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# The Constitutionality of Code of Civil Procedure Section 1094.5 (d): Effluvium From An Old Fountain- Head of Corruption

B. ABBOTT GOLDBERG\*

*In California, judicial review of administrative decisions has become notorious for the surprises it holds. . . .*<sup>1</sup>

At the request of the California Hospital Association, and despite the opinion of the Legislative Counsel that it is unconstitutional, the Governor signed SB 1472,<sup>2</sup> which adds a new subsection (d) to Code of Civil Procedure Section 1094.5.<sup>3</sup> New subsection (d) is so innocuous on its face that it escaped this journal's comment on "significant laws" enacted during the 1978 session.<sup>4</sup> Nevertheless, it is a remarkable novelty because it is the first time since Section 1094.5 was enacted in 1945 that the legislature stated in that section which of the two scopes of judicial review codified therein is applicable to any particular form of activity.

In substance new Section 1094.5(d) provides that judicial review in

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1. *President's Page*, 2 STAN. L. REV. 255, 258 (1950).

2. CAL. STATS. 1978, c. 1348, §1 at — (enacting CAL. CIV. PROC. CODE §1094.5(d)); Cal. Office of Legislative Counsel, Report on Enrolled Bill, SB 1472, Sept. 20, 1978; Letter from Joseph A. Saunders Esq., to Governor Edmund G. Brown, Jr., Sept. 26, 1978, (copy on file at the *Pacific Law Journal*).

3. All references to code sections are to the California Codes.

4. 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 247, 255 (1979).

cases "arising from private hospital boards" shall be limited in scope to determining if the board acted on "substantial evidence," thereby precluding the superior court from exercising "its independent judgment on the evidence," the other alternative codified in old Section 1094.5(c).<sup>5</sup> The purpose of Section 1094.5(d) was to alter the result of *Anton v. San Antonio Community Hospital*,<sup>6</sup> which held, *inter alia*, that Section 1094.5(c) required the superior court "to exercise its independent judgment on the evidence" in reviewing the dismissal of a physician by a private hospital from its medical staff.

Although *Anton* is a lawyer's field day, it has not aroused much comment. It raises questions ranging from a high philosophical level down to routine techniques of statutory interpretation. For example, it illustrates the dilemma between "value-oriented jurisprudence"<sup>7</sup> and "neutral principles of constitutional law."<sup>8</sup> It raises the problem of "constitutionalizing"<sup>9</sup> private agencies. It poses several questions as to "what process is 'due?'"<sup>10</sup> on such issues as the retroactive application

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5. The statement in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 346, 595 P.2d 579, 585, 156 Cal. Rptr. 1, 7 (1979), "Our holding does not, of course, affect review of administrative findings where the Legislature has left the choice of standard to the courts [e.g., as in §1094.5]," is misleading because it ignores the fact that new §1094.5(d) would deny the courts a choice of standard in cases of private hospitals. Section 1094.5(d) excepts cases alleging discrimination by hospitals against podiatrists in violation of California Health and Safety Code Section 1316. The intrusion of this specialized subject into the more general bill may be an example of the "substantial representation" that "powerful economic forces can obtain . . . in the halls of the Legislature . . ." *Bixby v. Pierno*, 4 Cal. 3d 130, 142, 481 P.2d 242, 250, 93 Cal. Rptr. 234, 242 (1971).

6. 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977); see *The Supreme Court of California 1976-1977*, 66 CALIF. L. REV. 180, 201-14 (1978).

7. At least one "value system proceeds from the assumption that a value is a 'desired event.'" E. BODENHEIMER, JURISPRUDENCE 149 (rev'd ed. 1974). "[I]t may also happen that a judge . . . will determine that orderly continuity must in a particular case yield to imperative requirements of justice." *Id.* at 249.

8. Constitutionality cannot be tested merely by moral approval or disapproval of the result reached. If the courts are to function as something besides "naked power organs" their decisions should rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). See also *id.* at 10-20. "Neutral principles [foreclose] *ad hoc* constitutional judgments which express merely the judge's transient feeling of what is fair, convenient, or congenial in the particular circumstances of litigation . . . . A neutral principle . . . is an intellectually coherent statement of the reason for a result which in like cases will produce a like result, whether or not it is immediately agreeable or expedient." A. BICKEL, THE LEAST DANGEROUS BRANCH 59 (1962). See also *id.* at 2, 49-65.

9. The quoted word is from *Goss v. Lopez*, 419 U.S. 565, 595 (1975) (Powell, J. dissenting). The subject is opened in Ewing, *Sunlight in the Salt Mines*, 29 HARV. L. SCH. BULL. 18 (1977), and D. EWING, FREEDOM INSIDE THE ORGANIZATION (1977). *Ezekial v. Winkley*, 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977), seems to be an independent example of Ewing's thesis. Other examples are *Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979), and *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

10. The phrase is from *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 12 (1978). See also *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361, 367 (9th Cir. 1976). *Anton*, in conformity with prior California cases, uses the expression "minimal requisites of fair procedure required by established common law principles." 19 Cal. 3d at 825, 567 P.2d at 1175, 140 Cal. Rptr. at 455. See *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550 n.7, 526 P.2d 253, 259

of procedural regulations, the right of the doctor to participate in the selection of the membership of the reviewing committee, the right to counsel, and the incidence of the burden of proof. All of these issues were resolved in favor of the hospital except for the holding that the "independent judgment" test under Section 1094.5(c) was applicable. And this holding leads to the principal question to be discussed. Is the holding on Section 1094.5(c) merely a statutory interpretation, a construction of legislative intent which the legislature could alter, or is it a holding of constitutional dimensions and, therefore, beyond legislative change?

