.2d 198 (1979). For a discussion of this problem in the context of the decision-making process, *see* text accompanying notes 279-296 *infra.*

270. 94 N.M. 496, 612 P.2d 1307 (1980).

271. The substantial evidence aspects of the case are discussed in note 431 *infra.*

272. 94 N.M. at 499, 612 P.2d at 1310. "It is undisputed that Trailways had been operating illegally and that the witnesses' preference for and reliance on Trailways arose as a result of those illegally provided services." *Id.*

273. The barring of the consideration of evidence gained from the carrier's illegal activity assures 1) that the wrongdoer does not benefit from his wrongdoing, 2) that the opposing party is not penalized for abiding by the regulations, and, perhaps most important, 3) that the agency responsible for seeing that the rules of the game are adhered to does not itself sanction wrongdoing. *See* Donahue v. Public Utilities Comm'n, 145 Colo. 499, 359 P.2d 1024 (1961). *See also,* Dutchland Tours, Inc. v. Commonwealth, 19 Pa. Comwlth. 1, 337 A.2d 922 (1975).

274. "We agree with Greyhound in this regard. We strongly condemn such [illegal] activities." 94 N.M. at 499, 612 P.2d at 1310.

275. The court had stated the issue in evidentiary terms, *see* text accompanying note 272, *supra,* and then misstated the question in ruling that illegal operations cannot be a per se bar to the granting of a certificate because "the primary consideration is the public welfare." *Id.* Greyhound's argument was not that illegal operations barred the issuance of the certificate, but only that it barred consideration of evidence favorable to Trailways which stemmed from illegality.

were "deliberate and willful,"[276] the court held that the Commission had properly "weighed the evidence of illegal acts against the need for the service and decided that the public welfare would be served by granting the certificate to Trailways."[277]

The *Greyhound Lines* court seriously undermined the illegal conduct doctrine.[278] The rule is prophylactic in nature, and rooted in an administrative necessity to insure that the regulatory process is fair and equitable. By establishing a prerequisite of proof that the illegal operations were deliberate and willful before applying a *per se* bar, the court invited illegal conduct. Deliberate and willful conduct is difficult or impossible to prove. Therefore, common carriers may now be able to compete without a certificate, and when they feel they have a competitive advantage, file for the certificate. Illegality will be then "weighed . . . against" the need for their service. Such a result undermines the integrity of the regulating process.

D. The Decision-Making Process

Last year's survey discussed the need for an impartial decision-maker as an essential element of due process in the adjudicative context.[279] In the professional licensing area, the boards are made up of

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276. *Id.* The court failed to explain how the establishment and maintenance of a bus line without an authorizing certificate can be anything but willful and deliberate.

277. *Id.*

278. The illegal conduct doctrine precludes the use of evidence derived from illegal conduct to support the illegal actor's claim. *See* note 273 *supra.*

279. *See* 1979-80 Administrative Law Survey, *supra* note 54 at 15-16. The problem may also exist in rule-making, but in that context the bias questions are more limited. Impartiality is not a prerequisite for a rule-maker in the same sense that it is required in an adjudicator, because the rule-making function is not aimed at any particular individual. *See e.g.,* B. Schwartz, *supra* note 197 at §§107-08; W. Gellhorn, *supra* note 27 at 763-67.Therefore, greater bias is necessary to disqualify a rule-maker than is required to disqualify an adjudicator. *Compare* Ass'n. of National Advertisers v. F.T.C., 627 F.2d 1151, 1174 (D.C. Cir. 1979) (disqualification in rulemaking required "only when there has been a clear and convincing showing that [the official] has an unalterably closed mind on matters critical to the disposition of the proceeding), *with,* Gibson v. Berryhill, 411 U.S. 564 (1973) (potential for economic gain from adjudicatory result grounds for disqualification).

Hearing officer bias generally falls into three categories: personal (including pecuniary) interest, personal antagonism to a party, and prejudgment bias. Personal interest bias is particularly insidious because it "produces a distinction in judgment not readily correctable by persuasive evidence in the hearing." W. Gellhorn, *supra* note 27 at 765. As a result this kind of bias readily leads to disqualification. *See e.g.,* Gibson v. Berryhill, 411 U.S. 564 (1973) (optometrist board members stood to gain from enforcement of rule restricting competition); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (mayor, who was responsible for fiscal affairs of city, disqualified from hearing traffic cases where city gained substantially from court fines). In this area the appearance of impropriety may be a significant factor governing disqualification. *See* Ried v. New Mexico Bd. of Examiners, 92 N.M. 414, 589 P.2d 198 (1979).

Personal antagonism to a party may also raise due process concerns, but in order to serve as grounds for disqualification such antagonism must have arisen outside the hearing process. *See*

members of the professions. This results in peer-review for both licensing and disciplinary decisions. Thus, charges of bias and pecuniary interest against board members are easily made,[280] resulting in successful challenges to the impartiality of the decision-making.[281] The problem is confused by appellate court's sporadic use of the Doctrine of Necessity[282] to allow a board to sit despite the presence of an otherwise valid ground for disqualification.[283]

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e.g., United States v. Wolfson, 558 F.2d 59 (2d Cir. 1977); United States v. Haldeman, 559 F.2d 31, 131-34 (D.C. Cir. 1976).

Prejudgment bias is perhaps the most difficult to establish, especially in the rule-making context. Strong convictions or crystallized points of view on questions of law and policy are not grounds for disqualification. Prejudgment bias, in order to serve as grounds for disqualification, must rise to the level of preferred opinions as to the facts. *See* American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

280. *See e.g.*, Seidenberg v. New Mexico Bd. of Medical Examiners, 80 N.M. 135, 452 P.2d 469 (1969).

281. Reid v. New Mexico Bd. of Examiners, 92 N.M. 414, 589 P.2d 198 (1979). In *Reid* a disciplinary complaint was brought against the appellant. Pursuant to applicable law, he disqualified two of the five Board members. At the hearing he sought to disqualify a third member of the Board, alleging prejudgment bias. The motion was denied and Reid's license was revoked.

The supreme court reversed the district court's affirmance of the Board's order, holding that the Board's failure to honor Reid's motion for disqualification violated his right to due process. Finding that there were acknowledged statements indicating the Board member's "bias and prejudgment of the issues," *id.* at 416, 589 P.2d at 200, the court concluded that there was sufficient appearance of bias or predisposition to meet the applicable test: "[W]hether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as . . . [a Board member] to try the case with bias for or against any issue presented to him." *Id.* The court went on to emphasize that the principle of having a decision-maker free from bias and the appearance of bias, which developed in the judicial context, must apply even "more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and supposed administrative efficacy, been relaxed." *Id.*

282. Under the doctrine of necessity, an otherwise valid ground for disqualification must be rejected if to honor it would destroy the only tribunal with the power to make the decision:

> The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. Y. B. Hil. 8 Hen. VI f. 19, p. 1, 6.

United States v. Will, 449 U.S. 200, 213-14 (1980). Similarly, the doctrine required Chancellor Kent to continue to act in Moers v. White, 6 Johns. Ch. 360 (N.Y. 1822), despite the fact that his brother-in-law was a party, because New York law made no provision for a substitute chancellor. 449 U.S. at 214, n. 15.

283. The New Mexico Supreme Court in *Seidenberg* used the doctrine to overcome a charge of bias resulting from the fact that the hearing board was also the charging party, but failed to apply it to overcome an appearance of prejudgment in *Reid*. The *Reid* court did not deal with the doctrine directly. Instead, it rejected a claim under the doctrine's statutory equivalent. N.M. Stat. Ann. §61-1-7 (Repl. Pamp. 1981) which provides that disqualification may not be allowed to defeat a quorum. In rejecting this rule of law, the *Reid* court concluded that due process considerations outweighed that statutory mandate. To the extent that all disqualifications for cause implicate due process rights in the adjudicatory context, the logic of *Reid* would abolish the doctrine of necessity.

This year, the legislature attempted to solve the problem of decision-making bias in the professional board context. The Licensing Act Amendments of 1981 authorize the use of hearing officers.[284] In cases to be heard by the board where a number of disqualifications for cause[285] results in the lack of a quorum, the board may designate a hearing officer to hear the entire matter,[286] or can request the Governor to appoint sufficient temporary board members to decide the matter.[287]

The general hearing officer provision contained in §61-1-7(A)[288] anticipates that the hearing officer would conduct the hearing and provide his findings of fact to the board, for ultimate decision by the board.[289] The provision does not, by itself, solve the bias problem.[290] Taken in conjunction with the provision which requires notice to the applicant or licensee concerning the identity of the hearing and deciding officers,[291] however, it allows for early identification of any bias problems. If such problems arise, and are of such magnitude as to threaten the ability of the agency to render a decision, then alternative methods may be used. A hearing officer may be appointed to decide the entire case or the governor may appoint temporary board members.

The temporary board member alternative appears the more cumbersome,[292] but may prove to be more politically appealing.[293] From the point of view of administrative efficiency, an independent, legally trained hearing examiner, not unlike that used as a matter of statutory compulsion in alcoholic beverage control hearings,[294]

284. "All hearings . . . shall be conducted either by the board or, at the election of the board, by a hearing officer who may be a member or employee of the board or any other person designated by the board in its discretion." N.M. Stat. Ann. §61-1-7(A) (Repl. Pamp. 1981).

285. Automatic disqualification by affidavit is allowed "as in the case of judges," *Id.* at §61-1-7(C), but disqualifications which would result in less than a quorum must be "for good cause shown to the board." *Id.* It is unclear whether the kind of appearance of bias referred to in *Reid, see* note 281, *supra,* would satisfy the good cause requirement of the statute.

286. *Id.* at §61-1-7(E).

287. *Id.* at §61-1-7(D).

288. *See* note 284 *supra.*

289. N.M. Stat. Ann. §61-1-7(A) (Repl. Pamp. 1981).

290. If so many disqualifications for cause were granted that there remained no quorum of the board to act, allowing a hearing examiner, who could only do the fact finding, would not solve the problem.

291. N.M. Stat. Ann. §61-1-4(D) (Repl. Pamp. 1981).

292. The appointment of "temporary" board members adds new and inexperienced persons to the process in midstream. They too may be subject to disqualification for cause, thereby raising the spectre of having to appoint temporary board members for the temporary board members.

293. The possibility of distributing political largess by way of further gubernatorial appointments is always an attractive alternative to those in a position to make the appointments.

294. N.M. Stat. Ann. §60-6C-3 (Repl. Pamp. 1981).

would be the most attractive approach. Liberal use of such hearing officers could become costly,[295] however, and nothing in the 1981 amendments suggests that the budgets of the licensing boards have been increased to cover such expenditures.

Again, as with the Licensing Act amendments affecting the process of proof,[296] the statutory amendments concerning hearing examiners may lead to increased formality. If such formality results in increased fairness to those threatened with the deprivation of important rights or entitlements, then the benefit to everyone may prove worth the additional costs.

E. Enforcement of Agency Rules and Rulings

The enforcement of agency action is often a troublesome issue when other laws or other governmental processes overlap with an agency action. Two cases decided this year highlight some of the problems created for the enforcement of agency action by laws and processes outside the normal scope of agency procedures.

In *State v. Joyce*[297] the court held that failure of the agency to file its regulations in conformity with the State Rules Act rendered those rules invalid and unenforceable.[298] Because the criminal trespass conviction involved in the case was based on the regulation which prohibited Joyce as a non-Indian from selling his wares on the Portal in Santa Fe,[299] the court also concluded that the conviction based on the substance of the regulation could not stand, even though the defendant had actual notice of the substance of the regulation.[300] Thus, valid promulgation and adequate notice are necessary, but not sufficient, conditions for agency enforcement of its rules and regulations. In addition, the filing process of the State Rules Act must be strictly observed. This requirement transforms that Act into a mini-Administrative Procedures Act. Under *Joyce,* the Rules Act is applicable to all agency rule-making; it controls the enforcement of agency rules as directly as the statutes under which those rules are promulgated.

The second case imposing external constraints on the enforceability of agency rules also arose in the criminal context. In *State v.*

295. Independent attorney hearing examiners appointed in Liquor Control Act cases are compensated at the rate of $100 per day. *See id.* It is hard to imagine that licensing boards could obtain similar services for less.

296. *See* text accompanying note 267 *supra.*

297. 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980).

298. *Id.* at 621, 614 P.2d at 33. The rulemaking aspects of *Joyce* are dealt with in a prior section of this survey. *See* text accompanying notes 128-140 *supra.*

299. *See* text accompanying notes 130 & 131 *supra.*

300. *See* text accompanying notes 137-139 *supra.*

Gardner,[301] the defendant became the target of an investigation concerning another crime while he was on probation. The conditions of his probation included consent to a search "of his car, person or residence at anytime upon the request of his probation officer."[302] During the investigation defendant was reminded of the probation conditions and, as a result, allowed a search of his car. Stolen items were found in his trunk which led to his being charged with receiving stolen property. The district court granted a motion to suppress the evidence on the ground that probation office regulations prohibited probation officers from conducting any search without a warrant.[303] The conditions of Gardner's probation were in direct conflict with this agency rule.

On appeal by the state,[304] the court of appeals reversed the suppression order and remanded the case for trial. The court reasoned that, while the court has a duty to enforce agency regulations when compliance with the regulation is mandated by law,[305] the relevant statutes "do not . . . require a court to enforce the provision of the manual concerning abstention from searches by probation officers."[306] The court concluded that the specific provisions of probation imposed by the court "overrode [the] manual provisions directing that probation officers abstain from searches of probationers."[307]

The court read the applicable state law as authorizing court-imposed conditions of probation "which override any general administrative regulations."[308] The state law, however, states the converse of this proposition. Rather than giving the court power to override agency regulations, the law states that the general agency regulations or conditions of probation only apply "in the absence of spe-

301. 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

302. *Id.* at 172, 619 P.2d at 848.

303. The Manual of Instructions for Officers issued by the Probation Department provides:

> "Officers will not search the person, vehicle or home of clients. . . .
>
> If a search is necessary, then we should take our information to local law enforcement officials and they have their own procedures for securing and executing search warrants."

Id. at 173, 619 P.2d at 849.

304. Appeal of such orders by the state are authorized in N.M. Stat. Ann. §39-3-3(B)(2) (1978).

305. 95 N.M. at 173, 619 P.2d at 849.

306. *Id.*

307. 95 N.M. at 174, 619 P.2d at 850. The court of appeals also concluded that the search was reasonable and did not violate the fourth amendment. This aspect of the case is treated in that portion of this year's survey dealing with criminal procedure. *See,* Stelzner, *Criminal Procedure,* 12 N.M. L. Rev. 271 (1982).

308. 95 N.M. at 174, 619 P.2d at 850.

cific conditions imposed by the court."[309] The *Gardner* result may have been the same under either approach because the probation condition in *Gardner* had already been imposed. A question will arise, however, when a court is considering its power to act in conscious defiance of agency regulation. The *Gardner* court's characterization of the law may lead to a misimpression about court authority to disregard agency regulations in general. The *Gardner* court's approach clearly implies that a court may disregard agency regulations whenever statutory or constitutional law does not require it to follow the regulation. That is not the law. Agency rules which are within the scope of agency authority[310] and are validly promulgated[311] are a part of the law which must be followed and applied by the courts.

The proper analysis for the *Gardner* court should have begun with the specific language of the authorizing statute.[312] Under a correct reading of this statute, the suppression order did not override the regulations. The authorizing statute merely clarified that the regulations did not apply under the conditions of *Gardner*. Had the *Gardner* court taken the correct analytical approach the result would have been the same, but the court could have avoided the erroneous suggestion that courts may "override" agency regulations when state or federal law does not specifically require that they be followed. *Gardner* can be used, however, to support such a suggestion, and it thereby stands as a potential device to undermine the enforceability of agency regulations.[313]

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309. N.M. Stat. Ann. §31-21-21 (1978). The problem is similar to that of an agency seeking to exercise authority beyond that which is conferred on it by law. *See* text accompanying notes 52–99, *supra*. If the probation department were seeking to impose its regulation as a limitation on the court's discretion, that would clearly be in excess of the authority conferred upon it.

310. *See* text accompanying notes 52–99 *supra*.

311. *See* note 129 *supra*.

312. *See* text accompanying notes 52–55 *supra*.

313. One further development during the year touched upon the enforcement of adjudicatory decisions by agencies. In Davis v. New Mexico Bureau of Revenue, 95 N.M. 218, 620 P.2d 376 (Ct. App. 1980), the *pro se* appellant successfully challenged an audit assessment of $199.13 plus penalty and interest. All of the members of the court found that the facts favored appellant's entitlement to the tax credit at issue. *See id.* (opinion of Sutin, J.) and *id.* at 221, 620 P.2d at 379 (opinion of Wood, C. J., concurring, joined in by Andrews, J.).

In the face of controlling contrary authority, N.M. Stat. Ann. §71-1-25(B) (1978); New Mexico Bureau of Revenue v. Western Electric Co., 89 N.M. 468, 553 P.2d 1275 (1976) Judge Sutin awarded costs to the appellant. According to Judge Sutin:

> A case can arise where a taxpayer has won a battle over a refund of $199.13 and lost the war if the expense of the transcript is in excess of the amount saved. The burden of "expense" in each case must be decided according to principles of equity and fair play exercised by the Bureau and the taxpayer in a determination of tax liability.

95 N.M. at 220, 620 P.2d at 378. While Judge Sutin alone subscribes to this reasoning, the fact

III. JUDICIAL CONTROL OF ADMINISTRATIVE POWER

A. Invoking Judicial Review—Timeliness

To seek judicial review of an administrative decision should be a relatively easy process.[314] The law, in its wisdom, however, has a way of making complex and confusing that which ought to be simple and straightforward. So it is with the manner and timeliness with which judicial review must be invoked. Two cases decided during the survey year illustrate the difficulties which inevitably arise when different mechanisms are provided for the entry of administrative decisions and the invocation of judicial review.

In *Town of Hurley v. New Mexico Municipal Boundary Commission,*[315] the town sought judicial review of a denial of an annexation request by the New Mexico Boundary Commission.[316] The final decision[317] of the Commission was received by the municipal clerk about December 21, 1978 but was not immediately recorded in municipal records. The applicable statute required the filing of a notice of appeal "within 30 days of the filing of the final order."[318] On February

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that the other judges joined his result means that Judge Sutin's equitable award of costs stands as the action of the court. *Davis,* therefore, may stand as authority for the award of costs when taxpayers are inequitably forced to establish and enforce their administratively denied statutory entitlements by resort to appellate courts.

314. Under the New Mexico Administrative Procedures Act, any party who has exhausted all administrative remedies may invoke judicial review upon the filing of a simple petition. *See* N.M. Stat. Ann. §12-8-16 (1978). Professor Davis has long supported this approach and protested against the use of antiquated and prolix methods of seeking judicial review. *See* K. Davis, Administrative Law Text at 458-59 (1972).

315. 94 N.M. 606, 614 P.2d 18 (1980). For a discussion of this case in the context of civil procedure, *see* Occhialino, *Civil Procedure,* N.M. L. Rev. 97 (1982).

316. A three-member Municipal Boundary Commission appointed by the governor determines whether territory may be annexed to a municipality. The Commission, within 60 days of receipt of a petition, must hold a public hearing in the municipality to which the territory is proposed to be annexed. At the hearing, two criteria for annexation are considered: 1) whether the territory proposed to be annexed is contiguous to the municipality; and 2) whether the municipality will be able to provide the territory with municipal services. If these conditions are met, the Commission must order annexation. A commission order is final unless a landowner in the territory proposed to be annexed obtains timely review of the order in the district court. *See* N.M. Stat. Ann. §§3-7-11 through 3-9-16 (1978).

317. The finality doctrine is as much a part of judicial review considerations in administrative law as it is in traditional civil litigation. *See generally,* K. Davis, Administrative Law Text §29.02 (3d ed. 1972). Finality may be of even more serious concern in the administrative context, because there are policies other than the avoidance of piecemeal appellate review which obtain. The special concern for finality in admininistrative law has been embodied in several doctrines. The doctrine of exhaustion comes into play to preclude non-final adjudication where the agency processes have not been fully used. *See* text accompanying notes 448-460 *infra.* The doctrines of mootness and ripeness, which, like exhaustion, may limit the right to invoke judicial review, are also intertwined with notions of finality. *See generally,* W. Gellhorn, *supra* note 27, at ch. 9, §§4.a & 4.b; B. Schwartz, Administrative Law 497-527 (1976).

318. N.M. Stat. Ann. §3-7-15(E) (1978). The statute required the filing of the order in the offices of both the county and municipal clerks. *Id.* §3-7-16(A). The county clerk received the

1, more than 30 days after the receipt of the order, but within 30 days of the recordation in the county records, the town filed its notice of appeal.[319] The district court dismissed the appeal for lack of jurisdiction. On appeal, the town argued that the "filing" required by the statutes is synonymous with recordation, and that, therefore, the 30-day period did not begin to run until January 2. The supreme court disagreed, and affirmed the trial court.

The court reasoned that the purposes of the filing requirement had been met in the case.[320] The court decided that to require "recording" for fulfillment of the statutory requirement of "filing" would impose an unjustifiable responsibility on the person filing. If the time for appeal ran from the recording, rather than from the filing, the person filing might be penalized if a municipal employee happened to fail to record, leaving the final order subject to appeal for longer than the law intends.[321] The court adopted a literal definition of filing: "delivery to the proper offices to be kept on file."[322] The court found that the statutory "filing" requirement was met on December 21, and upheld the dismissal of the appeal for failure of the town to invoke the jurisdiction of the court in a timely fashion.

The court went on to rule that receipt by the municipal clerk was actual notice to the town, which rendered the constructive notice of recordation unnecessary.[323] Thus, under *Town of Hurley,* when the body which serves as a repository of the decision is also the potential

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order on December 21, 1978 and placed it in an appropriately marked file folder. A new county clerk recorded the order January 2, 1979. The municipal clerk received a copy of the same document at or about the same time as did the county clerk, but failed to date it and apparently did not record it. 94 N.M. at 607, 614 P.2d at 19.

319. *Id.*

320. The court correctly noted three distinct purposes for the filing requirement of the statute: "1) to provide public and accessible repositories . . . 2) to give constructive notice to the world and 3) to fix commencement of the time within which an appeal . . . may be taken. . . ." *Id.* at 608, 614 P.2d at 20.

321. *Id.*, quoting Thorndale v. Smith, Wild, Beebe & Cades, 339 F.2d 676 (8th Cir. 1965). An appealing party has a duty to be on notice that the document has been filed, even if the filing official fails to notify him. *See* Fed. R. Civ. P. 77(d); *see also In re* Morrow, 502 F.2d 520 (5th Cir. 1974).

322. 94 N.M. at 608, 614 P.2d at 20 quoting Gallagher v. Linwood, 30 N.M. 211, 217-18, 231 P. 627, 629 (1924). The court also concluded that to read a recordation requirement into the law . . . indulges in an "impermissible inference never intended by the legislature." 94 N.M. at 608, 614 P.2d at 20.

323. *But see* State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980) (Rule invalid and unenforceable until filed in compliance with State Rules Act irrespective of actual notice). *Town of Hurley* may be distinguishable from *Joyce* in that the purpose being served in *Town of Hurley* involved only the timing of appellate review—a factor uniquely suited to actual notice. *Joyce* involved broader policy considerations in need of a prophylatic rule. *See* text accompanying notes 137-139 *supra.* On the other hand, if actual notice was deemed adequate substitution for recordation for all purposes, then the other policy purposes behind the statute would not be served. *See* note 320 *supra.*

appellant, its receipt of the decision starts the running of the time for the filing of a notice of appeal.[324]

Butcher v. City of Albuquerque[325] involved judicial review of a zoning decision, which was triggered under the applicable law by a petition for certiorari to the district court.[326] To invoke judicial review of a zoning decision, the petition for certiorari must be filed within thirty days of the filing of the decision with the appropriate authority. The zoning statute also requires, however, that the petition be "presented to the Court."[327] The petition in *Butcher* was filed within thirty days, but the district court dismissed the writ on the ground that the writ had not been *personally* presented to the district judge within 30 days, and therefore the court did not have jurisdiction to consider the appeal.[328]

The supreme court reversed, holding that the term "present" in the statute "requires only filing with the court."[329] The court reasoned that its prior cases had not required anything more than filing, and that a contrary ruling would run counter to legislative intent[330] and would violate the principle of construction that additional language will not be read into a statute which makes sense as written.[331]

Butcher and *Town of Hurley* demonstrate a consistent solution to different aspects of the same problem. Because our statutes provide

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324. The actual notice analysis was a necessary component of the court's ruling. Indeed, the actual notice analysis could have stood as a sufficient ground for the decision, making the filing vs. recording analysis unnecessary. *See* Occhialino, *Civil Procedure,* 12 N.M. L. Rev. 97 (1982).

325. 95 N.M. 242, 620 P.2d 1267 (1980).

326. The zoning law reads: "Any person aggrieved by a decision of the zoning authority . . . may present to the district court a petition, duly verified, setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality." N.M. Stat. Ann. §3-21-9(A) (1978).

327. *Id.*

328. 95 N.M. at 243, 620 P.2d at 1268. The district court also ruled that the nine-month delay from filing to the personal presentment to the judge could bar the petition under the doctrine of laches. *Id.*

329. *Id.* at 244, 620 P.2d at 269.

330. The court concluded that the intent of the legislature was to allow 30 days for the bringing of the appeal, and that to require personal presentation within that time would, in effect, shorten the legislatively intended time frame. For example, filing on the 29th day when a judge was unavailable could result in dismissal of the petition. "It is inconsistent with legislative intent or good reason to make a party's right to petition a court dependent upon the availability of a judge on the final day of the statutory period." *Id.*

331. The court correctly reasoned that the statute made sense as written, and that adding the personal presentment requirement would raise more questions than it would solve: "we would then need to decide whether presentment to the judge can be oral or written, formal or informal, to only the assigned judge hearing the matter or to any district judge." *Id.*

The *Butcher* court recognized that "presentment to the court" should be in a reasonable time but that unreasonable delays "can be dealt with adequately under the existing rules of civil procedure and the equitable doctrine of laches." *Id.* at 244-45, 620 P.2d at 269-70. *See e.g.,* N.M. R. Civ. P. 41. The court also ruled that laches did not bar this case because of the lack of any prejudice to respondent. 95 N.M. at 245, 620 p.2d at 270.

so many different routes to judicial review of administrative decisions, the courts are confronted with numerous technical arguments challenging the invocation of judicial review. By applying a common sense approach, the court in both *Town of Hurley* and *Butcher* helped overcome two minor differences in statutory judicial review language. To the extent that "filing" now means official receipt (*Town of Hurley*) and "present to the court" means filing with the court (*Butcher*), the court helped simplify a process which is confusing because of unnecessarily divergent statutory language.

B. Scope of Review

As pointed out in last year's Survey,[332] most administrative cases which reach the appellate courts raise some questions concerning the scope of review which should be afforded. Invariably the cases involve confusion about what standard of review is applicable, or how that standard should be applied in a given case. This Survey year is no exception. The New Mexico courts continue to confuse the standard of review which ought to apply.[333] Further, the cases reviewing questions of law appeared rather mechanistic and result-oriented,[334] although there was at least some movement toward clarification of the standard of review when questions of fact are at issue.[335]

One case which arose in the civil context highlighted the distinction between the plenary consideration given by courts of original jurisdiction and the standard of review to be applied by the same courts in reviewing final administrative action. *State v. Clayton*[336] involved a state challenge to the authority of the district courts to issue orders containing specific habilitation plans as part of the residential commitments of developmentally disabled adults. The court orders were issued pursuant to the state's Mental Health and Developmental Disabilities Code.[337] This statute requires court approval

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332. 1979-80 Administrative Law Survey, *supra* note 54, at 19.

333. *See* text accompanying notes 347-362 *infra*.

334. *See* text accompanying notes 363-400 *infra*.

335. *See* text accompanying notes 401-426 *infra*.

336. 95 N.M. 644, 625 P.2d 99 (Ct. App. 1981). This case involved consolidated cases concerning two mental patients, Clayton and Martinez.

337. N.M. Stat. Ann. §§43-1-1 to -25 (1978). In *Clayton*, because the State Health & Environment Department's plan for the patients recommended commitment, the law required the petition to be filed with the court for its approval of the plan. *Id.* §43-1-13(C). The law also imposed a fact-finding duty on the court, N.M. Stat. Ann. §43-1-13(E), and gave ultimate authority over the placement of the patients to the court: "The court shall order the placement which is least restrictive to the client, and may order attendance and participation as a nonresident in rehabilitation programs conducted at residential or nonresidential facilities." *Id.* §43-1-13(F). For a procedural discussion of how the code operated, *see* Ellis & Carter, *Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code*, 10 N.M. L. Rev. 279, 284-95 (1980).

of extended residential placement of mentally disabled patients. The petition must be brought in the district court,[338] with normal appellate review in the court of appeals.[339] Because the State Health and Environmental Department had fashioned a plan for the patients involved, the state in *Clayton* argued that the district court decision was nothing more than judicial review of administrative acts. Under the Department's view the appropriate scope of review was a narrow one, and the different plans promulgated by the district court orders went beyond that narrow scope.

The appellate court, however, rejected the state's contention, concluding that "judicial review of administrative action is not involved."[340] The court reasoned that commitment proceedings are not merely a review of "whether the administrative action . . . was permissible and reasonable under the administrator's authority."[341] Instead, such proceedings were brought under the district court's original jurisdiction. The court found support for this in the statutory hearing requirements. The commitment procedures provide for an adversary hearing,[342] which may give rise to trial court orders based on "clear and convincing evidence."[343]

Clayton highlights the similarities and distinctions between initial court judgments and court review of agency actions. In the former the court has control over the litigants, and can exercise plenary judgment within the bounds prescribed by law.[344] In the latter, the legal question is generally more limited—the court may decide only whether the agency acted lawfully in making its decision.[345] *Clayton* also clarifies that when an agency takes actions in an adversarial context which requires it to petition the court for an order, the agency may not act and then hide behind administrative law principles of limited review. Rather, as an adversarial litigant, it must

338. N.M. Stat. Ann. §43-1-13(C) (1978).

339. N.M. Stat. Ann. §43-1-24 (1978).

340. 95 N.M. at 647, 625 P.2d at 101.

341. *Id.*

342. N.M. Stat. Ann. §43-1-13(D) (1978) provides for representation by counsel, presentation of evidence, cross-examination of witnesses, a right to be present, a trial by jury, if requested, a complete record, and an expedient appeal.

343. *Id.* §43-1-13(E).

344. The *Clayton* court stated: "We agree with the State that the trial court's powers are those given by the applicable statutes." 95 N.M. at 648, 625 P.2d at 102. The court concluded that the trial court had authority to order the specific placement for the patients in both cases before it. With respect to patient Martinez it also concluded that language in the Martinez order which required the Department to provide an adequate program for Martinez, who was mentally retarded, was also proper. The court reversed that case however, because the language of the order did not make it clear that it was limited to Martinez and not all "mentally retarded persons at the New Mexico State Hospital." *Id.* at 649, 625 P.2d at 103.

345. *See* text accompanying notes 363-400 *infra*.

prove its case under applicable legal standards just as must any civil litigant.

1. Standard of Review—Which Standard to Apply?

Last year's Survey discussed the courts' confusion about the difference between the substantial evidence standard of review and the arbitrary and capricious standard. The question is how much deference should be given to administrative agency decisions, in the absence of a clear statutory standard. Some courts have held that an agency ruling will be upheld if there is "substantial evidence" in the record to support it, while other courts have held that the ruling will be upheld unless it is "arbitrary and capricious."[346] The difference, if any, between these standards, and which of them to apply, has been the subject of much controversy.[347] The confusion between these standards was evidenced this term in *Black v. Bernalillo County Valuation Protests Board,*[348] a case involving an appeal from a county assessment decision. *Black* also added further confusion to the standard of review question by implicating the "hard look" doctrine,[349] which has muddled the questions surrounding the scope of review in federal administrative law.[350]

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346. *See* Wright, *The Courts and the Rulemaking Process, the Limits of Judicial Review,* 59 Corn. L. Rev. 375 (1974).

347. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 21-22. The confusion is not limited to this jurisdiction. The confusion on the federal level is even more extreme. In Abbot Laboratories v. Gardner, 387 U.S. 136 (1967), the Supreme Court suggested that substantial evidence affords "a considerably more generous judicial review than the 'arbitrary and capricious' test. . . ." *Id.* at 143. This was the accepted statement of the relationship between the two tests until, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), the Court suggested that in reviewing a question of evidence a court must consider "whether there has been a clear error of judgment." The Court then seemed to come full circle in a later case in concluding that even though "an agency's finding may be supported by substantial evidence . . . it may nonetheless reflect arbitrary and capricious action." Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1975).

Judge J. Skelly Wright continues to see the two standards as distinct. *See* Wright, *The Courts and the Rulemaking Process, the Limits of Judicial Review,* 59 Corn. L. Rev. 375 (1974). Judge Leventhal now sees them as converging, *see* Electrical Workers v. NLRB, 448 F.2d 1127, 1142 (D.C. Cir. 1971), and Judge Friendly suggests that we cannot be sure. *See* Associated Industries of New York State, Inc. v. United States Dept. of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973). *See generally,* K. Davis, Administrative Law in the 1970's at ¶29.00-29.01 (1976).

348. 95 N.M. 136, 619 P.2d 581 (Ct. App. 1980).