Were one to apply "neutral principles" to California constitutional law, the logical conclusion would be that Section 1094.5(d) is partially unconstitutional. But the relevant California constitutional law is based on false premises, which, once accepted, cannot be corrected by correct logic. Were all the false premises to be rejected, the logical conclusion would be that Section 1094.5(d) is valid and from a reasonable, if not universally accepted, practical point of view desirable.

A plurality opinion, published after this paper was prepared for the press, *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board*,<sup>11</sup> indicates not only that the court is still value-oriented but also that its values may be changing. The plurality, at least, rejected the false premise that granting an administrative agency the authority to make final findings of fact was a grant of "judicial power" that inevitably violated the separation of powers provision and the judiciary article of the California constitution. But the plurality ignored, if it did not conceal, the fact that the prior cases also held that the due process clause of the California constitution forbade such grants of factual finality. Thus the best one can say of *Tex-Cal*, considering its ambiguous status and its elision of what could be a controlling consideration, is that it permits, but does not necessarily compel, the conclusion that Section 1094.5(d) is constitutional.

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n.7, 116 Cal. Rptr. 245, 251 n.7 (1974). Professor Tribe's explanation of "state action," discussed hereafter, makes this distinction between "due process" and "common law . . . fair procedure" unnecessary.

11. 24 Cal. 3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979). Only three justices concurred without qualification. One "concurred in the judgment." Two "concurred in the result." And one dissented in part and otherwise "concurred in the conclusions reached by the majority [*sic*] opinion." *Id.* at 356, 595 P.2d at 591, 156 Cal. Rptr. at 13. Since there is only one opinion, and it is not a majority opinion unless the concurrence makes it one, the reference to the "majority opinion" is tantalizingly obscure. It is assumed that had an unqualified concurrence, except as to the portions dissented from been intended, the justice would have said so and not merely "concurred in the conclusions."

*ANTON*: THE COURT'S DESIRE TO AVOID INCONGRUITY

For the purposes of the sole question of the applicability of Section 1094.5(c), the facts in *Anton* are simple. Dr. Anton had been a member of the medical staff of the private hospital for some 13 years during which he had been subjected to various sanctions for failure to complete hospital records. In 1973 the hospital found that he had been guilty of both over- and underutilization of the hospital, poor medical judgment, and continuing incompleteness of physical examinations and medical histories. Pursuant to Business and Professions Code Section 2392.5(a), the hospital refused to reappoint him to the staff for 1974. Dr. Anton brought a proceeding under Code of Civil Procedure Section 1085, the traditional form of mandate used to compel readmission to a private group. In such a proceeding "the court [below] properly refused to pass on the truth of [the] charges against the plaintiff."<sup>12</sup> If the witnesses before the private group presented evidence that did not have to be disbelieved, "the decision of the [private group] as to the merits of the charges was controlling upon the trial court and jury."<sup>13</sup> What the court reviews in such cases is not the credibility of the evidence but its legal sufficiency to support the action taken.<sup>14</sup> This is a form of statement of the "substantial evidence" test. The Court of Appeal held that this test was correctly applied in reviewing the failure to reappoint Dr. Anton, and he lost, at least temporarily.<sup>15</sup> The holding conforms with what had been the common understanding of the law. As Judge Deering wrote before *Anton* was decided by the supreme court:

Code of Civil Procedure §1094.5 has never been held to apply to judicial review of such actions [of private organizations]; the section's inapplicability appears implicit in its historical context.<sup>16</sup>

"Never" lasted from May 1977, when Judge Deering's statement was published, until August 1977, when the supreme court demoted it to an assumption and declared: "[We] find nothing in the statutory language

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12. *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal. 2d 134, 147, 231 P.2d 6, 13 (1951). The opinion was written by Gibson, C.J., who, as Chairman of the Judicial Council, was a principal proponent of Section 1094.5, which had been on the books for several years.

13. *McConville v. Milk Wagon Drivers' Union*, 106 Cal. App. 696, 699, 289 P. 852, 854 (1930).

14. *Smetherham v. Laundry Workers' Union*, 44 Cal. App. 2d 131, 111 P.2d 948 (1941).

15. *Anton v. San Antonio Community Hosp.*, 127 Cal. Rptr. 394, 398 (1976) (opinion superseded by grant of hearing by the supreme court). The fact that at some point Dr. Anton switched from a request for relief under Section 1085 to relief under Section 1094.5 is immaterial, 19 Cal. 3d at 813-14, 567 P.2d at 1167, 140 Cal. Rptr. at 447; 5 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §§183, 184 (2d ed. 1971), unless the supreme court wishes to make the label on the petition significant. *Standard Oil Co. v. State Bd. of Equalization*, 6 Cal. 2d 557, 59 P.2d 119 (1936). See note 43 *infra*.

16. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS, §2.10D (Supp. 1977).

or supporting legislative materials which would lead us to accept that assumption as warranted.”<sup>17</sup> And with this language *Anton* became an example of “value-oriented” jurisprudence. The desired value is to reach similar results in what the court considered similar cases. In a favorite phrase of the author of the opinion, the court looked at “the realities of the situation.”<sup>18</sup> Thus it adverted to the “practical consideration” that had the case involved a public hospital under the Local Hospital District Law, Section 1094.5 would have been applicable.<sup>19</sup> And it likened private hospitals to public hospitals.

For many years an accepted proposition of California law has been that “a [private] society acting upon the expulsion of a member is a *quasi*-judicial body and its hearing is a *quasi*-judicial hearing.”<sup>20</sup> From this *Pinsker v. Pacific Coast Society of Orthodontists*<sup>21</sup> derived the rule that a member of “ ‘an unincorporated association may not be suspended or expelled’ ” without being afforded procedural fairness,<sup>22</sup> a rule which *Anton* says “insures that such a hearing will be accompanied by the related procedural protections requisite to Section 1094.5 review.”<sup>23</sup> And *Anton* then concluded:

It would be incongruous, we believe, to hold that the decisions of *private* hospital boards, which are required by the same decision [*Pinsker v. Pacific Coast Society of Orthodontists*] to be based upon a hearing of substantially identical scope and purport, were to be subject to some different form of review.<sup>24</sup>

Had the court been writing on a clean slate, avoidance of the incongruity would have presented no problem. But as in *Strumsky v. San Diego County Employees Retirement Association*,<sup>25</sup> where it held that there was no longer “any rational or legal justification” for distinguishing between the scope of judicial review of local and statewide adminis-

17. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 816, 567 P.2d 1162, 1169, 140 Cal. Rptr. 442, 449 (1977).

18. *Id.* at 824, 567 P.2d at 1174, 140 Cal. Rptr. at 454; *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 45, 520 P.2d 29, 41, 112 Cal. Rptr. 805, 816 (1974).

19. 19 Cal. 3d at 818, 567 P.2d at 1170, 140 Cal. Rptr. at 450.

20. *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 3d 623, 649, 114 Cal. Rptr. 681, 697 (1974).

21. 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974) (*Pinsker II*).

22. *Id.* at 552-53, 526 P.2d at 262, 116 Cal. Rptr. at 254.

23. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 818, 567 P.2d 1162, 1170, 140 Cal. Rptr. 442, 450 (1977). See also *id.* at 815, 567 P.2d at 1168-69, 140 Cal. Rptr. at 448-49.

24. *Id.* at 818, 567 P.2d at 1170, 140 Cal. Rptr. at 450. The incongruity apparently remains as regards the University of California hospitals. Although an untenured pharmacist's assistant may not be dismissed without “minimal due process safeguards,” *e.g.*, adequate notice of the charges and the reasons therefore, *Mendoza v. Regents of Univ. of Cal.*, 78 Cal. App. 3d 168, 172, 144 Cal. Rptr. 117, 119 (1978), the scope of judicial review is the substantial evidence test, because the university is “a statewide administrative agency possessing adjudicatory powers derived from the Constitution as to the problems and purposes of its personnel.” *Ishimatsu v. Regents of Univ. of Cal.*, 266 Cal. App. 2d 854, 864, 72 Cal. Rptr. 756, 763 (1968) (dismissal of untenured medical librarian).

25. 11 Cal. 3d 28, 32, 520 P.2d 29, 31, 112 Cal. Rptr. 805, 807 (1974).

trative agencies, the court had to clean the slate itself. The erasers it used in *Anton* were the obliteration of history and the alteration of the meaning of language, particularly the word "administrative." A review of the history is necessary to the understanding of the change in usage. And if the change in usage is taken at face value, new Section 1094.5(d) is partially unconstitutional unless *Tex-Cal* is authoritative.

#### A GLANCE AT *ANTON'S* POLITICAL AND CONSTITUTIONAL BACKGROUND

The history of the constitutional issue raised by Section 1094.5(d) can be judicially documented in California from 1936, but its actual history may have begun even earlier. At some point in the first quarter or third of this century the courts became aware of and afraid that a "huge administrative . . . burgeoning bureaucracy would endanger the prevailing concepts of individual rights."<sup>26</sup> That fear was not peculiar to the United States, and its tone may be inferred from *The New Despotism*, written by Lord Hewart of Bury, Lord Chief Justice of England, in 1929. This was the book form of his "series of sensational essays on the administrative practices of the government" that had startled newspaper readers.<sup>27</sup> *The New Despotism* may have been available to the justices of the California Supreme Court, because a copy was in the court's library as late as 1944.<sup>28</sup> Whether read or not, Lord Hewart's fears resembled some of the fears of the opponents of the Roosevelt Administration that began in 1933. And in 1936, while the hostility to "administrative law" was in full ferment, California had a supreme court described as "bent upon nullifying and/or preventing the advent of a little New Deal in California with its usual incidence of bureaucratic control and regulation."<sup>29</sup>

The instrument the court used for its purpose was *Standard Oil Company v. State Board of Equalization*,<sup>30</sup> a case which must be one of the outstanding departures from "neutral principles" of constitutional law. The mode the court chose was to hold that certiorari, the common law

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26. *Bixby v. Pierno*, 4 Cal. 3d 130, 142, 481 P. 2d 242, 250, 93 Cal. Rptr. 234, 242 (1974).

27. Smith, *Book Review*, 39 YALE L.J. 763 (1930).

28. This statement is based on personal recollection from reading parts there. See JUDICIAL COUNCIL OF CALIFORNIA, TENTH BIENNIAL REPORT 9 (1944) [hereinafter cited as TENTH BIENNIAL REPORT].

29. Netterville, *Judicial Review: The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262, 264 (1956); see *Bixby v. Pierno*, 4 Cal. 3d 130, 159, 481 P.2d 242, 255, 93 Cal. Rptr. 234, 255 (1971) (Burke, J., concurring). See also the pejorative reference to the "evil of administrative action which must be guarded against," *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 846, 123 P.2d 457, 466 (1942), and McGovney's references to "persons who dislike administrative agencies" and "opponents of administrative agencies," McGovney, *The California Chaos in Court Review of Decisions of State Administrative Agencies*, 15 S. CAL. L. REV. 391, 411 (1942).