349. 95 N.M. at 142, 619 P.2d at 587. The doctrine eminated from historic language in *Overton Park:*

> Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' [Citation omitted.] To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. [Citations omitted.] Although *this in-*

In *Black,* property owners protested the Bernalillo County assessor's refusal to allow them the favorable assessment rate for lands used primarily for agricultural purposes. The Bernalillo County Valuations Protests Board upheld the assessor. The Board found that the application for special valuation was based on grazing use, but grazing was only a subordinate use of the land. The Board thus found that the land was being held for speculation with agricultural use being incidental to the primary use.[351] Therefore, the property owners were not entitled to the assessment rate for agricultural use. The court of appeals reversed, holding that "the lands were used primarily for agricultural use and are subject to this special method of taxation."[352]

Unfortunately, the reasoning of the judges in *Black* takes us in several directions at the same time.[353] Judge Sutin, writing only for

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quiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

401 U.S. at 416. Judge Leventhal labeled the doctrine in Greater Boston Television Corp. v. Federal Communications Comm., 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971):

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making.

Judge Leventhal would apply the doctrine to assure that agencies 1) abide by fair and reasonable procedures, 2) give good faith consideration to matters assigned to them, and 3) produce results that are definable in reason. Leventhal, *Environmental Decision-making and the Role of the Courts,* 122 U. Pa. L. Rev. 509, 515 (1974). The doctrine has been applied most consistently in the environmental law field. *See, e.g.,* International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1972), *rev'd.* 494 F.2d 1212 (6th Cir. 1974) (on remand from the Supreme Court); Kennecott v. EPA, 149 U.S. App. D.C. 231, 462 F.2d 846 (1972).

The "hard look" doctrine can be applied in two ways. As applied by Judge Leventhal in *Greater Boston Television Corp.,* it refers to a standard of review whereby the court assures itself that the agency took a "hard look" at the matter before it. 444 F.2d at 851. In making that inquiry, however, the court itself must take a hard look at the facts and circumstances before it. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1972). Judge Sutin, in *Black,* would have applied the doctrine both ways. "[T]he duty of the Board, like that of the Court, is to take a hard look at the facts and the law to arrive at the result." 95 N.M. at 142, 619 P.2d at 587.

350. *See generally,* W. Rodgers, Handbook on Environmental Law 19–23 (1977).

351. 95 N.M. at 139, 619 P.2d at 584.

352. *Id.* at 142, 619 P.2d at 587.

353. There is no opinion for the whole court in this case. Judge Sutin announced the result. Judge Hernandez concurred only in the result, and Judge Walters dissented in part and concurred in part.

himself[354] while announcing the judgment of the court, explained several bases for the result. Judge Sutin first concluded that "there is no substantial evidence to support any of the Board's findings."[355] Throughout his substantial evidence discussion, however, Judge Sutin used language suggesting the arbitrary and capricious test.[356] Second, he demonstrated that a statutory presumption in favor of the correctness of the assessor's valuation did not apply and could not help sustain the decision of the Board.[357] Third, he explained that the protestants' application need not fail merely because its use description was inaccurate. The protestants should not be bound by the technical wording of their administrative appeal.[358] Finally, in Judge Sutin's view, the actions of the Board and the assessor could not withstand scrutiny under the "hard look" doctrine, which he would apply to the review process of valuation decisions of the assessor.[359]

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354. The lack of an opinion of the court has become all too common in our Court of Appeals. *See e.g.*, Emery v. Univ. of N.M. Medical Center, 94 N.M. 144, 628 P.2d 1140 (Ct. App. 1981); Martinez v. Teague, 20 N.M. St. B. Bull. 587, 631 P.2d 1314 (Ct. App. 1981); State v. Lopez, 20 N.M. St. B. Bull. 847, 631 P.2d 1324 (Ct. App. 1981); Gonzales v. Bates Lumber Co., 20 N.M. St. B. Bull. 791, 631 P.2d 328 (Ct. App. 1981); State v. Santillanes, 20 N.M. St. B. Bull. 163, 632 P.2d 359 (Ct. App. 1980). Perhaps more determined efforts at fashioning a majority without rigid adherence to initial assignments would help rectify matters. *See* Occhialino, *Civil Procedure*, 12 N.M. L. Rev. 97 (1982).

355. 95 N.M. at 140, 619 P.2d at 585. Judge Sutin's review of the record is persuasive in support of his substantial evidence conclusion, and he is correct in stating that, on an appeal to the board, the assessor may not win by remaining silent "[w]hen a taxpayer makes a prima facie case that a ranch is used primarily for agricultural purposes. . . ." *Id.* at 142, 619 P.2d at 587.

356. The substantial evidence discussion is confused by Judge Sutin's accusation that the assessor and the board failed to "exercise an honest judgment based upon the information they possess or are able to acquire." *Id.* at 140, 619 P.2d at 585. This language is from an earlier case, First National Bank v. Bernalillo County Valuation Board, 90 N.M. 110, 114, 569 P.2d 174, 178 (Ct. App. 1977), where the court of appeals held that the lack of honest judgment meant that the board's decision was arbitrary and capricious. Judge Sutin seems to use the same reasoning in *Black*.

357. Judge Sutin correctly pointed out that the statutory presumption, *see* N.M. Stat. Ann. §7-38-6 (1978), and the applicable regulatory presumption, P.T.D. Reg. 29-9:1(c), dealt only with the valuation of the land by the assessor, not with what *method* of valuation the assessor may use. 95 N.M. at 141, 619 P.2d at 586.

358. The protestants' application alleged that all of the tracts in question were used for "grazing," whereas, in fact, five of them were put to non-grazing agricultural use. Judge Sutin concluded that "[a] determination of agricultural use is not made by a technical oversight of an applicant made in a protest; it is determined by the evidence presented at the hearing." 95 N.M. at 141, 619 P.2d at 586.

359. 95 N.M. at 142, 619 P.2d at 587. It is clear from the context of the discussion that Judge Sutin was applying the doctrine to the second of Judge Leventhal's concerns—that the agency give good faith consideration to matters assigned to it. *See* Leventhal, *supra* note 349, at 515.

Judge Hernandez concurred in the result only. Judge Walters, while dissenting in part, apparently using a "substantial evidence" standard of review, concurred with respect to most of the parcels of land using an "arbitrary and capricious" standard of review.[360]

Black in all its dimensions unnecessarily compounds the existing confusion over standards of review. Based on the portions of the record cited by Judge Sutin, the result in the case could be supported on traditional substantial evidence grounds. On the other hand, the Board's improper use of the presumption of the correctness of the assessor's valuation and the attempt by the Board to limit the application for special valuation to grazing purposes, are both subject to question under an arbitrary and capricious standard. The solution might be to use both standards, without confusing them. The two standards can be understood to serve different purposes and to apply to different questions on appeal. The sufficiency of the evidence issue is uniquely suited to substantial evidence review, and the arbitrary and capricious standard is most appropriately used when improper legal standards or improper and unfair procedures are employed by the agency.[361]

The *Black* court's mention of the federal "hard look" doctrine is not helpful. The federal administrative law example in this area is not one to be followed. The federal cases also confuse the substantial evidence and the arbitrary and capricious standards, and the "hard look" doctrine merely multiplies the confusion. If "hard look" has any utility at all, it is in very complex administrative decision-making,[362] not in normal state administrative adjudications. In-

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360. Judge Walters' conclusion is a clear example of telescoping the substantial evidence test into the arbitrary and capricious standard. She bases a finding of capriciousness on the lack of substantial evidence: "I would agree that the Board was capricious in denying all of the protests thereafter filed, *in view of the evidence produced.* . . ." 95 N.M. at 142, 619 P.2d at 587 (emphasis added).

Judge Walters agreed that the Board's ruling was "capricious" despite her conclusion that the assessor made an "honest judgment based on his observations of land use in the area." *Id.* She argued that it was permissible for the Board to base its ruling on the assessor's conclusions even though they were not the result of extensive observation, and only went to to the question of whether there was "grazing." To allow the Board to base a holding on such sketchy evidence puts a burden on the property owners to prove affirmatively agricultural use of the land. Judge Walters saw nothing improper in imposing that burden, and only found the Board "capricious" in refusing to hear the evidence that was presented. *Id.*

361. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 22, n. 142.

362. In terribly complex administrative decision-making, the "hard look" doctrine insures that judicial review actually goes on, and that judges do not abrogate that function in the guise of restraint:

> Our obligation is not to be jettisoned because our initial technical understanding may be meagre when compared to our initial grasp of FCC or freedom of speech questions.
>
> The substantive review of administrative action is modest, but it cannot be car-

stead, the court ought to take our existing standards, recognize their separate purposes, and seek to apply them in a balanced and even-handed way.

2. Questions of Law—Interpreting the Statutes

The scope of review afforded to questions of law falls somewhere on the spectrum between plenary exercise of independent judgment by the court, and total judicial deference to the particular agency's interpretation of law.[363] The fundamental thrust of the New Mexico cases seems to favor the independent judgment standard.[364] After a cursory bow toward agency interpretation,[365] the New Mexico courts take a two-step approach. First, the courts apply the plain meaning of the law when it is clear and unambiguous.[366] Second, if the law is unclear or ambiguous,[367] the courts resort to a search for legislative intent as evidenced by extrinsic factors[368] and rules of construc-

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> ried out in a vacuum of understanding. Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably. . . .
>
> . . . .
>
> On issues of substantive review, on conformance to statutory standards and requirements of rationality, the judges must act with restraint. Restraint, yes, abdication, no.

Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir. 1975), *cert. denied,* 426 U.S. 941 (1976) (Leventhal, J. dissenting). On the other hand, there is a concern that the "hard look" could lead to judgment by inexpert judges rather than trained administrators. Judge Bazelon has suggested a way to avoid this evil:

> '. . . in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.'
>
> . . . .
>
> Because substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures. . . .

Id. at 66–67 (Bazelon, C. J., concurring).

363. *See* 1979–80 Administrative Law Survey, *supra* note 54, at 23–24.

364. *Id.* at 24–25.

365. *See e.g.,* Perea v. Baca, 94 N.M. 624, 627, 614 P.2d 541, 544 (1980); Strebeck Properties, Inc. v. Bureau of Revenue, 93 N.M. 262, 268, 599 P.2d 1059, 1065 (1980).

366. *See* Perea v. Baca, 94 N.M. 624, 627, 614 P.2d 541, 544 (1980).

367. The ambiguity question is a threshold question which must be determined by the inquiring court as a matter of law. *See* Thompson v. Occidental Life Ins. Co. of California, 90 N.M. 620, 567 P.2d 62 (Ct. App. 1977), *cert. denied,* 91 N.M. 4, 569 P.2d 414 (1977).

368. Some of those factors extrinsic to the law in question are: the object sought to be accomplished or the wrong to be remedied, *see* Chavez v. State Farm Mutual Auto. Ins. Co., 87 N.M. 327, 533 P.2d 100 (1975), the interpretation given to other similar legislation, *see* State v. Gonzales, 78 N.M. 218, 430 P.2d 376 (1967); New Mexico Mun. League, Inc. v. New Mexico Envt'l. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975), *cert. denied,* 88 N.M.

tion.[369] The cases decided during the Survey period clearly illustrate New Mexico's application of the independent judgment standard. The cases further demonstrate how the use of this standard may mask the courts' exercise of a fundamental policy-making role.

The New Mexico approach was illustrated in the litigation surrounding the dismissal of tenured teacher Sharon Bryant from the Alamogordo School System. Ms. Bryant had been employed by the school system for four years, gaining tenure with her 1978–79 school year contract. When her father was elected to the school board in the Spring of 1979, she was not re-employed for the following year on the basis of the anti-nepotism statute.[370] The state Board of Education reversed that decision under its long-standing interpretation of the law "that the words 'employ or approve the employment' means 'initial hiring' and 'initial approval of employment.' "[371]

On appeal by the local board, the court of appeals, in *Board of Education of Alamogordo Public Schools v. Bryant,*[372] reversed the state board, and upheld the local board's dismissal of Bryant. The

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318, 540 P.2d 248 (1975), the interpretation of the statute by the agency given the authority to carry out its dictates and the duration and consistency of that interpretation. *See* Board of Educ. of Alamogordo Public Schools v. Bryant, 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980), *rev'd on other grounds sub. nom.*, New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo Public Schools, 95 N.M. 588, 624 P.2d 530 (1981), as well as the nature of the prior law. *See* Human Rts. Comm'n v. Board of Regents of the Univ. of New Mexico, 95 N.M. 576, 624 P.2d 518 (1981).

369. The rules of construction used in the search for legislative intent have been: 1) a statute will not be interpreted so as to lead to inconsistencies or conflicts with other statutes, *see* New Mexico Mun. League, Inc. v. New Mexico Envt'l Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975); 2) a statute is presumed to be constitutional, *see* City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975); 3) when a statute is subject to two constructions, only one of which would be constitutional, the court should adopt the constitutional construction, *see* Huevy v. Lente, 85 N.M. 597, 514 P.2d 1093 (1973); 4) a statute must be interpreted as it was understood by the legislature at the time of passage, *see* Pan Am. Petroleum Corp. v. El Paso Nat. Gas Co., 82 N.M. 193, 477 P.2d 827 (1970); and 5) a statute must be read in such a way as to prevent absurdity, *see* State v. Hernandez, 89 N.M. 698, 556 P.2d 1174 (1976).

370. The statute read in pertinent part: "No local school board shall employ or approve the employment of any person in any capacity by a school district if the person is related by consanguinity or affinity within the first degree to any member of the school board governing the district. N.M. Stat. Ann. §22-5-6 (1978). The statute was amended in 1981 and now reads: "No local school board shall *initially* employ. . . ." N.M. Stat. Ann. §22-5-6 (Repl. Pamp. 1981).

371. Board of Educ. of Alamogordo Public Schools v. Bryant, 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980), *rev'd sub. nom.*, New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo Public School Dist. No. 1, 95 N.M. 588, 624 P.2d 530 (1981). In addition the record in the case showed "that the Attorney General's office has consistently interpreted the statute to apply only to the initial hiring of teachers and that there has been widespread reliance upon this interpretation of the statute by school boards throughout the state." *Id.* at 622, 624 P.2d at 1019.

372. 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980), *rev'd sub. nom.*, New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo Public Schools, 95 N.M. 588, 624 P.2d 530 (1981).

court held that the statute was clear and unambiguous,[373] that it precluded Ms. Bryant's continued employment,[374] and that her dismissal did not violate due process.[375] Bryant and the State Board had argued that the statute was ambiguous and that the state board's interpretation was correct under four canons of statutory construction: 1) consistency with the statutory purpose, 2) due deference to the administrative interpretation, 3) avoidance of the constitutional problem, and 4) consistency with other statutes.[376] In ruling that the statute precluded Bryant's further employment, the court did not quarrel with the proffered rules of construction, but rather concluded that "[t]hey are not applicable . . . until there has been a valid determination of ambiguity, and appellees have not successfully met the local board's challenge to the State Board's finding that the statute was ambiguous."[377]

On certiorari the supreme court, in *New Mexico State Board of Education v. Board of Education of Alamogordo Public School District No. 1,*[378] reversed the court of appeals, and affirmed the ruling of the State Board of Education. The court held "that the meaning and applicability of the nepotism statute in the present context is unclear"[379] and "that the intent of the Legislature is best reflected by construing the words . . . [of the statute] to relate only to the initial hiring of teachers."[380]

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373. *Id.* at 622, 624 P.2d at 1019.

374. *Id.* at 623, 624 P.2d at 1020.

375. Because the court construed the statute to preclude the rehiring of Bryant, it had to deal with her constitutional claim that the application of the statute to her as a tenured teacher deprived her of protected property and liberty interests without due process. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). While recognizing that Bryant had protectable property and liberty interests, the court concluded that the deprivation of those interests did not offend due process because, prior to the deprivation, she had been afforded a full and fair hearing and because the nepotism statute was "good and just cause" for her dismissal. 95 N.M. at 624, 624 P.2d at 1021. *See* N.M. Stat. Ann. §22-10-15(D) (1978). For a full discussion of the constitutional issues in this case, *see* Schowers, *Constitutional Law,* 12 N.M. L. Rev. 191 (1982).

376. 95 N.M. at 622, 624 P.2d at 1019.

377. *Id.* Although the court expressly indicated that rules of construction were inapplicable because the statute was unambiguous, it justified its conclusion by resort to the very rules of construction it said did not apply. The court reasoned that the legislative failure to adopt the bills introduced in 1977 and 1979 to limit the meaning of the statute evidences "an intent that the statute means what the Alamogordo Board read it to mean . . . ." *Id.* Furthermore, the court looked to the abuses which could flow from a reading of the statute and concluded that "[l]egislation to restrict the likelihood of such undesirable consequences cannot be said to be absurd." *Id.* at 623, 624 P.2d at 1020. Finally, the court read the nepotism statute as being consistent with the previously enacted tenure laws. The court relied in part on the presumption in statutory construction that "the Legislature was informed regarding the existing tenure laws when it enacted the nepotism statute." *Id.* at 624, 624 P.2d at 1021.