30. 6 Cal. 2d 557, 59 P.2d 119 (1936).

writ used since the admission of the state to review quasi-judicial actions of administrative agencies, could no longer be so used because to allow such use would be an acknowledgment that “judicial power” had been vested in such agencies and such investiture would be unconstitutional.<sup>31</sup> *Standard Oil* is not only unprecedented, it is contrary to the historical precedents. As early as 1850 California adopted the common law of England as the rule of decision,<sup>32</sup> and at common law certiorari was the common means of bringing the record of the proceedings of an “inferior jurisdiction” before the King’s Bench “to inspect the record, and see whether they keep themselves within the limits of their jurisdiction.”<sup>33</sup> It was used to review not only the actions of courts but also of commissioners of sewers, the censors of the Royal College of Physicians and like bodies, which are not judicial but proceed on records susceptible to judicial review.<sup>34</sup>

The English law was summarized in *Local Government Board v. Arlidge*:

The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties.<sup>35</sup>

The California law, later stated in *Suckow v. Alderson*, was virtually identical:

[T]ribunals such as the board of medical examiners . . . are not courts in the strict sense; they are not exercising ‘the judicial power of the state’ as that phrase is used in the constitution conferring judicial power upon courts . . . [w]here a board has exercised *quasi-judicial* power . . . its decisions are subject to revision by way of *certiorari*.<sup>36</sup>

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31. The story of *Standard Oil* and its progeny has been told so completely and definitively that any detailed repetition is superfluous. *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 851, 123 P.2d 457, 469 (1942) (Gibson, C.J., dissenting); TENTH BIENNIAL REPORT, *supra* note 28 at 26-28, 137-43 (1944) (Mr. Ralph N. Kleps was the principal author, *id.* at 9); Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285 (1950); Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions—1949-1959*, 12 STAN. L. REV. 554 (1960). It is synopsized in *Bixby v. Pierno*, 4 Cal. 3d 130, 137-40, 481 P.2d 242, 247-49, 93 Cal. Rptr. 234, 239-41 (1971).

32. *Lux v. Haggin*, 69 Cal. 255, 379-87, 10 P. 674, 746-51 (1886) (discussing what is now CAL. CIV. CODE §22.2).

33. *Groenvelt v. Burwell*, 91 Eng. Rep 134 (K.B. 1700).

34. *Rex v. Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338, 351 (Denning, L.J.) (certiorari held applicable to correct error of law and not limited to jurisdictional errors); A. DENNING, *THE DISCIPLINE OF LAW* 63-66 (1979). “*Northumberland* . . . transformed the law about statutory tribunals.” *Id.* at 66. I am indebted to Mr. Geoffrey Eisen, A.R.P.S., for these references.

35. [1915] A.C. 120, 140.

36. 182 Cal. 247, 250, 187 P. 965, 966 (1920).



The failure of the court in *Standard Oil* to consider *Local Government Board v. Arlidge* may be significant. Although the case was familiar to American students of administrative law,<sup>37</sup> one might charitably suppose that it was not called to the court's attention, because the court showed no reluctance to consider the English precedents when it served its purposes to do so.<sup>38</sup> On the other hand, if the supposition that the court had been affected by *The New Despotism* has any validity, it may have deliberately ignored *Local Government Board v. Arlidge* because the case was particularly outrageous to Lord Hewart.<sup>39</sup>

But the failure to dispose of *Suckow v. Alderson* admits of no charitable explanation. It was cited in *Standard Oil* and disposed of as conflicting with other cases. But the other cases did not involve the exercise of quasi-judicial authority, and so the asserted conflict was imaginary, not real.<sup>40</sup>

Thus Netterville's explanation that the court was bent on reaching a preconceived result seems credible.<sup>41</sup> The court dispelled its fears of administrative usurpation of judicial powers by ignoring history and tinkering with terminology, and thus set a precedent for the use of like techniques in later cases.<sup>42</sup>

#### THE SEPARATION OF POWERS

*Standard Oil*, on its face, involved only a procedural problem, a mistaken choice of remedy, which could easily have been solved by granting the proper remedy.<sup>43</sup> But instead of following this obvious and even then familiar path, the next step was to hold that prohibition, like certiorari, was also an improper means of reviewing administrative revocation of a license, because such revocation was not the exercise of "judicial power," and prohibition lay only to review the exercise of "ju-

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37. F. FRANKFURTER & J. DAVISON, CASES AND MATERIALS ON ADMINISTRATIVE LAW 576 (1932). See also *Morgan v. United States*, 298 U.S. 468, 482 (1936).

38. *Drumme v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 82, 87 P.2d 848, 852 (1939).

39. The effect of the decision seems to be that where judicial functions are vested in a Minister or Government Department, parties to the proceedings have none of the securities against injustice which they enjoy in judicial proceedings before the Courts.

G. HEWART, *THE NEW DESPOTISM* 172-73 (1929).

40. *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 852-54, 864-65, 123 P.2d 457, 469-70, 475-76 (1942) (Gibson, C.J., dissenting); TENTH BIENNIAL REPORT, *supra* note 28 at 138 n.31 (1944). *Suckow v. Alderson* was not expressly overruled. It seems to be among "some cases" which "must be deemed to have been overruled" by *Standard Oil*. *Drumme v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 81, 87 P.2d 848, 852 (1939).

41. See note 29 *supra*.

42. Comment, *Administrative Adjudication in California and its Review by the Writ of Certiorari*, 25 CALIF. L. REV. 694, 711 (1937).

43. *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d at 850, 854, 869, 123 P.2d at 468, 470, 478 (1942) (Gibson, C.J., dissenting); *Van Hoosear v. Railroad Comm'n*, 189 Cal. 228, 236, 207 P. 903, 906 (1922); *People v. Board of Supervisors*, 27 Cal. 655, 671-72, 673 (1865); CAL. CIV. PROC. CODE §580; 5 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §§183, 184 (2d ed. 1971). See note 15 *supra*.

dicial power.”<sup>44</sup> The constitutional implication of the cases denying the availability of certiorari and prohibition was that the delegation of fact-finding authority to administrative agencies violated the separation of powers and judiciary clauses of the California constitution.<sup>45</sup>

#### FEDERAL AND STATE DUE PROCESS

If the only question were the separation of powers of government under the state constitution, there would seem to be no doubt that new Section 1094.5(d) is constitutional, because there is no requirement that the powers of a private group be similarly separated. But the cases involve more than the constitutional separation of powers; they also involve due process. *Drumme v. State Board of Funeral Directors*<sup>46</sup> held that mandate or mandamus was the proper remedy to review the action of an administrative agency of statewide jurisdiction exercising what had heretofore been considered “quasi-judicial power.” But *Drumme* went further and held that if

finality is given to [administrative] findings based on conflicting evidence . . . [it] would probably violate the due process clause of the federal Constitution. . . . [I]f the courts in reviewing the administrative board’s actions do not exercise an independent judgment on the facts as well as on the law, then the party adversely affected, at least where constitutional rights are involved, has been deprived of due process.<sup>47</sup>

Within less than four months what was only probable in *Drumme* was converted to “mandatory” by dictum in *McDonough v. Goodcell*.<sup>48</sup> Dictum because *McDonough v. Goodcell* did not involve what the court considered existing “valuable property rights,” a license, but involved only an application for a license. The history of *McDonough* is the source of the “fountainhead of corruption” used in the title of this paper. But *McDonough*, with its distinction between the treatment afforded licensees and applicants, is so quixotic and so enmeshed with the current use of the expression “fundamental vested rights” that in the interests of coherence and clarity, consideration of it has been deferred to a later section.

The “probable” of *Drumme* and the “mandatory” of *McDonough* both referred only to what the court considered the requirements of the

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44. *Whitten v. California State Bd. of Optometry*, 8 Cal. 2d 444, 65 P.2d 1296 (1937).

45. *Strumsky v. San Diego County Employees Retirement Ass’n*, 11 Cal. 3d 28, 35-38, 520 P.2d 29, 33-36, 112 Cal. Rptr. 805, 809-11 (1974); *Bixby v. Pierno*, 4 Cal. 3d 130, 141, 481 P.2d 242, 250, 93 Cal. Rptr. 234, 242 (1971); *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 812, 136 P.2d 304, 316 (1943) (Traynor, J., concurring and dissenting).

46. 13 Cal. 2d 75, 87 P.2d 848 (1939).

47. *Id.* at 84, 87 P.2d at 853.

48. 13 Cal. 2d 741, 752, 91 P.2d 1035, 1041-42 (1939).

federal constitution. *Laisne v. California State Board of Optometry*,<sup>49</sup> however, made the independent judgment test a requirement of the due process clause of the *state* constitution.<sup>50</sup> *Laisne* held that a trial de novo was required to review administrative revocation of a license not only because of the separation of powers clauses of the state constitution but also that

[a] further reason and one of equal strength is that if binding fact-finding power is conferred upon purely administrative boards, and if the courts in reviewing the administrative boards' actions do not exercise an independent judgment on the facts as well as on the law, the due process provisions of both the federal and state Constitutions will have been violated.<sup>51</sup>

The court recognized that there was some confusion in the federal cases, but held that this confusion

does not detract from the strength of the language of these cases when applied to the question of the powers of state-wide administrative agencies as controlled by the provisions of the Constitution of this state . . . such [administrative] action denies the aggrieved party the due process of law guaranteed to him by the state and federal Constitutions, unless such action by such body may be questioned in a court of law. It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the factfinding power coupled with the order based on the findings made which would deprive a person of a property right. . . . The federal cases . . . are . . . not controlling on this court when the power of a state administrative board is in question.<sup>52</sup>

Thus in 1942 the court anticipated a result that it again articulated some thirty years later: the federal constitution provides only minimum requirements that may be extended to provide greater individual protection under parallel provisions of the state constitution.<sup>53</sup>

*Laisne's* requirement of a trial de novo was qualified in *Dare v. Board of Medical Examiners*<sup>54</sup> by an explication of what sort of procedure the court had in mind, but the court repeated its position that administrative action that might deprive a person "of a constitutional right either of liberty or property" entitled him to a review by manda-

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49. 19 Cal. 2d 831, 923 P.2d 457 (1942).

50. Now Article I, Section 7(a).

51. 19 Cal. 2d 845, 123 P.2d 465 (1942).

52. *Id.* at 846-47, 123 P.2d at 466.

53. *People v. Hannon*, 19 Cal. 3d 588, 606, 564 P.2d 1203, 1214, 138 Cal. Rptr. 885, 896 (1977); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 366-67 n.21, 521 P.2d 441, 449-50 n.21, 113 Cal. Rptr. 449, 457-58 n.21 (1974); *Pipkin v. Board of Supervisors*, 82 Cal. App. 3d 652, 660, 147 Cal. Rptr. 502, 506-07 (1978).

54. 21 Cal. 2d 790, 136 P.2d 304 (1943).

mus wherein "the court is not confined to the record before the board but may exercise an independent judgment on all the competent evidence before it."<sup>55</sup> *Dare* did not, nor has any subsequent case, expressly impaired *Laisne's* reliance on the state due process clause. On the contrary, the discussion in *Bixby v. Pierno*<sup>56</sup> of the survival of the independent judgment rule in several states after the virtual demise of the federal basis for the rule shows, inferentially at least, that this aspect of *Laisne* is still alive.<sup>57</sup> Thus if *Anton* raises an issue as to the constitutionality of new Section 1094.5(d), it is an issue only under the state constitution. To determine whether such an issue is raised some legislative background is helpful.

#### THE CHANGE IN DEFINITION OF "ADMINISTRATIVE"; SOME LEGISLATIVE HISTORY

The procedural and substantive chaos caused by *Standard Oil, Drummey, McDonough* and other cases<sup>58</sup> was so severe that the legislature submitted a constitutional amendment, said to have been drafted by Dean McGovney,<sup>59</sup> that would have given the legislature the authority to prescribe the scope of review "of decisions of administrative officers, boards, commissions or agencies."<sup>60</sup> The amendment was vigorously debated, before it was voted on *Laisne* was decided, and the amendment was defeated at the November 1942 election.<sup>61</sup> Nevertheless, the legal morass remained impenetrable, and the legislature remained determined to do what it could. It therefore asked the Judicial Council to undertake a study "of review of decisions of administrative boards, commissions and officers" and to report recommended legislation.<sup>62</sup> In

55. *Id.* at 795, 136 P.2d at 307.

56. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

57. *Id.* at 138 n.4, 481 P.2d at 247 n.4, 93 Cal. Rptr. at 239 n.4. *Modern Barber Colleges, Inc. v. California Employment Stabilization Comm'n*, 31 Cal. 2d 720, 725, 192 P.2d 916, 919 (1948), notes with approval *Laisne's* reliance on the state due process clause. But the concurring opinion of Justice Burke in *Bixby* mentions only *Drummey* and *Laisne's* reliance on the federal due process clause. 4 Cal. 3d at 156, 158, 481 P.2d at 261-62, 93 Cal. Rptr. at 253-54 (Burke, J., concurring). The dissent in *Dare* similarly omits reference to the state due process clause. *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 812, 136 P.2d 304, 316 (1943) (Traynor, J., concurring and dissenting).

58. For definitive discussions of the history see the materials cited at note 31 *supra*.

59. Turrentine, *The Laisne Case—A Strange Chapter in Our State Jurisprudence*, 17 CAL. ST. B.J. 165, 166 (1942) (an argument in favor of the amendment) [hereinafter cited as Turrentine].

60. S.C.A. No. 8, CAL. STATS. 1941, res. c. 142, at 3549. This was proposition number 16 on the ballot. CAL. STATS. 1943, at cxlii.

61. *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 848, 123 P.2d 457, 467 (1942); Resolution of the Board of Governors of the State Bar, reprinted in *Reasons Why The State Bar of California is Opposed to Proposition No. 16*, 17 CAL. ST. B.J. 257 (1942); Bianchi, *The Case Against S.C.A. Number 8*, 17 CAL. ST. B.J. 172 (1942); Browne, *Proposition 16 Should be Defeated*, 17 CAL. ST. B.J. 184 (1942); Turrentine, *supra* note 59.

62. CAL. STATS. 1943, res. c. 991, §2, at 2904. TENTH BIENNIAL REPORT, *supra* note 28, at 8, describing this statute as "only one part of a general legislative interest in the field of administrative procedure."

the context of *Anton* the points to note from these fragments of history are that *all* of the cases leading to the confusion involved governmental agencies,<sup>63</sup> and the legislature consistently used the word “administrative” to describe them. Thus when the court said in *Anton* that it could find nothing in the “supporting legislative materials” to warrant the “assumption” that Section 1094.5 related only to governmental agencies, it was, apparently, excluding this part of the history as irrelevant.

The Judicial Council responded to the legislature by submitting its *Tenth Biennial Report*. In the absence of any legislative history as such, it has been generally assumed that the legislature “‘adopted the proposed legislation with the intent and meaning expressed by the council in its report.’”<sup>64</sup> The Judicial Council recommended the adoption of Section 1094.5, which it titled as “[a]n act . . . relating to the judicial review of administrative decisions,” and described as “the procedure by which judicial review can be had by the writ of mandate after a formal adjudicatory decision by any administrative agency.”<sup>65</sup> But for some additions to Section 1094.5(f), which are immaterial here, the act was adopted as proposed by the Council including the restrictive title.<sup>66</sup> Thus even if the statute had referred to private bodies, it would have been limited by the title to the review of “administrative decisions.”<sup>67</sup> But the language of the statute was consistent with the title and spoke only to the review of an “administrative order or decision” made after a hearing by an “inferiôr tribunal, corporation, board or officer.”

In the present context the word “administrative” has heretofore been used only to apply to public bodies, for example, “[a]n administrative agency is a governmental authority. . . .”<sup>68</sup> Conversely, a nongovernmental commission “is not an administrative agency.”<sup>69</sup> But despite

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63. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 815-16, 567 P.2d 1162, 1169, 140 Cal. Rptr. 442, 449 (1977).

64. *Id.* at 817, 567 P.2d at 1170, 140 Cal. Rptr. at 450.

65. TENTH BIENNIAL REPORT, *supra* note 28 at 45.

66. CAL. STATS. 1945, c. 368, §1, at 1636 (enacting CAL. CIV. PROC. CODE §1094.5).

67. CAL. CONST. art. IV, §9 (formerly §24); *Estate of Mellone*, 141 Cal. 331, 333-34, 74 P. 991, 992 (1903); *Balzano v. Traeger*, 93 Cal. App. 640, 648, 270 P. 249, 252 (1928); see *Powers Farms v. Consolidated Irrigation Dist.*, 19 Cal. 2d 123, 130, 119 P.2d 717, 722 (1941); *Powers v. Floersheim*, 256 Cal. App. 2d 223, 231-32, 63 Cal. Rptr. 913, 918 (1967).

68. K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 6 (2d ed. 1975); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §1.01 (1958) (supp. 1970); *id.* 1970 supp. at 2; 1 AM. JUR. 2d *Administrative Law* §3 (1962); BALLENTINE'S LAW DICTIONARY 34 (3d ed. 1969); BLACK'S LAW DICTIONARY 66 (4th ed. 1968). “[A]dministrative law: law dealing with the establishment, duties, and powers of and available remedies against authorized agencies in the executive branch of government.” MERRIAM-WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 28 (3d ed. 1967). The relation of “administrative law” to public functions seems to be coeval with the first common use of the expression in this country. “[A]dministrative law is that part of the law which governs the relations of the executive and administrative authorities of the government. It is therefore a part of the public law . . . .” 1 F. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 7 (1893).