378. 95 N.M. 588, 624 P.2d 530 (1981).

379. *Id.* at 591, 624 P.2d at 533.

380. *Id.* at 592, 624 P.2d at 534.

The supreme court found ambiguity precisely where the court of appeals found none. The court of appeals stated expressly that tenure laws were not implicated by the nepotism statute.[381] The supreme court, however, based part of its finding of ambiguity on an analysis of the consistency of the statute with the tenure laws,[382] as well as on "[t]he history of uncertainty as to the meaning of the nepotism statute."[383] The difference between the two courts' holdings on the ambiguity question demonstrates the disingenuousness of this threshold inquiry. The ambiguity issue seems to be used as a result determining label and not as a standard for the resolution of the inquiry.[384] In the *Bryant* litigation, ambiguity is given lip service and then applied in such a way that it really merges with the legislative intent inquiry by the examination of factors external to the words of the statute.[385]

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381. The court of appeals had found that the statute "does not refer to reemployment as an exception, nor does it exempt tenured personnel." 95 N.M. at 622, 624 P.2d at 1019.

382. The supreme court, as part of its threshold inquiry into ambiguity, relied, in part, on the tenure laws which refer to renewal contracts as "reemployment," and to the automatic renewal of contracts for tenured teachers. *See* N.M. Stat. Ann. §22-10-12 (1978). In light of that statute the supreme court found that "the annual reemployment process resembles merely a procedure for regular review of the teacher's performance rather than a procedure to 'approve the employment' of a teacher." 95 N.M. at 590, 624 P.2d at 532.

383. *Id.* at 591, 624 P.2d at 533. Under the test of ambiguity embraced by the court—"fairly susceptible of different constructions by reasonably intellilgent men," *id.*, the court virtually conceded that any colorable or arguable claim that a statute could be subject to more than one construction is sufficient to meet the ambiguity standard. *But see* Perea v. Baca, 94 N.M. 624, 614 P.2d 541 (1980).

384. Perea v. Baca, 94 N.M. 624, 614 P.2d 541 (1980), also decided this term, clearly demonstrates the result-oriented "labelling" approach. In *Perea* the petitioner had purchased a liquor license in one zone, then obtained its transfer to an area within that zone which overlapped with another zone. A subsequent application to transfer the license to an area solely within the second zone was denied by the Director of the Department of Alcoholic Beverage Control. The district court granted petitioner a writ of mandamus ordering the transfer of the license. The liquor director appealed, claiming that the practice of leapfrogging from one zone to another by first obtaining a transfer to an overlapping buffer zone violated the Liquor Control Act.

On appeal the court affirmed the issuance of the writ. In doing so, the court looked to the relevant statute and found that "[t]he statute authorizes the requested transfer [within the Albuquerque zone]. The language of the statute is clear. There is no room for interpretation." 94 N.M. at 627, 614 P.2d at 544. The court took this mechanical approach despite the policy implications in the statute precluding interzone transfers, noting only "[t]he fact that the license was also in the Tijeras zone does not justify a departure from established rules of statutory construction." *Id.* For a discussion of the mandamus portion of the case, *see* text accompanying notes 482-495 *infra.*

385. Occasionally the court has merged the ambiguity question with the search for legislative intent. *See* State *ex rel.* Maloney v. Sierra, 82 N.M. 125, 134, 477 P.2d 301, 310 (1970): "absent any clear intent expressed to the contrary, words are to have their ordinary and usual meaning." Such an approach is inconsistent with the general view expressed in the New Mexico cases that "the initial question presented is whether the meaning and application of the statute . . . is free from doubt. . . ." New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo, 95 N.M. 588, 590, 624 P.2d 530, 532 (1981).

Bryant is an example of the confusion of the ambiguity notion with that of the search for legislative intent:

> If, after applying the common, usual, ordinary and everyday meaning to

It may be possible for a statute to be completely unambiguous, but that would be a rarity.[386] The court, therefore, should abandon the ambiguity issue entirely, and make explicit what is implicit in the *Bryant* litigation—that the court must make a searching inquiry for legislative intent. Where that intent is not clear, the court must, as the final arbiter of the dispute, select that reading of the law which furthers the societal goals behind the statute. Such an approach would explicitly recognize the policy-setting role the court is often called upon to assume. Performing the role and acknowledging it, rather than performing it while disclaiming it, would be more forthright and, in the long run, would engender more respect for the court.

If the court honestly wishes to eschew this policy-making role, at least in its review of law questions which arise in the administrative context, then deference to agency interpretation is the appropriate path.[387] Deference to the agency interpretation would have brought the supreme court in *Bryant* to the same conclusion it ultimately reached. If, however, distrust of agency determinations of law lead the court away from deference to agency interpretations, and it is unwilling to forthrightly assume its policy-choosing role, then the court forces itself into word-play over whether a given statute is or is not ambiguous.

In one other case involving the scope of a statute governing agency authority,[388] the court again confronted the standard to be applied when deciding questions concerning the scope of a statute. In *Human Rights Commission of New Mexico v. Board of Regents of the University of New Mexico,*[389] the supreme court held that with

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> words in a statute, its meaning is unclear, the legislative intent clearly indicates another meaning, or a different meaning must be applied to prevent absurdity, then a statute may be declared ambiguous and resort may be had to the rules of construction to determine its meaning.

95 N.M. at 622, 624 P.2d at 1019.

386. Under the supreme court formulation in *Bryant,* however, it is hard to see how any case which results in litigation over the interpretation of a statutory term cannot meet the test. *See* note 383 *supra.*

387. On the federal level, deference to agency interpretation is often relied upon to avoid court imposed policy-making. Where an agency's interpretation of a statute is thoroughly reasoned and consistently applied, the role of the reviewing court has been defined by the Supreme Court: "not to interpret the statute as it thought best but rather the narrower inquiry into whether the . . . [agency's] construction was 'sufficiently reasonable.' " Federal Election Comm'n v. Democratic Senatorial Campaign Committee, 50 U.S.L.W. 4001, 4004 (1981). The accepted rationale is that if Congress disagrees with the agency it is for Congress to amend the authorizing statute. *See e.g.,* Zemel v. Rusk, 381 U.S. 1, 8, 12 (1965).

388. Statutory interpretation in the administrative law area often involves the scope of agency authority. In that context, the question can also be framed in terms of agency jurisdiction, or whether or not the agency acted ultra vires. *See* text accompanying notes 79-99 *supra.*

389. 95 N.M. 576, 624 P.2d 518 (1981). For an in-depth analysis of this case, *see* Note, *Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act?,* 12 N.M. L. Rev. 541 (1982).

respect to the manner and method of administering its academic program the university is not "a 'public accommodation' within the meaning of New Mexico Human Rights Act. . . ."[390] The court affirmed the district court's dismissal of a discrimination charge brought by a nursing student who was given a failing grade.[391] The court concluded that because the university is not a public accommodation within the meaning of the Act, the Human Rights Commission did not have jurisdiction to hear the claim.[392]

In *Human Rights Commission,* the court failed to afford even a passing nod of deference to the Commission's finding that the statute applied.[393]The court made an independent judgment of the statute's meaning. The court reached its conclusion on the basis of its reading of the "historical and traditional meanings as to what constitutes a 'public accommodation,' "[394] as well as its understanding of the legislative intent in light of the fact that prior New Mexico anti-discrimination law did not include universities within the specifically enumerated list of public accommodations.[395]

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390. 95 N.M. at 577, 624 P.2d at 519.

391. The complainant charged that the University had discriminated against her on the basis of race "by giving her a failing grade in a clinical nursing course and then refusing to provide an opportunity for her to immediately retake the course." *Id.* at 576, 624 P.2d at 518. The commission found that the University had exercised great flexibility with respect to most students, but that "contrary to its practice with other students, the University had taken a very inflexible position with respect to Tyler, and concluded that the inflexibility was based on Tyler's race." *Id.*

392. *Id.* at 578, 624 P.2d at 520.

393. As a threshold matter, the Commission must have determined that the statute applied to the University. These kinds of determinations of authority are most often left to the agency. *See e.g.,* Gray v. Powell, 314 U.S. 402 (1941). *See generally,* Nathanson, *Administrative Discretion in the Interpretation of Statutes,* 3 Vand. L. Rev. 470 (1950). The scope of review question in this context necessarily implicates the ultra vires doctrine. *See* text accompanying notes 52-99 *supra.*

394. 95 N.M. at 577, 624 P.2d at 519. The court looked to the common law definition of public accommodations—places of lodging, entertainment, and public transportation—to inform its judgment. *Id.*

395. *Id.* at 578, 624 P.2d at 520. Under previous anti-discrimination statutes, 1955 N.M. Laws. ch. 192, §§ 1-7 and 1963 N.M. Laws ch. 202, § 1, universities were not listed within specifically enumerated public accommodations. The court concluded from this history: "that the legislature, by including a general, inclusive clause in the Human Rights Act, . . . [did not intend] to have all establishments that were historically excluded, automatically included as public accommodations subject to the Human Rights Act." 95 N.M. at 578, 624 P.2d at 520. The court was obviously searching for legislative intent. Yet its reference to the historical meaning of the term "public accommodations" linked this consideration to the question of whether the statute was ambiguous. The court then went on to merge the two questions. "We look to the previous act for guidance and should, unless the contrary is apparent, construe the wording of the statute in its ordinary and usual sense." *Id.* This language indicates that the history of a term will be part of its "plain meaning." Thus the court may look to statutory history, extrinsic evidence, in considering whether a statute is ambiguous.

The *Human Rights Commission* court was clearly troubled by the possible consequences of its holding. The holding implies that the university is not subject to state anti-discrimination laws. The court sought to avoid this implication by expressly reserving "whether under a different set of [non-academic] circumstances the University would be a 'public accommodation,' and subject to the jurisdiction of the Human Rights Commission."[396] This reservation, however, is unsupported by the legal analysis used. The statutory history cited by the court did not suggest that it was only in the conduct of their academic programs that universities are not public accommodations, but rather that universities in general are not public accommodations. The court was trapped by its attempt to decide the case on purely legal, rather than policy grounds. The legal analysis leads to a result so extreme that it requires limitation as a matter of policy. By failing to give some consideration to the remedial nature of the Human Rights Act, as a valid external criteria,[397] and by attempting to resolve the case solely as a matter of statutory construction rather than a balancing of competing policies, the court was forced to embrace a limitation foreign to its own analysis.[398]

Human Rights Commission makes a silent statement about the principle of deference to agency interpretation of its enabling statute. In *Human Rights Commission,* the court did not even suggest the possibility of such deference. *Human Rights Commission, Perea v. Baca*[399] and the *Bryant* litigation all demonstrate that judicial

396. *Id.* This limitation could make some sense if, for example, the present case were contrasted with a claim brought against a university for discrimination in the assignment of on-campus housing, or the allocation of meal privileges in on-campus dining facilities in a public university. Both of these factors would fall within even the most traditional definitions of public accommodations. However, the court left no logical room for these kinds of distinctions.

397. It is a well accepted principle that remedial statutes are to be broadly construed to encourage the fullest accomplishment of their underlying remedial purposes. *See e.g.,* United States v. Beach Assocs., Inc., 286 F. Supp. 801 (D. Md. 1968) (federal Civil Rights Act); Security Trust v. Smith, 93 N.M. 35, 596 P.2d 248 (1979) (State Workmen's Compensation Act); Parsons v. Employment Security Comm'n, 71 N.M. 405, 397 P.2d 57 (1963) (State Unemployment Compensation Statute).

398. The court might have achieved its result in a more satisfactory fashion by adopting a reading of the statute which included the university as a public accommodation within the meaning of the Act, and then reaching the merits of the claim. It may be that the court saw the public accommodation issue as an easy way out because of the difficulty of considering discrimination claims in the delicate context of academic evaluations. *Cf.* Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

399. 94 N.M. 624, 614 P.2d 541 (1980). *See* note 384 *supra* for a discussion of this case.

deference to agency interpretations of law continues to occupy a low rank in New Mexico jurisprudence.[400]

3. Questions of Fact—Applying the Substantial Evidence Standard

There is a tension which exists in the New Mexico cases[401] between the traditional "substantial evidence" standard[402] and the later-developed "whole record" variation of that standard.[403] That tension was highlighted this term in *Jones v. Employment Services Division.*[404] Another case decided this year, *American Automobile Association v. State Corporation Commission*[405] *(AAA),* raises the threshold question which often accompanies the application of the substantial evidence standard—what it is that the evidence must substantiate. The former case helps explain how the standard ought to apply. The latter case demonstrates that substantive law issues can be resolved under the rubric of the substantial evidence standard.

In *Jones v. Employment Services Division,*[406] the supreme court affirmed a district court ruling that the Employment Services Division had properly denied unemployment compensation benefits to Jones. The court held, inter alia,[407] that there was substantial

400. Another level of the deference question is involved when the courts are called upon to review agency interpretations of their own regulations as opposed to state statutes. There too, the New Mexico courts have not been deferential to agency expertise. *See e.g.,* Hughes v. State *ex rel.* Human Servs. Dep't., 95 N.M. 739, 626 P.2d 276 (Ct. App. 1980). In such cases, the court considers the entire statutory scheme of the agency and judges the agency interpretation of the regulation in light of the statutory purposes. *See id.* at 740, 626 P.2d at 277.

401. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 26-29.

402. "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." American Auto. Assoc. v. State Corp. Comm'n, 95 N.M. 227, 228, 620 P.2d 881, 882 (1980) citing Rinker v. State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973); Tapia v. Panhandle Steel Erectors Co., 78 N.M. 86, 428 P.2d 625 (1976). Under the traditional standard every inference must be drawn in support of the decision. Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 92 N.M. 721, 594 P.2d 1177 (1979). The similarity or difference between the substantial evidence test applied to a trial court's judgment, and the substantial evidence applied to an agency decision, is less than clear. *See, e.g.,* K. Davis, Administrative Law Text §29.02 (1972).

403. The whole record standard, enacted by Congress as part of the Federal Administrative Procedures Act in 1946, *see* 5 U.S.C. §706 (1976), requires that an agency decision be set aside when the court "cannot conscientiously find that the evidence supporting that decision is substantial, *when viewed in light that the record in its entirety furnishes,* including the body of evidence opposed to the . . . [agency's] view." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (Frankfurter, J.). *See, e.g.,* N.M. Stat. Ann. §12-8-19 (1978) (whole record standard in the state Administrative Procedures Act).

404. 95 N.M. 97, 619 P.2d 542 (1980).

405. 95 N.M. 227, 620 P.2d 881 (1980).

406. 95 N.M. 97, 619 P.2d 542 (1980).

407. The court also addressed the standing of the employer to appeal from the agency ruling, which granted benefits to the employee. The employer had failed to return a form which precluded the right to be heard within the agency. This failure suggests that the employer sub-

evidence to support both the agency finding that the appellant had failed to notify the employer of his impending absence from work,[408] and the district court's conclusion that the employee's termination resulted from his own misconduct.[409]

In a compelling dissent, Justice Felter condemned the failure of the court to adopt and apply the whole record standard. He also noted the court's disregard of both the remedial nature of the unemployment compensation statute and of its own ruling six months earlier in *Trujillo v. Employment Security Commission*.[410]

Justice Felter admitted that the federal origin of the whole record standard does not govern New Mexico law, but he concluded that the whole record standard "carries with it a more providential approach to judicial review of administrative acts which should be adopted by this Court."[411] Applying the higher standard of review required by a consideration of the entire record,[412] Justice Felter

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mitted to a final determination by the agency. The court concluded, however, that the failure to return the form did not foreclose the statutorily authorized judicial review rights of the employer as an "interested party." *Id.* at 99, 619 P.2d at 544.

408. The court made a cursory review of the facts. Those facts indicated that Jones, a truck driver, returned from a trip in the early evening, but did not punch out until later that night, in violation of ICC regulations; that he reported being ill but agreed to take a later run on the following day; and that he failed to report his inability to do so in accordance with the time requirements of company policy. *Id.* at 99-100, 619 P.2d at 544-45. It is clear that the court applied the traditional substantial evidence standard, from the fact that it failed to give weight to contrary evidence, which a "whole record" standard would have required. The court stated: "The findings of the tribunal are not unsubstantiated simply because the evidence may be conflicting [citations omitted]. Although the evidence is conflicting, we find substantial evidence which supports the findings of the appeals tribunal." *Id.* at 99, 619 P.2d at 544.

409. The court recognized that "mere absence or tardiness alone, without unheeded warnings or past history of absence . . ." is hardly sufficient to support a conclusion of employee misconduct, *id.* at 100, 619 P.2d at 545. In rather bootstrap fashion, however, the court made of the single incident three separate acts of "misconduct": 1) clocking in late in violation of the ICC regulations, 2) failure to timely report an inability to take a shift, and 3) failure to report periodically while ill. *Id.* This characterization of the facts allowed the court to conclude that while "[i]ndividually these incidents may not have been enough to constitute misconduct, . . . taken together they do." *Id.*

410. 94 N.M. 343, 610 P.2d 747 (1980).

411. 95 N.M. at 101, 619 P.2d at 546.

412. The additional portions of the record brought out by the dissent are indeed compelling:

> During petitioner's long working day on May 15, 1978, he felt ill and nauseated having had diarrhea all day at the job site. He was physically and emotionally exhausted and told the Big Three dispatcher he was sick and wanted to be taken off the dispatching board. According to the petitioner, Mike Chandler never told him he was to make an 8:00 a.m. run on May 16, although Mr. Chandler was irritated that petitioner was not going to make a run at 1:30 a.m., just two hours after petitioner clocked in after a 21 hour day.
>
> . . . .
>
> . . . Since he lived by himself and thought he might be seriously ill, he went to the house of some friends, waking them up during the early hours of May 16. He went to bed at their house, but was unable to fall asleep until 4:00 a.m. Dur-

concluded that there was not substantial evidence to support the decision of the court[413] and that "the acts of Mr. Jones do not rise to the level of misconduct contemplated by the statute. . . ."[414]

Justice Felter also noted that because of the remedial nature of the Unemployment Compensation statute,[415] the definition of "misconduct" should be strictly construed against the forfeiture of benefits. Finally, the dissent points out that two critical findings against Jones were supported only by hearsay testimony.[416] A result based on such evidence, according to the dissent, cannot be sustained under the "legal residuum" rule as applied in *Trujillo,* which requires at least

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> ing the afternoon of May 16, 1978, petitioner awoke and went to see his physician, Dr. Don Hedges, who diagnosed his condition as physical and mental fatigue. . . .
>
> After coming back from the doctor's office, at approximately 6:30 p.m. on May 16, 1978, petitioner called the Big Three plant and talked to two employees of Big Three, including Mr. Gene Buck, an operator at the plant . . . .
>
> After speaking with Gene Buck and his friend, Don Moore, petitioner went back to bed and did not get up for more than twenty hours. When he awoke he felt able to go back to work so he called the plant and asked the dispatcher, Mike Chandler, to put him back on the board. Mr. Chandler then informed petitioner that he had been fired.

95 N.M. at 102-103, 619 P.2d at 547-548.

413. 95 N.M. at 104, 619 P.2d at 549. With some justification, Justice Felter accused the majority of affording a scanty evidentiary review: "This Court has said in effect that its job is done when it finds that there is more than a scintilla of evidence to support the administrative decision and that it need look no further once that point is reached." 95 N.M. at 100, 619 P.2d at 545. This cursory glance, according to Judge Felter, did not fulfill the court's duty of review.

414. 95 N.M. at 104, 619 P.2d at 549. Justice Felter and the majority agreed on the appropriate definition of misconduct:

> [M]isconduct . . . is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or carelessness or negligence of such degree or reoccurrence as to manifest equal culpability, wrongful intent or evil design or to show unintentional and substantial disregard of the employer's interest or the employee's duties and obligations to his employer.

Id. at 100, 619 P.2d at 545, quoting from Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.M. 636, 640 (1941) (adopted as the New Mexico standard in Mitchell v. Lovington Good Samaritan Center, Inc., 89 N.M. 575, 555 P.2d 696 (1976)). What they disagreed on was whether that standard had been met in this case.

415. The statute reads:

> [E]conomic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life.

N.M. Stat. Ann. §51-1-3 (Repl. Pamp. 1981).

416. The hearsay testimony concerned whether Jones agreed to report at 8:00 a.m. on May 16, and whether he intentionally violated ICC clocking-out regulations. 94 N.M. at 106, 619 P.2d at 557.

some residuum of evidence admissible in a court of law before the "substantial right" of unemployment benefits can be taken away.[417]

Jones, therefore, raises two critical points about the substantial evidence standard. First, as argued by Justice Felter, the facts and circumstances of the case demonstrate why it is necessary for the supreme court to accept the whole record standard.[418] It is clearly the more prudential standard, and would preclude the court from reading and relying on only one side of the case. In *Jones,* the majority virtually ignored the portions of the record contrary to its holding.[419] This may have led to an inequitable result. As *Jones* illustrates, failure to apply the whole record standard means the courts can avoid the full and complete exercise of independent judgment which must be afforded to assure fairness in the application of any administrative standard.[420]

The second point that *Jones* raises is also discussed in the dissent. The dissent raises the essential difficulty of the interplay between the substantial evidence standard and the legal residuum rule.[421] A lit-

417. Under a literal reading of *Trujillo,* receipt of unemployment benefits is a "substantial right as a matter of public policy." Therefore, any action depriving someone of that right must be " 'based upon such substantial evidence as would support a verdict in a court of law.' " Trujillo v. Employment Security Comm'n, 94 N.M. 343, 344, 610 P.2d 747, 748 (1980) (quoting Young v. Board of Pharmacy, 81 N.M. 5, 9, 462 P.2d 139, 142 (1969); *see* text accompanying notes 257-269 *supra.*

418. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 28.

419. Criticism of just such an approach was one of the factors leading to the adoption of the whole record standard in the federal APA. Justice Frankfurter noted the concern of the dissenting members of the Attorney General's Committee on the Walter-Logan Bill, who as early as 1939, pointed out the impropriety of a standard which allows a reviewing court to ignore portions of the record. These members suggested that "judicial review" could extend to "findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence." Universal Camera Corp. v. NLRB, 340 U.S. 474, 484 (1951) (Frankfurter, J.).

420. *See id.*

421. Professor Davis has argued forcefully that:

> [T]he strongest reason against the residuum rule is the lack of correlation between reliability of evidence and the exclusionary rules of evidence. The exclusionary rules were designed for guiding admission or exclusion of evidence, not for weighing its reliability, and were designed for juries, not for administrators. Wigmore said that the residuum rule "is not acceptable" because it rests upon the fallacy "that this 'residuum of legal evidence' which is to be indispensable, will have some necessary relation to the truth of the finding. But the 'legal' rules have no such necessary relation. . . . This 'residuum' rule, then, is decidedly not the wise and satisfactory rule for general adoption. . . . Let us remember that the greatest part of the community's industrial, commercial and financial activity already functions on a solid basis of fact determined without any formal rules of proof. Let us, here too, put our trust in men and minds, rather than in rules."

Davis, Administrative Law Text §14.07 at 279, quoting 1 Wigmore, Evidence §4b (3rd ed. 1940).

The gathering of administrative evidence ought to be less rigid and more informal than in the courts, giving probative effect to evidence of a type "commonly relied upon by reasonably pru-

eral application of *Trujillo* to the facts in *Jones* would undoubtedly require a reversal of the district court[422] because, although there is substantial evidence to support the district court holding, the evidence would not be admissible in a court of law. The court must at some point address the question of when and under what circumstances the legal residuum rule will serve to limit the substantial evidence standard by requiring that some residuum of the evidence be admissible. It is a significant issue, and we are not well served by a judicial approach which merely avoids the matter.

Finally, *Jones* suggests another consideration which affects the application of the substantial evidence doctrine when judicial review of an agency's decision advances to the appellate level. The United States Supreme Court recently indicated that when an appellate court is confronted with a substantial evidence case after one level of judicial review has been afforded, its role is limited to a consideration of whether "the standard was misapprehended or grossly misapplied"[423] rather than a de novo determination of the substantial evidence balance. In *Jones,* as in virtually every other case involving state supreme court judicial review after an initial review at a lower level,[424] our supreme court engaged in a de novo substantial evidence review.[425] The practice of de novo review in these circumstances should be reconsidered. Where judicial review runs in the first in-

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dent men in the conduct of their affairs." N.M. Stat. Ann. § 12-8-11 (1978) (State APA standard). If the use of the residuum rule is permitted to confuse the question of weight to be given to evidence with questions of admissibility, it might undercut the traditional leeway given to agencies to hear whatever evidence is relevant and probative, without regard for its admissibility. *See generally,* Utton, *Substantial Evidence to Review Administrative Findings of Fact in New Mexico,* 10 N.M. L. Rev. 103 (1979-80).

422. *Trujillo* can be read more narrowly to require reversal on the basis of the legal residuum rule only when benefits are denied on the basis of controverted hearsay alone. Trujillo v. Emplyoment Sec. Comm'n, 94 N.M. 343, 344, 610 P.2d 747, 748 (1980).

423. American Textile Mfg. Co. v. Donovan, 49 U.S.L.W. 4720, 4729 (June 17, 1981). Justice Stewart, dissenting on the substantial evidence point, concluded "this is one of those rare instances where an agency has categorically misconceived the nature of the evidence necessary to support a regulation." *Id.* at 4734.

424. *See e.g.,* New Mexico Dept. of Human Servs. v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980). In *Garcia* the Supreme Court not only reassessed the substantial evidence balance, it misapplied the statutory standard involved. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 28-29.

425. The second appeal to our supreme court may often be a matter of right as distinguished from the discretionary review in the United States Supreme Court. In New Mexico, where the initial review is to the district court, the statute usually provides for appeal to the supreme court as a matter of right. *See e.g.,* N.M. Stat. Ann. § 51-1-8(M) (1978) (unemployment compensation cases) and N.M. Stat. Ann. § 62-11-7 (1978) (appeals from Public Service Commission). The United States Supreme Court has discretion over what appeals it will hear. *See* 28 U.S.C. § 1254(1) (1976) and Sup. Ct. R. 17. This distinction, however, does not justify a different result. In either circumstance, the appellant has already received one complete substantial evidence review. Another full review would be expensive and redundant.

stance to a lower court, a more limited review on a subsequent appeal to the supreme court would serve several important interests. It could conserve judicial time and energy and would respect the decision-making role of the initial reviewing court.[426] Such a procedure would also preserve for the supreme court its proper role of reviewing law rather than fact questions.

American Automobile Association v. State Corporation Commission[427] demonstrates that when the substantial evidence standard is applied it often raises other significant judicial review considerations. *AAA* involved an application by the New Mexico Wrecker Operations Association for a rate change. AAA intervened in the action, claiming that the rates sought were excessive. After two sets of hearings and a staff report, the Commission adopted a rate schedule for state-wide use from which AAA appealed. The district court affirmed the order of the Commission, but the supreme court reversed. The court concluded "that the Commission's order is not based on substantial evidence in that the sample on which it is based does not fairly represent the wrecker industry in New Mexico."[428]

The important part of the *AAA* case was not the court's substantial evidence ruling, but rather its legal conclusion that in performing its rate-setting function "the Commission must take a state-wide sample which must include large and small operators and be representative."[429] Because the Commission did not meet that legal requirement, the court concluded that there was not substantial evidence to support the Commission's conclusion. Thus, the Commis-

426. This increased respect is particularly important where the legislature has placed the initial stage of review in a specific court. In those instances where the legislature has reposed initial review in the court of appeals, *see e.g.*, N.M. Stat. Ann. §27-3-4 (1978) (public assistance appeals); N.M. Stat. Ann. §74-1-9 (1978) (environmental appeals, or in one particular district court, *see, e.g.*, N.M. Stat. Ann. §63-9-13 (1978) (telephone company orders of the corporation commission appealable to the district court for Santa Fe County), expertise should be allowed to develop. One way to develop that expertise is for the supreme court to withdraw from plenary review to a more removed role of assuring only the accuracy of the legal standard applied by the lower court.

Where initial review lies in the district courts in general, perhaps there is greater reason for substantive review by the supreme court. First, with diverse district courts making the initial review, there may be no particular expertise being developed. Second, with so many courts involved, the supreme court may need to oversee the cases to assure uniformity and consistency of application of the law.

427. 95 N.M. 227, 620 P.2d 881 (1980).

428. *Id.* at 229, 620 P.2d at 883. At the first hearing, the Commission heard testimony from six wrecker operators from Gallup, Albuquerque, and San Ysidro. The commission then sent a staff team to Gallup to audit the two wreckers from that area who had testified. At its second hearing the commission received a rate proposal from the staff which it modified before adoption for state-wide use. *Id.* at 228, 620 P.2d at 882.

429. *Id.* at 229, 620 P.2d at 883.

sion's decision was not reversed for its failure to meet an evidentiary standard. The decision was reversed for its failure to follow what the court on review imposed as the process of decision-making necessary for the Commission to carry out its statutory duty of setting just and reasonable rates.[430]

The courts must be cautious, of course, not to remake clear statutory standards.[431] Judicial guidance is appropriate, however, where the statutory standard is so broad and general as to provide no real guidance for the agency or litigants before it. In those instances, an agency would be well advised to articulate definable standards for itself.[432] It is essential, however, for the court to review those agency-imposed standards; in the process the judiciary becomes directly involved in the standard-setting itself.[433] *AAA* serves as an example of judicial involvement, under the guise of the application of the substantial evidence test.

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430. The "just and reasonable" standard is an extremely general one. Agencies, however, sometimes flesh out extremely general standards by imposing their own procedures, thereby avoiding delegation problems. Yakus v. United States, 321 U.S. 414, 425-26 (1944); Amalgamated Meat Cutters & Butcher Workers v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J.) (Three-Judge Court).

This problem is usually couched in non-delegation terms, and the administrative gap-filling is used to avoid the invalidation of an otherwise impermissibly broad delegation of authority. Such was the case in both *Yakus* and *Amalgamated Meat Cutters. See also* text accompanying notes 23-31, *supra.* However, the "just and reasonable" rule-making standard has been uniformly upheld against non-delegation attack. *See, e.g.,* FPC v. Hope Nat. Gas Co., 320 U.S. 591, 600 (1944).

The *AAA* court analyzed the nature and scope of agency review as one involving the responsibility of the commission "to be thorough in its decision making." 95 N.M. at 229, 620 P.2d at 883. In that regard, the court-imposed state-wide sampling procedure resembles more a judicial inquiry at whether the commission took "a 'hard look' at the salient problems" before making its decision. *See* Greater Boston Television Corp. v. Federal Communications Comm'n, 444 F.2d 841, 851 (D.C. Cir. 1975), *cert. denied,* 403 U.S. 923 (1971). For a discussion of the "hard look" doctrine, *see* notes 349 & 362 *supra.*

431. For example, in Greyhound Lines v. New Mexico St. Corp. Comm'n, 94 N.M. 496, 612 P.2d 1307 (1980), the court recognized that the statutory standard contained in N.M. Stat. Ann. §65-2-7 (1978) required the commission to determine whether "there is a public need for the proposed additional service and [whether] . . . the existing facilities are . . . reasonably adequate." 94 N.M. at 498, 612 P.2d at 1309. This kind of standard needs no elaboration. The role of the reviewing court is merely to see that the standard is properly applied, and that properly admitted evidence is sufficient to support a conclusion based on the standard. For a discussion of *Greyhound* in its process of proof posture *see* text accompanying notes 270-278 *supra.*

432. *See* note 430 *supra. But see,* Stewart, *The Reformation of American Administrative Law,* 88 Harv. L. Rev. 1667, 1700-01 (1975).

433. *See* American Auto. Ass'n v. State Corp. Comm'n, 95 N.M. 227, 620 P.2d 881 (1980). Even Justice Rehnquist has acknowledged that the legislature need not fill in all the blanks while setting standards for administrative agencies. It is only complete legislative abdication of the more difficult policy-making aspect of setting standards which, in his view, ought to trigger use of the nondelegation doctrine. American Textile Mfg. Co. v. Donovan, 49 U.S.L.W. 4720, 4735 (Rehnquist, J., dissenting). It is therefore appropriate, if not necessary, for the agency and the courts do to the blank-filling when that becomes necessary.

C. *Res Judicata & Estoppel*[434]

The doctrine of res judicata operates to preclude the relitigation of claims or issues when a reasonable opportunity has been afforded to the parties to litigate those claims or issues at an earlier time.[435] The doctrine arose in the context of traditional civil litigation and is designed to allow parties and others to rely on the finality of a decision in ordering their subsequent affairs.[436] Early cases suggested that res judicata principles do not apply to administrative decisions.[437] The United States Supreme Court in *United States v. Utah Construction and Mining Co.*,[438] however, stated the prevailing modern view: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[439]

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434. Last year's cases touched upon administrative estoppel, *see* 1979-80 Administrative Law Survey, *supra* note 54, at 30-33. This year saw only minor treatment of res judicata, and no cases on estoppel.

435. *Restatement of the Law of Judgments* 9 (1942).

436. *Id.* For a discussion of the principle in the context of traditional civil litigation *see generally, Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818 (1952); Cleary, *Res Judicata Reexamined,* 57 Yale L. J. 339 (1948).

437. *See, e.g.*, Pearson v. Williams, 202 U.S. 281 (1906).