69. *Natural Milk Producers Ass'n v. City and County of San Francisco*, 20 Cal. 2d 101, 115, 124 P.2d 25, 33 (1942), *vacated as moot*, 317 U.S. 423 (1943).

the common use of language, the history that lead to the Council's study, and the court's recognition that the Council "admitted" its study was "concern[ed] . . . exclusively with the review of governmental agency decisions,"<sup>70</sup> the court in *Anton* held of the words "administrative order or decision," in Section 1094.5(a): "Clearly this language is not limited, on its face at least, to governmental as opposed to nongovernmental agencies."<sup>71</sup>

The court reached this result by noting the parallelism between Section 1094.5(a), which refers to "any inferior tribunal, corporation, board or *officer*," and Section 1085, so-called "traditional mandate," which refers to "any inferior tribunal, corporation, board or *person*," and stating:

We are not persuaded that the Legislature, in substituting the word 'officer' for the word 'person' in its 1949 [sic] enactment of Section 1094.5, thereby intended to indicate that the new procedure was designed to be limited in its application to the decisions of governmental bodies.<sup>72</sup>

It was not persuaded, because otherwise the two sections are "substantially identical."<sup>73</sup> Indeed, the two sections are substantially identical, except for the difference. "It is a settled rule of statutory construction that where different language is used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning and effect."<sup>74</sup> The court avoided "the settled rule" by ignoring it. And if the California Supreme Court wishes to say that "officer" and "person" mean the same thing, who can say that it is wrong? "We are not final because we are infallible, but we are infallible only because we are final."<sup>75</sup>

The court also adverted to the statement in the Council's report:

*Without affecting the historic uses of the writ* it is suggested that, by the addition of a new section to the statute [the Code of Civil Procedure], the Legislature could prescribe the details of procedure where the writ is used for reviewing the adjudicatory decisions of administrative bodies.<sup>76</sup>

The suggestion, however, was not that of the Council, it was that of

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70. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 818, 567 P.2d 1162, 1170, 140 Cal. Rptr. 442, 450 (1977).

71. *Id.* at 816, 567 P.2d at 1169, 140 Cal. Rptr. at 449.

72. *Id.* at 816 n.13, 567 P.2d at 1169 n.13, 140 Cal. Rptr. at 449 n.13.

73. *Id.* at 817, 567 P.2d at 1170, 140 Cal. Rptr. at 450

74. *People v. Campbell*, 110 Cal. App. Supp. 783, 786, 291 P.2d 161, 162 (1930); 45 CAL. JUR. 2d *Statutes* §143, at 650 n.16 (1958). See also *Estate of Denney*, 52 Cal. App. 3d 393, 397-98, 124 Cal. Rptr. 910, 912 (1975); *In re Karpf*, 10 Cal. App. 3d 355, 365, 88 Cal. Rptr. 895, 900 (1970).

75. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

76. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 818, 567 P.2d 1162, 1170, 140 Cal. Rptr. 442, 450 (1977) (emphasis in original); TENTH BIENNIAL REPORT, *supra* note 28 at 27.

Justice Schauer concurring in *Sipper v. Urban*.<sup>77</sup> The reason why the court emphasized the reference to the “historic uses of the writ” is not apparent. The historic use of Section 1085 to review the action of private bodies and quasi-legislative action had persisted unchanged after the passage of Section 1094.5.<sup>78</sup> *Anton* itself changed the historic use of the writ by enlarging the scope of review of the quasi-judicial action of private bodies.<sup>79</sup> One can speculate that the emphasis may have been an oblique reference to the court’s power to expand the uses of mandate “to provide a remedy where no other remedy existed.”<sup>80</sup>

The court in *Anton* omitted the Council’s repeated statements that its proposal was “limited to the field of administrative adjudication,”<sup>81</sup> and “cases involving administrative adjudication.”<sup>82</sup> Instead it quoted the Council’s statement: “The theories underlying the Council’s proposals in this limited field are susceptible, of course, of adaptation to other kinds of administrative action . . . .”<sup>83</sup> The quotation is out of context, because by “limited field” the Council was referring to the fact that its study of administrative procedure had been limited to professional and occupational licensing and did not include “such diverse functions as . . . taxation, workmen’s compensation, public utilities regulation and the payment of unemployment or social security benefits.”<sup>84</sup> The Council carefully distinguished between its study of “administrative procedure” and its study of “review of administrative action.”<sup>85</sup> In context the “adaptation” to which the Council referred was not to judicial review but to the fields of administrative procedure it had not covered.

But from this medley of neglect of history, disregard of the ordinary meaning of words, partial quotation, quotation out of context, and ignoring conventional rules of construction, the court in *Anton* drew its conclusion that Section 1094.5 applied to private hospitals because it would be “incongruous” to conclude otherwise. In effect what the court did was rewrite the definition of “administrative” to characterize the form of action taken rather than to characterize the nature of the actor. Thus it said that a private hospital’s “adjudicatory decisions are

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77. 22 Cal. 2d 138, 151, 137 P.2d 425, 431 (1943).

78. *Cason v. Glass Bottle Blowers Ass’n*, 37 Cal. 2d 134, 147, 231 P.2d 6, 13 (1951); *Lewin v. St. Joseph Hospital of Orange*, 82 Cal. App. 3d 368, 383, 146 Cal. Rptr. 892, 900-01 (1978) (collecting authorities on review of quasi-legislative action).

79. See text accompanying notes 12-19 *supra*.

80. *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 82, 87 P.2d 848, 852 (1939).

81. TENTH BIENNIAL REPORT, *supra* note 28 at 26.

82. *Id.* at 27.

83. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 818, 567 P.2d 1162, 1170, 140 Cal. Rptr. 442, 450 (1977); TENTH BIENNIAL REPORT, *supra* note 28 at 10.