438. 384 U.S. 394 (1966).

439. *Id.* at 421-22. In matters involving administrative res judicata the initial inquiry involves the provisions of the governing statute. Where the statute provides for or allows a reconsideration or modification of the initial agency decision, then the statutory authority will control to allow relitigation despite res judicata. *See* Banks v. Chicago Grain Trimmers Ass'n. Inc., 390 U.S. 459 (1968) (Relitigation of compensation claim allowed when new evidence discovered despite res judicata because statute allowed reconsideration on grounds of changed conditions or mistake in determination of fact). Where a statute or regulation does not confer reopening power, however, and the case resembles a traditional judicial action, it is more likely that res judicata principles will apply.

When the prior decision involves uniquely administrative functions, in which public interest considerations predominate, a more flexible approach is taken toward res judicata principles. The essential consideration is whether "application of res judicata principles unduly impede the agency's effectuation of the social objectives which the legislature has committed to its care." W. Gellhorn, *supra* note 27, at 403-04. In licensing, for example, the public interest considerations in the granting of a license must have been held to outweigh the reliance by competitors on an initial denial. Mulcahy v. Public Service Comm'n, 101 Utah 245, 117 P.2d 298 (1941). Similarly, res judicata has been rejected in the rate-making context: "[t]he appropriateness of a particular rate schedule typically depends on factual circumstances and policy considerations which change dratistically, and often quite rapidly over time. A doctrine barring all reconsideration would seem to be contrary to sound regulatory policy." Borough of Lansdale v. Fed. Power Comm'n, 494 F.2d 1104, 1115, n. 45 (D.C. Cir. 1974), quoting K. Davis, Administrative Law Treatise § 1802 at 548 (1958).

In a recent New Mexico case the supreme court failed to follow the *Borough of Lansdale* approach and upheld an application of res judicata principles to rate-making. Hobbs Gas Co. v. New Mexico Public Serv. Comm'n, 94 N.M. 731, 616 P.2d 1116 (1980) involved a utility appeal from a Commission order denying a rate increase. The district court overturned the order,

This term the New Mexico Supreme Court in *State ex rel Reynolds v. Rio Rancho Estates, Inc.*,[440] confronted one narrow aspect of the application of res judicata to the administrative process—that of the res judicata impact of a prior agency proceeding on subsequent court litigation.[441] In *Reynolds,* the subdivision had applied for a permit to repair a well. The State engineer granted the permit subject to the condition that in the process the well would not be deepened or the diameter enlarged. No appeal was taken from that decision. It was subsequently found that the well could not be repaired. Rio Rancho then applied for a permit to move the well, and to increase its diameter. That permit was granted, but the initially imposed limitations on size were retained. On de novo review the district court found that Rio Rancho had a right to construct the well, and that the size limitation could not be imposed. The supreme court affirmed, holding inter alia[442] that the doctrine of administrative res judicata did not apply to bar litigation of the depth of the well and diameter of the pipe.

The court applied the principle that res judicata, or issue preclusion, will attach only when the prior case actually addressed the issue in a manner that was essential to the decision.[443] In *Reynolds,* the initial application had not requested a change in the amount of the

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concluding that the order was arbitrary and capricious and unsupported by substantial evidence. The supreme court affirmed the district court.

One of the issues on appeal in *Hobbs Gas Co.* involved whether the district court erred in applying res judicata principles to bar the Commission from disallowing a plant acquisition adjustment from the company's equity capital—a step which was contrary to the previous policy of the Commission and previous rate-making orders of the Commission. 94 N.M. at 735, 616 P.2d at 1120. The court held that the application of res judicata (and collateral estoppel) principles was not in error in that case. *Id.* at 736, 616 P.2d at 1121. The court limited its holding to the facts of the case, however, out of a concern that its holding "not restrict the ability of the Commission to adapt to changes in circumstances in the rate-making determination from one year to the next." *Id.* The parameters of the limitation are unclear, however, and the holding in *Hobbs Gas Co.* creates a hurdle for future rate-making policy changes by the Commission.

440. 95 N.M. 560, 624 P.2d 502 (1981).

441. The range of administrative res judicata problems is truly expansive. The usual context involves matters of agency reconsideration, but the issue can arise over the extent to which one agency must give res judicata effect to the decision of a sister agency, as well as the res judicata impact of a court decision in a subsequent agency proceeding. *See generally,* Markley, *Conflict in the Courts: NLRB Decisions as Res Judicata in Section 303 Suits,* 27 Admin. L. Rev. 83 (1975); Note, *The Preclusive Effect of State Agency Findings in Federal Agency Proceedings,* 64 Iowa L. Rev. 339 (1979); Comment, *Application of Res Judicata to Agencies with Parallel Jurisdictions,* 52 Denver L. J. 595 (1975).

442. The main point on appeal involved the court's affirmance of the lower court's conclusion that the *Mendenhall* doctrine afforded Rio Rancho an inchoate water right not subject to size limitations. 95 N.M. at 564, 624 P.2d at 506; *see* State v. Mendenhall, 68 N.M. 467, 362 P.2d 998 (1961).

443. 95 N.M. at 562, 624 P.2d at 506, quoting Paulos v. Janetakos, 46 N.M. 390, 393, 129 P.2d 636, 638 (1942).

water, "nor was a statement of limitation of the right required for the State Engineer to grant [the initial] approval."[444] The court concluded that "the State Engineer's [initial] determination did not bar the subsequent litigation of those issues here."[445]

The *Reynolds* court properly reasoned that "[a] party should not be required to litigate every incidental matter which might come up in the course of a proceeding before the State Engineer or forever lose its claim."[446] This rationale underlies the general principle that res judicata will not attach to issues not litigated when not essential to the earlier decision.[447] *Reynolds* highlights the importance of insuring that the policy-making processes of administrative agencies remain open for full consideration, and are not foreclosed by an unbalanced concern for finality.

D. Limitations on Judicial Review—Exhaustion and Primary Jurisdiction

During the Survey year, one decision, *First Central Service Corporation v. Mountain Bell Telephone,*[448] involved exhaustion and primary jurisdiction considerations.[449] *Hernandez v. Home Education Livelihood Program, Inc.,*[450] although not arising in the administrative context, also raised administrative exhaustion considerations.

In *First Central,* the plaintiff, a subscriber to Mountain Bell services, sought to retain the telephone number of its predecessor subscriber. Mountain Bell conditioned its approval of the request upon plaintiff's agreeing to pay the indebtedness of its predecessor.[451] The plaintiff refused and sought relief in the district court. From an

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444. 95 N.M. at 562, 624 P.2d at 506.

445. *Id.*

446. *Id.*

447. *See* Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636 (1942).

448. 95 N.M. 509, 623 P.2d 1023 (Ct. App. 1981).

449. These are two of several doctrines which limit judicial review of administrative decisions. One commentator has stated: "[a]ll of these doctrines . . . presuppose that administrative action may be subject to review in appropriate circumstances, although not necessarily at the behest of this plaintiff (standing) or at this time (ripeness, exhaustion, primary jurisdiction)." G. Robinson, E. Gellhorn, & H. Bruff, *The Administrative Process* 207 (West. 1979). Last year's survey gave substantial treatment to venue as a tangential limitation on judicial review of administrative decision-making. 1979-80 Administrative Law Survey, *supra* note 54, at 33-36.

450. 95 N.M. 281, 620 P.2d 1306 (1980).

451. The relevant phone company tariff, approved by the State Corporation Commission, provides: "In any case where existing service is continued for a new subscriber, the telephone number may be retained by the new subscriber only if the former subscriber consents and an arrangement acceptable to the Telephone Company is made to pay all outstanding charges against the service." *Id.* at 511, 623 P.2d at 1025 (quoting Mountain Bell's General Exchange Tariff, Section 20, paragraph N(2) (Sixth Revised Sheet) (emphasis by the court deleted).

adverse ruling, plaintiff appealed.[452] The court of appeals upheld the district court, holding that the utility had an absolute right to withhold the use of any given telephone number.[453]

The court expressly rejected an exhaustion defense put forward by Mountain Bell, although a ruling on that issue was unnecessary to the decision.[454] Mountain Bell argued that the New Mexico Constitution[455] and a state statute[456] granted exclusive jurisdiction to the State Corporation Commission, requiring exhaustion of commission remedies as a precondition to judicial review.

The court conceded that the complaint could have been filed with the Corporation Commission in the first instance, but held that the plaintiff was not *required* to file with the Commission.[457] The court reasoned that "[n]o utility commission or state agency should be allowed to usurp the jurisdiction granted district courts under Article VI, Section 13 of the New Mexico Constitution."[458]

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452. The district court entered a temporary restraining order and continued the TRO pending appeal despite the adverse ruling on the merits. At the time of the court of appeals' decision, therefore, plaintiff retained use of the phone number in dispute.

453. The court of appeals also dissolved the temporary restraining order and ordered the discontinuation of service under the contested number "unless First Central pays the outstanding charges against this service." 95 N.M. at 513, 623 P.2d at 1027.

454. Because the court ruled for Mountain Bell on the merits, it was unnecessary for the court to consider Mountain Bell's alternative theory—that plaintiff's case should be dismissed for failure to exhaust administrative remedies.

In theory, the exhaustion question is a threshold matter, the resolution of which could obviate the need for consideration of the merits. The court, by first resolving the merits in favor of the phone company, relegated the exhaustion discussion to the status of dicta.

455. N.M. Const. art. 11, §7.

456. N.M. Stat. Ann. §63-9-11(A) (1978).

457. Smith v. Southern Union Gas Co., 58 N.M. 197, 269 P.2d 745 (1945) held to the contrary with respect to the exclusive jurisdiction of the Public Service Commission, but the *First Central* court distinguished *Smith* on the ground that the Public Service Commission's jurisdiction is "general and exclusive" whereas the Corporation Commission's jurisdiction under the Telephone and Telegraph Company Certification Act was read to be permissive and concurrent with the district court. 95 N.M. at 513, 623 P.2d at 1027.

A careful reading of N.M. Stat. Ann. §63-9-11 (1978) and related sections does not support the court's permissive reading. First, the statute lays out an elaborate procedural mechanism for the conduct of hearings on complaints. Second, the hearing on the complaint results in an order, N.M. Stat. Ann. §63-9-11(D) (1978), which is judicially reviewable as any other order of the Commission. *See* N.M. Stat. Ann. §63-9-13 (1978). Finally, the statute specifically confers only on the Commission the authority to use the courts to enforce the Act or Commission regulations issued thereunder. N.M. Stat. Ann. §63-9-19 (1978).

This elaborate statutory scheme suggests that matters concerning the regulation of telephone companies were intended to be left to the Commission, even though the legislature did not use the "general and exclusive" language found in the Public Service Commission statute. In any event, consideration of that question merited more than offhand treatment. The *First Central* court answered the argument only by reference to dicta in *Smith* to the effect that litigants ought not be forced into an administrative arena "at the whim of . . . the commission. . . ." 95 N.M. at 573, 623 P.2d at 1027.

458. *Id.*

This minor and unnecessary portion of the *First Central* opinion contorted the law of exhaustion. First, the court confused the interplay between exhaustion and primary jurisdiction. Second, the court failed to acknowledge the policies which underlie those doctrines, and in the process stood exhaustion on its head. The court incorrectly viewed exhaustion as a doctrine which can usurp judicial authority,[459] when in fact exhaustion is a *judicially imposed* mechanism to assure that judicial review is orderly, expeditious and does not usurp agency authority.[460]

The doctrines of exhaustion and primary jurisdiction must be carefully separated. Exhaustion, according to Justice Brandeis, is "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[461] The doc-

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459. The anti-agency animus implied in the *First Central* opinion evokes a nostalgic notion of self-reliance rooted in the notion that less government intervention in private matters makes for a better society. It is more likely that the administrative state will not only remain with us, but will continue to grow for three important reasons:

> First, escape from the administrative state would not mean escape from the administered society. The latter is ubiquitous and exists in both public and private sectors: for the business of society, the whole of society, is conducted by organizations with specialized functions. On the private side, organizations—corporations, unions, associations—are now the dominant factor in the economy. . . . Man is, in other words, inescapably a subject of private administration.
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> Second, the ballot of the market place does not provide to man an adequate means of protecting and promoting his interests. Man casts his ballot much more frequently in the market place than he does in the political system. He votes when he chooses a product, or elects to buy or not to buy, to sell or not to sell, to borrow or not to borrow, to patronize one dealer rather than another. Yet in spite of the multitude of individual ballots, continuously cast, there are grave limitations on the capacity of the economic vote.
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> . . .
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> . . . Man has turned to politics and to creation of the administrative state because his ballot in the market place did not satisfy all of his interests.
>
> Third, the public and the private sectors of the administered society are interlocked. The private sector is dependent upon the public, just as the public sector is dependent upon the private. The private sector is propped and serviced in innumerable ways by the administrative state.

E. Redford, *Democracy in the Administrative State,* 180-82 (1969).

460. The exhaustion doctrine is premised on notions of judicial economy and regard for the relationship between courts and agencies:

> A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

McKart v. United States, 395 U.S. 185, 195 (1969).

461. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (Brandeis, J.).

trine only applies to the timing of judicial review, and only comes into play when there is some kind of agency action which is sought to be reviewed.[462] When, however, the issue is whether it should be the court or an agency which takes the *initial* action, then the doctrine of primary jurisdiction comes into play.[463] Both primary jurisdiction and exhaustion constrain court action and both are based on considerations for the proper relationship between court and agency. Primary jurisdiction concerns itself with the proper initial forum. Exhaustion is concerned only with the timing of judicial review once there is agency action.

The *First Central* court's confusion between the two doctrines emanates from the confusion in an earlier case, *Smith v. Southern Union Gas Co.*[464] *Smith* involved the determination of the appropriate utility rate schedule to be applied to the plaintiff. The court held that exclusive original jurisdiction over the matter was conferred by statute on the Public Service Commission,[465] and that the statute was not an unconstitutional usurpation of the general jurisdiction of the district court.[466] The phrase "exclusive, original juris-

462. " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone. . . ." United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956). Exhaustion is used in four general circumstances: 1) to preclude resort to agency relief after the expiration of a stated period of time; 2) to preclude the raising of an issue for the first time on an appeal from an agency; 3) to prevent the thwarting of agency processes by litigants who seek to wait until agency decisions are rendered before attacking agency processes; and 4) to prevent premature challenges to agency decisions. *See* G. Robinson, *supra* note 448, at 235-39.

There are several recognized exceptions to the exhaustion doctrine. It will not bar judicial action where the administrative remedy is inadequate. *See* Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919). Nor will exhaustion preclude judicial action where resort to the agency process would in itself cause the legal cognizable injury, *see* Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56 (1939). Also the doctrine does not apply where the application of agency procedures could impinge upon constitutionally protected rights. *See, e.g.,* Barney v. Barchi, 443 U.S. 55 (1979). *But see,* Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981) (en banc), *cert. granted,* 50 U.S.L.W. 3244 (1981).

463. The policy behind primary jurisdiction is that the expertise of the agency can best decide certain questions, at least in the first instance.

> "Primary jurisdiction," . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956). Primary jurisdiction is rarely mandated by statute. It is a question of judicial recognition of a need for agency expertise in the resolution of a matter which is before the court.

464. 58 N.M. 197, 269 P.2d 745 (1954).

465. *See* N.M. Stat. Ann. §62-6-4 (1978).

466. The *Smith* court stated: "[W]hat has been done in the Public Utility Act is not a deprivation or ouster of jurisdiction of the courts, but a postponement until the commission has passed upon the complaint." 58 N.M. at 199, 219 P.2d at 747. While *Smith* may not have articulated the usurpation question in delegation terms, *see* note 457, *supra,* the question is

diction" can be read to include both a requirement of exhaustion insofar as the jurisdiction is exclusive, and an implication of the policies behind primary jurisdiction insofar as the jurisdiction is original. The *Smith* court was reading from the statute and did not disentangle the two. The doctrines remained entangled in the *First Central* decision.

The claims of the plaintiffs in *Smith* and *First Central* were very much the same. Both cases involved a legal determination of the meaning and applicability of an established tariff. The *First Central* court distinguished *Smith* by noting that the statutory language involved is different. The Public Service Commission statute at issue in *Smith* confers "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its . . . service regulations . . . ,"[467] whereas the Corporation Commission statute at issue in *First Central* only states that complaint against the phone company "*may* be made" by resort to the Commission.[468]

The *First Central* court's reading of the telephone statute may be subject to question.[469] That reading, however, makes it very clear that there is concurrent jurisdiction over this type of complaint—and it is just that situation which renders the question one of primary jurisdiction rather than exhaustion.[470]

Under primary jurisdiction, as articulated by our court in *State ex rel. Norvell v. Arizona Public Service Co.*,[471] the question should be resolved in favor of the primary jurisdiction of the agency when, 1) there is a potential for conflicting court decisions if uniform standards must be maintained under a pervasive regulatory scheme, or 2) the issue is one involving experience and technical judgment within the agency's area of particular competence.[472] These factors seem to

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most fundamentally whether the legislature may, without running afoul of separation of powers, confer power on an agency which has the effect of depriving a court of judicial power conferred by the Constitution. *See generally* text accompanying notes 34 & 35 *supra*.

467. 95 N.M. at 513, 623 P.2d at 1027.

468. *Id.* (emphasis by the court).

469. The statute uses the term "may" in a context which indicates that the word was used to describe *how* agency complaints could be brought. In context, it does not read as suggesting that there are complaint mechanisms other than the commission available. *See* note 457 *supra*.

470. *See* L. Jaffe, Judicial Control of Administrative Action 121 (1965).

471. 85 N.M. 165, 510 P.2d 98 (1973). In *Norvell* the supreme court applied the doctrine of primary jurisdiction to preclude judicial consideration of an action to abate power plant emissions on a common law nuisance theory. The court held that primary resort must be had to agency process afforded by the state Environmental Improvement Act.

472. The *Norvell* court quoted Justice Frankfurter:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than

be present in the *First Central* case. Application of the doctrine of primary jurisdiction might have led to the same result in *First Central,* but misplaced reliance on the analysis in *Smith* led the court to apply the wrong doctrine of limitation.

During the Survey year the court relied upon the administrative exhaustion doctrine in what was in essence a private contract dispute. In *Hernandez v. Home Education Livelihood Program, Inc.,*[473] the court of appeals reversed a district court decision which dismissed a private damage action based on the exhaustion doctrine. Plaintiff sued her prior employer for wrongful discharge. The case was dismissed for her failure to exhaust the grievance procedures in the employer's personnel manual. The court of appeals reversed on the ground that the manual placed a duty on the employer to inform the employee of her procedural rights, and the emloyer's failure to comply with that duty[474] barred the exhaustion defense.

Hernandez indicates that administrative law principles pervade the private sector as well as areas of public law.[475] Because the plaintiff was part of a private administrative structure which imposed its rules and regulations as a matter of contract, the employer and employee were bound by the private administrative processes, just as they would have been if the employer had been an administrative agency.[476] Cases like *Hernandez* suggest that administrative law principles like exhaustion will increasingly be found to be applicable to private relationships.

E. Non-Statutory Review

This section deals with the kind of judicial review of agency action which was not expressly mentioned either by the statute creating the agency or a statute conferring general administrative review powers on the courts.[477] The two classic routes to non-statutory judicial review are extraordinary writs and suits for declaratory and injunc-

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courts by specialization, by insight gained through experience, and by more flexible procedure.

Id. at 171, 510 P.2d at 104 (quoting Far East Conference v. United States, 342 U.S. 570, 572 (1952)).

473. 95 N.M. 281, 620 P.2d 1306 (Ct. App. 1980).

474. For a discussion of this case in the context of "notice" *see* text accompanying notes 216-220 *supra.*

475. *See* note 459, *supra.*

476. One essential distinction remains, however. *Hernandez* could not claim a lack of due process or equal protection in treatment afforded by her private employer because of the lack of state action in the private employment context.

477. The commentators refer to review mechanisms that exist outside of the administrative law framework as "non-statutory" review. *See* K. Davis, Administrative Law Text §23.02 at 444 (1972); 1979-80 Administrative Law Survey, *supra* note 54, at 36, n. 242.

tive relief. During this survey year there were several cases in both categories, demonstrating the willingness of our courts to intercede in agency processes where necessary to protect substantial rights.

1. The Prerogative Writs

Prerogative writs may be an inefficient means of reviewing agency action because of procedural anachronisms.[478] That method, however, continues to provide a vehicle for the litigation of purely legal claims against agencies. In two cases, *Perea v. Baca*[479] and *State ex rel Edwards v. City of Clovis,*[480] writs of mandamus were successfully used to challenge agency action or inaction. In *State ex rel Martinez v. Padilla,*[481] the quo warranto remedy was used to determine title to a public office.

In *Perea,* the supreme court affirmed the district court's issuance of a writ of mandamus ordering the Director of the Department of Alcoholic Beverage Control to grant a transfer of a license.[482] The Director approved a transfer of a liquor license from one zone to a buffer area overlapping two zones. He denied a second transfer, however, which would have put the license into the zone it now overlapped. The Director conceded that all statutory conditions had been met for the second transfer but argued that he denied the transfer in the exercise of his discretionary powers, which are not controllable by issuance of a writ.[483] The court held that the Director's discretion was only to determine "whether the statutory requirements have been met."[484] Once the requirements were met, as they were in this case, the Director was "performing a ministerial function and mandamus is an appropriate remedy. . . ."[485]

State ex rel Edwards v. City of Clovis,[486] which involved the fail-

478. Professor Davis has observed that the prerogative writs are laden with the procedural baggage from an earlier era. He states: "the litigant must be prepared to negotiate the procedural paths presented by the particular writ in addition to establishing the substantive claim against the agency action." *See* 1979-80 Administrative Law Survey, *supra* note 54, at 38.

479. 94 N.M. 624, 614 P.2d 541 (1980).

480. 94 N.M. 136, 607 P.2d 1154 (1980).

481. 94 N.M. 431, 612 P.2d 223 (1980).

482. The case also concerned statutory construction of the law on transfers and the weight to be given to the agency interpretation of the statute. That portion of the decision is discussed in note 384 *supra.*

483. One of the historical limitations on the use of mandamus is that the writ will not issue to control the exercise of discretion. *See* El Dorado at Santa Fe, Inc. v. Board of County Comm'rs, 89 N.M. 313, 551 P.2d 1360 (1976). *See generally,* Mandamus in New Mexico, *supra* note 145, at 177-84.

484. 94 N.M. at 627, 614 P.2d at 544.

485. *Id.*

486. 94 N.M. 136, 607 P.2d 1154 (1980).

ure of the city to enforce its swine ordinance,[487] used a similar analysis. The court found that the law at issue prohibited the keeping of swine, and that enforcement of the law was ministerial.[488] Therefore a writ of mandamus was proper. The court seemed to imply that it is only in interpreting a statute that there might be discretion. Acting under a correct interpretation of the statute is ministerial and subject to the writ of mandamus. *Edwards* also considered the adequacy of the remedy at law, a procedural hurdle which could have been used to preclude the issuance of the writ. The court concluded that "[t]he fact that petitioner may have available to him other remedies against private individuals does not prevent petitioner from seeking mandamus against respondents."[489]

Perea and *Edwards* suggest that concern about the complexity of the prerogative writ approach is misplaced. Both cases make clear that when the court is convinced that a serious breach of a legal requirement has taken place, the procedural hurdles in extraordinary writ practice will not be permitted to stand in the way of relief.

Similarly, the complexities of quo warranto requirements did not prevent the court's granting of that writ in *State ex rel Martinez v. Padilla.*[490] A quo warranto suit was brought to challenge defendants' title to seats on a local Board of Education, alleging misuse of public funds. The district court issued the writ, and the supreme court affirmed. In reaching its decision, the court found that the defendants had misused public funds and concluded that "[a]n action in quo warranto is a proper method of correcting the usurpation, misuser, or nonuser, of a public office or corporate franchise."[491] The court had to contend with several procedural attacks on the propriety of the writ. In the view of the *Martinez* court, none of the problems

487. The portion of the case dealing with the enforceability of the city's rule in light of a rule change during litigation is discussed in the text accompanying notes 141-155 *supra.*

488. The court stated: "Once petitioner showed that there was a valid ordinance in existence and that it was being violated, the duty cast upon the City became ministerial and subject to enforcement by mandamus." 94 N.M. at 139, 607 P.2d at 1157.

489. *Id.* Although mandamus is rooted in law rather than equity, Jenks, *The Prerogative Writs in English Law,* 32 Yale L.J. 523, 532 (1923), the prerogative nature of the writ has precluded its issuance where an adequate remedy "in the ordinary course of law" is available. N.M. Stat. Ann. §44-2-5 (1978).

It is difficult to say whether, in deciding the adequate remedy question, it is permissible or necessary to look to available legal remedies against other *parties.* The court's ruling implies that the court can only look to available legal remedies between the parties to the suit.

490. 94 N.M. 431, 612 P.2d 223 (1980).

491. *Id.* at 434, 612 P.2d at 227 (quoting J. High, Extraordinary Legal Remedies §591 (3d ed. 1896)).

were insurmountable,[492] and the antiquated quo warranto writ[493] proved useful as a device to remove wrongdoers from public office.

2. Declaratory and Injunctive Relief

The suit for declaratory and injunctive relief is an appropriate means of challenging state administrative action where there is no statutory avenue for review or where that avenue is inappropriate or ineffective.[494] The mechanism has frequently been used in New Mexico to challenge the constitutionality of agency action.[495] *Nall v. Baca*[496] and *Lung v. O'Chesky*[497] illustrate such challenges. In addition, one unique case, *In re Remains of Johnson,*[498] suggests that resort to the court for declaratory and injunctive relief may, under

492. The court gave short shrift to the argument that the Constitution limits grounds for public officer removal to conviction for a felony. The court held that the applicable constitutional provision, N.M. Const. art. 8, §4, requires only a judicial finding of public fund misuse and that "disqualification is not dependent on a felony conviction." 94 N.M. at 433, 612 P.2d 225. Defendants also argued that the only proper procedure for removal was a recall election. The court found that the term "disqualification" contained in the Constitution was synonymous with the "forfeiture" notion in quo warranto "in that both go to eligibility to hold office." *Id.* at 434, 612 P.2d 226. The court therefore concluded that defendants' acts were a forfeiture "and the court has jurisdiction to remove public officers by a writ of quo warranto." *Id.*

Finally, the court rejected the defense that petitioner as a private party could not seek the writ. The court noted that the office in question pertains to a local school district "so it is clear that a private person may maintain the quo warranto action." *Id.* The court paid no attention to the conditions under which a private action is allowed. For a discussion of the problem of meeting those conditions *see* 1979-80 Administrative Law Survey, *supra* note 54, at 37-38.

493. *See e.g.,* Huning v. Los Chavez Zoning Comm., 93 N.M. 655, 604 P.2d 121 (1979); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

494. *See* 1979-80 Administrative Law Survey, *supra* note 54, at 40.

495. During the survey year, two cases brought constitutional challenges in the context of employment terminations. In Gallegos v. Los Lunas Consol. Schools, 95 N.M. 160, 619 P.2d 836 (Ct. App. 1980) the court of appeals reversed a summary judgment in favor of the defendants and ordered that plaintiff's claim of wrongful dissmisal be returned to the district court for trial. *Gallegos* involved the lawfulness of the termination under both due process and the state statute conferring employee discharge power on local school boards.

Lux v. Board of Regents, 95 N.M. 361, 622 P.2d 266 (Ct. App. 1980) involved the dismissal of a tenured professor who claimed that his dismissal violated due process and equal protection as well as first amendment and federal statutory rights. The court of appeals reversed a jury verdict for the plaintiff finding no violation of plaintiff's liberty interest or first amendment rights. *Id.* at 369, 622 P.2d at 274. Both of these cases continue the well established tradition of allowing resort to the general jurisdiction of the courts where serious constitutional claims concerning the terms and conditions of state agency employment are involved, even when other administrative processes subject to traditional judicial review are available. For a discussion of the constitutional issues discussed in *Lux, see* Schowers, *Constitutional Law,* 12 N.M. L. Rev. 191 (1982).

496. 95 N.M. 783, 626 P.2d 1280 (1980).

497. 94 N.M. 802, 617 P.2d 1317 (1980).

498. 94 N.M. 491, 612 P.2d 1302 (1980).

some circumstances, become the exclusive remedy, despite the presence of administrative processes which could afford the same relief.

In *Lung v. O'Chesky,*[499] the plaintiffs sued in district court to challenge the constitutionality of applying the New Mexico state income tax against them. Plaintiffs were Texas residents employed on a federal enclave within New Mexico. The court held that there was sufficient nexus for the State of New Mexico to tax the plaintiffs[500] and that the tax was not being discriminatorily applied. The case proceeded as a suit for declaratory and injunctive relief under the general jurisdiction of the district court. It illustrates the use of this procedure as an expeditious way of resolving the constitutionality of an agency's applying its law to the plaintiffs.

Similarly, in *Nall v. Baca,*[501] the invocation of the district court's power to issue declaratory and injunctive rulings was deemed an appropriate method of testing the constitutionality of allowing a violation of the nude dancing statute to serve as grounds for revocation of a liquor license.[502] The substantive claim was rejected and the statute upheld against constitutional attack. The declaratory/injunctive procedural route again proved expeditious, and was used despite available administrative procedures.[503]

Finally, in one case involving an agency's invocation of the general jurisdiction of the court, the court suggested that resort to the courts may foreclose alternative administrative procedures. *In re Remains of Johnson*[504] involved a request by the state Board of Medical Investigators for an order to disinter the remains of the decedent.[505] The court granted the motion *ex parte,* but, upon a subsequent motion by the son of the decedent,[506] and after notice and a hearing, the court set aside its order.

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499. 94 N.M. 802, 617 P.2d 1317 (1980).

500. *Id.* at 804, 617 P.2d at 1319.

501. 95 N.M. 783, 626 P.2d 1280 (1980). For a more detailed analysis of the constitutional issues in this case, *see* Note, *Regulating Nude Dancing in Liquor Establishments—The Preferred Position of the Twenty First Amendment,* 12 N.M. L. Rev. 611 (1982).

502. The court expressly withheld a ruling on "whether the entertainers may attack the constitutionality of the statute because it also prohibits indecent dancing in a 'public place' or for other reasons." *Id.* at 788, 626 P.2d at 1285.

503. The licensees could have litigated the question through the normal hearing appeal process. *See* N.M. Stat. Ann. §§60-6C-1 to -9 (Repl. Pamp. 1981). Indeed, the appeal statute seeks to preclude resort to judicial intervention by way of injunction, *id.* §60-6C-6, but constitutional cases like *Nall* are a clear, although unarticulated, exception.

504. 94 N.M. 491, 612 P.2d 1302 (1980).

505. The decedent had been living with her daughter and there was some evidence of physical abuse by the daughter prior to the decedent's last hospital stay. The police report which contained this information was not filed until after decedent was buried. The report triggered the Board's application for an order permitting disinterment. *Id.* at 492-93, 612 P.2d 1303-04.

506. At the hearing on the son's motion for reconsideration there was conflicting evidence about foul play. *Id.* at 493, 612 P.2d at 1304.

After the hearing on the son's motion, but before the decision, the Board moved to dismiss the case claiming independent statutory authority to exhume without court authorization. The district court denied that motion, and rescinded its order of disinterment. On appeal, the supreme court affirmed the district court, holding that "it was not an abuse of the trial court's discretion to rescind its first order permitting disinterment."[507] The court added that despite an alternative administrative route to disinterment,[508] "the trial court did have subject matter jurisdiction . . . and there exists no statute in New Mexico which . . . deprives a court of general jurisdiction from hearing such cases."[509] The court reasoned that since it was the Board which invoked the jurisdiction of the court in the first instance, "the Board cannot now deny that such jurisdiction exists. . . ."[510]

While the court may have somewhat miscast plaintiffs' request for dismissal by putting it in terms of jurisdiction,[511] the result in the case, rooted in equity consideration, is certainly proper.[512] The reasoning suggests that going to district court may, under some circumstances, preclude resort to alternative administrative decision-making processes. That might be an appropriate principle in cases involving attempts at forum shopping. Extending such a principle, however, could improperly bar agency hearings, thereby undermining the important policies upon which the doctrines of exhaustion and primary jurisdiction rest.[513] The holding of the case, although correct, must be carefully limited. *In re Remains of Johnson* is an interesting sport in the law, and due regard for the proper relationship between courts and agencies requires that it remain just that.

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507. *Id.* at 494, 612 P.2d at 1305.

508. The court acknowledged that although a permit is required for disinternment, the medical examiner could have obtained a permit administratively without resort to the courts. *Id.* at 493-94, 612 P.2d 1304-05; *see* N.M. Stat. Ann. §24-12-4 (Repl. Pamp. 1981).

509. *Id.* at 494, 612 P.2d at 1305.

510. *Id.*

511. Rather than suggesting a jurisdictional bar, the Board's motion is more accurately read as based on discretionary prudential considerations—urging the court not to exercise its jurisdiction where, because of other administrative avenues, judicial intervention is not necessary. This argument, however, is somewhat disingenuous, in that the Board itself had initially invoked the jurisdiction. The posture of the case suggests that the Board engaged in forum-shopping to avoid an adverse ruling. Such circumstances seriously undercut the Board's position.

512. Of obvious import to the court were the substantial rights of the decedent's next of kin, *see* Barela v. Frank A. Hubbell Co., 67 N.M. 319, 355 P.2d 133 (1960), and the fact that removal of the case from the court, at that stage, might have defeated their right to protest the disinterment. 94 N.M. at 494, 612 P.2d at 1305.

513. *See* text accompanying notes, 460-463 *supra*.

APPENDIX A

ADMINISTRATIVE LAW CASES, 1980–81, BY NAME

Academy Road Limited Partnership v. Bernalillo County Treasurer, 95 N.M. 555, 624 P.2d 64 (Ct. App. 1981).

American Automobile Association v. State Corp. Commission, 95 N.M. 227, 620 P.2d 881 (1980).

Bakel v. Bernalillo County Assessor, 95 N.M. 723, 625 P.2d 1240 (Ct. App. 1980).

Black v. Bernalillo County Valuation Protests Board, 95 N.M. 136, 619 P.2d 581 (Ct. App. 1980).

Board of County Commissioners v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980).

Butcher v. City of Albuquerque, 95 N.M. 242, 620 P.2d 1267 (1980).

County of Bernalillo v. Ambell, 94 N.M. 395, 611 P.2d 218 (1980).

Davis v. New Mexico State Bureau of Revenue, 95 N.M. 218, 620 P.2d 376 (Ct. App. 1980).

Duke City Lumber Co. v. New Mexico Environmental Improvement Board, 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980).

Duran v. New Mexico Department of Human Services, 95 N.M. 196, 619 P.2d 1232 (1980).

First Central Service Corp. v. Mountain Bell Telephone, 95 N.M. 509, 623 P.2d 1023 (Ct. App. 1981).

Gallegos v. Los Lunas Consolidated Schools, 95 N.M. 160, 619 P.2d 836 (Ct. App. 1980).

Gas Co. of New Mexico v. O'Cheskey, 94 N.M. 630, 614 P.2d 547 (Ct. App. 1980).

Greyhound Lines, Inc. v. New Mexico State Corp. Commission, 95 N.M. 496, 612 P.2d 1307 (1980).

Hansman v. Bernalillo County Assessor, 95 N.M. 697, 625 P.2d 1214 (Ct. App. 1980).

Harper v. New Mexico Department of Human Services, 95 N.M. 471, 623 P.2d 985 (1980).

Hawthorne v. Director of Revenue Division, 95 N.M. 480, 612 P.2d 710 (1980).

Hernandez v. Home Education Livelihood Program, Inc., 95 N.M. 281, 620 P.2d 1306 (1980).

Hobbs Gas Co. v. New Mexico Public Service Commission, 94 N.M. 731, 616 P.2d 1116 (1980).

Hughes v. State *ex rel.* Human Services Department, 95 N.M. 739, 626 P.2d 276 (Ct. App. 1980).

Human Rights Commission v. Board of Regents of University of New Mexico, 95 N.M. 576, 624 P.2d 518 (1981).

In re Horn, 95 N.M. 38, 618 P.2d 382 (Ct. App. 1980).
In re Remains of Johnson, 94 N.M. 491, 612 P.2d 1302 (1980).
Jones v. Employment Services Division of the Human Services Department, 95 N.M. 97, 619 P.2d 542 (1980).
Katz v. New Mexico Department of Human Services, 95 N.M. 530, 624 P.2d 39 (1981).
Kerr-McGee Nuclear Corp. v. Property Tax Div., 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980).
Lung v. O'Chesky, 94 N.M. 802, 617 P.2d 1317 (1980).
Lux v. Board of Regents, New Mexico Highlands University, 95 N.M. 361, 622 P.2d 266 (Ct. App. 1980).
McCoy v. New Mexico Real Estate Commission, 94 N.M. 602, 614 P.2d 14 (1980).
Mitchell v. Hedden, 94 N.M. 348, 610 P.2d 752 (1980).
Molycorp, Inc. v. State Corporation Commission, 95 N.M. 613, 624 P.2d 1010 (1981).
Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980).
Nall v. Baca, 95 N.M. 783, 626 P.2d 1280 (1980).
New Mexico Board of Pharmacy v. New Mexico Board of Osteopathic Medical Examiners, 95 N.M. 780, 626 P.2d 854 (Ct. App. 1981).
Perea v. Baca, 94 N.M. 624, 614 P.2d 541 (1980).
Ramah Navajo School Board v. Bureau of Revenue, 95 N.M. 708, 625 P.2d 1225 (1980).
New Mexico State Board of Education v. Board of Education, Alamogordo, 95 N.M. 588, 624 P.2d 530 (1981), *reversing,* Board of Education of Alamogordo v. Bryant, 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980).
State *ex rel.* Edwards v. City of Clovis, 94 N.M. 136, 607 P.2d 1154 (1980).
State v. Clayton, 95 N.M. 644, 625 P.2d 99 (Ct. App. 1981).
State v. Gardner, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).
State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980).
State *ex rel.* Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).
State *ex rel.* Reynolds v. Rio Rancho Estates, Inc., 95 N.M. 560, 624 P.2d 502 (1981).
Taxation and Revenue Department v. F. W. Woolworth Co., 95 N.M. 519, 624 P.2d 28 (1981).
Tiffany Construction Co. v. Bureau of Revenue, 93 N.M. 593, 603 P.2d 332 (Ct. App. 1980).
Town of Hurley v. New Mexico Municipal Boundary Comm'n, 94 N.M. 606, 614 P.2d 18 (1980).
Trujillo v. Employment Security Commission, 94 N.M. 343, 610 P.2d 747 (1980).
United States v. State of New Mexico, 624 F.2d 111 (10th Cir. 1980), *cert. granted,* Feb. 23, 1981.

APPENDIX B

ADMINISTRATIVE LAW CASES, 1980-81, BY AGENCY

Alamogordo Board of Education

State Board of Education v. Board of Education, Alamogordo, 95 N.M. 588, 624 P.2d 530 (1981), *reversing,* Board of Education of Alamogordo v. Bryant, 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980).

Bernalillo County

Academy Road Limited Partnership v. Bernalillo County Treasurer, 95 N.M. 555, 624 P.2d 64 (Ct. App. 1981).

Bakel v. Bernalillo County Assessor, 95 N.M. 723, 625 P.2d 1240 (Ct. App. 1980).

Black v. Bernalillo County Valuation Protests Board, 95 N.M. 136, 619 P.2d 581 (Ct. App. 1980).

County of Bernalillo v. Ambell, 94 N.M. 395, 611 P.2d 218 (1980).

Hansman v. Bernalillo County Assessor, 95 N.M. 697, 625 P.2d 1214 (Ct. App. 1980).

In re Horn, 95 N.M. 38, 618 P.2d 382 (Ct. App. 1980).

Board of Medical Examiners

In re Remains of Johnson, 94 N.M. 491, 612 P.2d 1302 (1980).

Board of Osteopathic Medical Examiners

New Mexico Board of Pharmacy v. New Mexico Board of Osteopathic Medical Examiners, 95 N.M. 780, 626 P.2d 854 (Ct. App. 1981).

Board of Pharmacy

Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980).

New Mexico Board of Pharmacy v. New Mexico Board of Osteopathic Medical Examiners, 95 N.M. 780, 626 P.2d 854 (1981).

Board of Regents of University of New Mexico

Human Rights Commission v. Board of Regents of University of New Mexico, 95 N.M. 576, 624 P.2d 518 (1981).

City of Albuquerque

Butcher v. City of Albuquerque, 95 N.M. 242, 620 P.2d 1267 (1980).

City of Clovis

State *ex rel.* Edwards v. City of Clovis, 94 N.M. 136, 607 P.2d 1154 (1980).

City of Santa Fe

Mitchell v. Hedden, 94 N.M. 348, 610 P.2d 752 (1980).

Department of Alcohol and Beverage Control

Nall v. Baca, 95 N.M. 783, 626 P.2d 1280 (1980).
Perea v. Baca, 94 N.M. 624, 614 P.2d 541 (1980).

Department of Health and Environment

State v. Clayton, 95 N.M. 644, 625 P.2d 99 (Ct. App. 1981).

Department of Human Services

Duran v. New Mexico Department of Human Services, 95 N.M. 196, 619 P.2d 1232 (1980).
Harper v. New Mexico Department of Human Services, 95 N.M. 471, 623 P.2d 985 (1980).
Hughes v. State *ex rel.* Human Services Department, 95 N.M. 739, 626 P.2d 276 (Ct. App. 1980).
Jones v. Employment Services Division of the Human Services Department, 95 N.M. 97, 619 P.2d 542 (1980).
Katz v. New Mexico Department of Human Services, 95 N.M. 530, 624 P.2d 39 (1981).

Department of Taxation and Revenue

Davis v. New Mexico State Bureau of Revenue, 95 N.M. 218, 620 P.2d 376 (Ct. App. 1980).
Gas Co. of New Mexico v. O'Cheskey, 94 N.M. 630, 614 P.2d 547 (Ct. App. 1980).
Hawthorne v. Director of Revenue Division, 94 N.M. 480, 612 P.2d 710 (1980).
Kerr-McGee Nuclear Corp. v. Property Tax Division, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980).
Lung v. O'Chesky, 94 N.M. 802, 617 P.2d 1317 (1980).
Ramah Navajo School Board v. Bureau of Revenue, 95 N.M. 708, 625 P.2d 1225 (1980).
Taxation and Revenue Department v. F. W. Woolworth Co., 95 N.M. 519, 624 P.2d 28 (1981).
Tiffany Construction Co. v. Bureau of Revenue, 93 N.M. 593, 603 P.2d 332 (Ct. App. 1980).
United States v. State of New Mexico, 624 F.2d 111 (10th Cir. 1980), *cert. granted,* Feb. 23, 1981.

Employment Security Commission

Trujillo v. Employment Security Commission, 94 N.M. 343, 610 P.2d 747 (1980).

Environmental Improvement Board

Duke City Lumber Co. v. New Mexico Environmental Improvement Board, 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980).

Highlands University Board of Regents

Lux v. Board of Regents, New Mexico Highlands University, 95 N.M. 361, 622 P.2d 266 (Ct. App. 1980).

Human Rights Commission

Human Rights Commission v. Board of Regents of University of New Mexico, 95 N.M. 576, 624 P.2d 518 (1981).

Los Lunas Board of Education

Gallegos v. Los Lunas Consolidated Schools, 95 N.M. 160, 619 P.2d 836 (Ct. App. 1980).

Municipal Boundary Commission, Town of Hurley

Town of Hurley v. New Mexico Municipal Boundary Commission, 94 N.M. 606, 614 P.2d 18 (1980).

Public Service Commission

Hobbs Gas Co. v. New Mexico Public Service Commission, 94 N.M. 731, 616 P.2d 1116 (1980).

Real Estate Commission

McCoy v. New Mexico Real Estate Commission, 94 N.M. 602, 614 P.2d 14 (1980).

State Board of Education

State Board of Education v. Board of Education, Alamogordo, 95 N.M. 588, 624 P.2d 530 (1981), *reversing,* Board of Education of Alamogordo v. Bryant, 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980).

State Corporation Commission

American Automobile Association v. State Corp. Commission, 95 N.M. 227, 620 P.2d 881 (1980).

First Central Service Corp. v. Mountain Bell Telephone, 95 N.M. 509, 623 P.2d 1023 (Ct. App. 1981).

Greyhound Lines, Inc., v. New Mexico State Corp. Commission, 94 N.M. 496, 612 P.2d 1307 (1980).

Molycorp, Inc. v. State Corp. Commission, 95 N.M. 613, 624 P.2d 1010 (1981).

State Engineer

State *ex rel.* Reynolds v. Rio Rancho Estates, Inc., 95 N.M. 560, 624 P.2d 502 (1981).

San Miguel County

Board of County Commissioners v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980).

State Museum Board of Regents
State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980).

State Probation Department
State v. Gardner, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

West Las Vegas Board of Education
State *ex rel.* Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

APPENDIX C

ADMINISTRATIVE LAW CASES, 1980-81, BY TOPIC

I. *Authority of Agency to Act*
  A. *The Non-Delegation Doctrine*
    Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980).
  B. *Statutory Authority*
    Board of County Commissioners v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980).
    In re Horn, 95 N.M. 38, 618 P.2d 382 (Ct. App. 1980).
    Katz v. New Mexico Department of Human Services, 95 N.M. 530, 624 P.2d 39 (1981).
    Mitchell v. Hedden, 94 N.M. 348, 610 P.2d 752 (1980).
    New Mexico Board of Pharmacy v. New Mexico Board of Osteopathic Medical Examiners, 95 N.M. 780, 626 P.2d 854 (Ct. App. 1981).
  C. *Federal Authority in State Administered Federal Programs*
    Duran v. New Mexico Department of Human Services, 95 N.M. 196, 619 P.2d 1232 (1980).
    Harper v. New Mexico Department of Human Services, 94 N.M. 471, 623 P.2d 985 (1980).
    Katz v. New Mexico Department of Human Services, 95 N.M. 530, 624 P.2d 39 (1981).

II. *Exercise of Administrative Power*
  A. *Rules and Rule-Making*
    State *ex rel.* Edwards v. City of Clovis, 94 N.M. 136, 607 P.2d 1154 (1980).
    State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980).
  B. *Orders and Adjudications*
    Hernandez v. Home Education Livelihood Program, Inc., 95 N.M. 281, 620 P.2d 1306 (1980).
    Katz v. New Mexico Department of Human Services, 95 N.M. 530, 624 P.2d 39 (1981).

McCoy v. New Mexico Real Estate Commission, 94 N.M. 602, 614 P.2d 14 (1980).

C. *The Process of Proof*

Duke City Lumber Co. v. New Mexico Environmental Improvement Board, 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980).

Greyhound Lines, Inc., v. New Mexico State Corp. Commission, 94 N.M. 496, 612 P.2d 1307 (1980).

Trujillo v. Employment Security Commission, 94 N.M. 343, 610 P.2d 747 (1980).

D. *The Decision Making Process*

E. *Enforcement of Agency Rules*

Davis v. New Mexico State Bureau of Revenue, 95 N.M. 218, 620 P.2d 376 (Ct. App. 1980).

State v. Gardner, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980).

III. *Judicial Control of Administrative Power*

A. *Timing of Judicial Review*

Butcher v. City of Albuquerque, 95 N.M. 242, 620 P.2d 1267 (1980).

Town of Hurley v. New Mexico Municipal Boundary Commission, 94 N.M. 606, 614 P.2d 18 (1980).

B. *Scope of Review*

State v. Clayton, 95 N.M. 644, 625 P.2d 99 (Ct. App. 1980).

1. *Standards*

Black v. Bernalillo County Valuation Protests Board, 95 N.M. 136, 619 P.2d 581 (Ct. App. 1980).

2. *Questions of Law*

Human Rights Commission v. Board of Regents of University of New Mexico, 95 N.M. 576, 624 P.2d 518 (1981).

Perea v. Baca, 94 N.M. 624, 614 P.2d 541 (1980).

State Board of Education v. Board of Education, Alamogordo, 95 N.M. 588, 624 P.2d 530 (1981), *reversing,* Board of Education of Alamogordo v. Bryant, 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980).

3. *Questions of Fact—Substantial Evidence*

American Automobile Association v. State Corp. Commission, 95 N.M. 227, 620 P.2d 881 (1980).

Jones v. Employment Services Division of the Human Services Department, 95 N.M. 97, 619 P.2d 542 (1980).

Trujillo v. Employment Security Commission, 94 N.M. 343, 610 P.2d 747 (1980).

C. *Res Judicata and Estoppel*

Hobbs Gas Co. v. New Mexico Public Serv. Commission, 94 N.M. 731, 616 P.2d 1116 (1980).

State *ex rel.* Reynolds v. Rio Rancho Estates, Inc., 95 N.M. 560, 624 P.2d 502 (1981).

D. *Limitations on Judicial Review—Primary Jurisdiction/Exhaustion*
First Central Service Corp. v. Mountain Bell Telephone, 95 N.M. 509, 623 P.2d 1023 (Ct. App. 1981).
Hernandez v. Home Education Livelihood Program, Inc., 95 N.M. 281, 620 P.2d 1306 (1980).

E. *Non-Statutory Judicial Review*
1. *The Prerogative Writs*
Perea v. Baca, 94 N.M. 624, 614 P.2d 541 (1980).
State *ex rel.* Edwards v. City of Clovis, 94 N.M. 136, 607 P.2d 1154 (1980).
State *ex rel.* Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).
2. *Declarative and Injunctive Relief*
Gallegos v. Los Lunas Consolidated Schools, 95 N.M. 160, 619 P.2d 836 (Ct. App. 1980).
In re Remains of Johnson, 94 N.M. 491, 612 P.2d 1302 (1980).
Lung v. O'Chesky, 94 N.M. 802, 617 P.2d 1317 (1980).
Lux v. Board of Regents, New Mexico Highlands University, 95 N.M. 361, 622 P.2d 266 (Ct. App. 1980).
Nall v. Baca, 95 N.M. 783, 626 P.2d 1280 (1980).