84. TENTH BIENNIAL REPORT, *supra* note 28 at 10.

85. *Id.* at 12, 26.

subject to review under the same rules which are applicable to all decisions by administrative agencies lacking judicial powers,"<sup>86</sup> *i.e.*, a hospital is an administrative agency because it acts administratively whether it be public or private,<sup>87</sup> a position it forthrightly reiterated since *Anton*:

We have said that the right to practice a lawful trade or profession is sufficiently 'fundamental' to require substantial protection against arbitrary administrative interference, either by government . . . or by a private entity.<sup>88</sup>

"Administrative interference by a private entity" is a neologism, but there is no doubt as to its meaning—the court intended to treat a private group that had powers like those of a public agency as if it were a public agency.

There are various jocular ways to describe the judicial technique used in *Anton*. The most familiar is that biological phenomenon, the speaking egg whose words have turned into a law review chestnut so overworked that they are here allowed to repose in the margin.<sup>89</sup> Less familiar is Professor Corwin's observation:

Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to *remake* it.<sup>90</sup>

But what seems most appropriate to *Anton* is Edmund Wilson's criticism of the scholarship of one interpreter of the Dead Sea Scrolls:

[B]y using such methods I should have little difficulty in proving that the Pentateuch was written by Ben Gurion.<sup>91</sup>

#### THE APPLICABLE SCOPE OF REVIEW

Section 1094.5 recognizes two different scopes of review, the "independent judgment rule" and the "substantial evidence rule." Thus when *Anton* held that Section 1094.5 was applicable to the action of a private group, the court had to decide which rule was applicable. This decision, in turn, presents a further question: whether the choice is to

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86. 19 Cal. 3d at 822, 567 P.2d at 1173, 140 Cal. Rptr. at 453.

87. *Id.* at 825, 567 P.2d at 1175, 140 Cal. Rptr. at 455 (describes the private hospital as "the administrative body"). See text accompanying note 108 *infra*.

88. *Ezekial v. Winkley*, 20 Cal. 3d 267, 272, 572 P.2d 32, 35, 142 Cal. Rptr. 418, 421 (1977). See also *California Dental Ass'n v. American Dental Ass'n*, 23 Cal. 3d 346, 357, 590 P.2d 401, 407, 152 Cal. Rptr. 546, 552 (1979).

89. For precedent for the verbal agility in Dr. Anton's case consult no conventional law book. Look rather to *Through the Looking Glass*:

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

L. CARROLL, *THE ANNOTATED ALICE* 269 (M. Gardner ed. 1960).

90. Corwin, *The Supreme Court as National School Board*, 14 L. & CONTEMP. PROB. 3, 20 (1949) (emphasis in original).

91. E. WILSON, *ISRAEL AND THE DEAD SEA SCROLLS* 276 (1978) (Foreword by L. Edel).



be made by the courts or by the legislature. Some language in *Bixby* may suggest that the choice is legislative because in an unguarded moment the court said that Section 1094.5 “empowers this court to establish standards” for determining which cases call for which review and that the legislature “created” the categories of review.<sup>92</sup> But elsewhere in *Bixby* it more correctly described Section 1094.5 as a “codification of the then [1944] current approach to the judicial review of administrative decisions by writ of mandamus.”<sup>93</sup> The most *creation* and *codification* have in common is the initial letter. The Judicial Council described its proposal as a codification and recognized that it could not be creative because of the constitutional restrictions imposed by the cases.<sup>94</sup> The court has “empowered” itself; the legislature has only the power to describe but not to determine the scope of judicial review, unless the plurality opinion in *Tex-Cal* can be taken at face value.<sup>95</sup> This was clearly and succinctly set forth as a syllogism in Justice Traynor’s dissent in *Southern California Jockey Club*:

Judicial functions cannot constitutionally be delegated to state-wide administrative agencies. The function of making final findings of fact is judicial, and such finality can be accorded only to the findings of fact of a court. . . . Accordingly, the findings of fact of an administrative agency must be reviewed by a court that must exercise its independent judgment on the facts . . . and determine therefrom whether those findings are supported by the *weight* of the evidence . . . and not merely by *substantial* evidence. Presumably, any more limited review would confer judicial functions upon the administra-

92. *Bixby v. Pierno*, 4 Cal. 3d 130, 140, 481 P.2d 242, 249, 93 Cal. Rptr. 234, 241 (1971).

93. *Id.* at 137-38, 481 P.2d at 247, 93 Cal. Rptr. at 239. Other cases also describe Section 1094.5 as a codification, *see, e.g.*, *Merrill v. Department of Motor Vehicles*, 71 Cal. 2d 907, 914 n.11, 458 P. 2d 33, 37 n.11, 80 Cal. Rptr. 89, 93 n.11 (1969); *Temescal Water Co. v. Department of Pub. Works*, 44 Cal. 2d 90, 105, 280 P.2d 1, 10 (1955).

94. These proposals do not depart from the procedural pattern laid down by recent court decisions, and the proposed statute specifies the details of procedure for judicial review by the writ of mandate. The proposals do not purport to be a complete solution to all the problems of judicial review. Indeed, the steps which have been recommended by some, as for example, the use of a simple statutory proceeding in place of the extraordinary writs, do not seem feasible in view of the limited power which the Legislature has to act in this field.

TENTH BIENNIAL REPORT, *supra* note 28 at 26-27, 144. Section 1094.5 is largely a codification of *Dare*, *see* text accompanying notes 54-57 *supra*, and “in view of the dubious but nonetheless controlling principles of constitutional law announced in the *Standard Oil* and *Drummey* cases, there was probably little more that either the Council could recommend or the Legislature could enact constitutionally.” *Netterville, Judicial Review: The “Independent Judgment” Anomaly*, 44 CALIF. L. REV. 262, 268 (1956); TENTH BIENNIAL REPORT, *supra* note 28 at 141 n.60. *See also* *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 315, 196 P.2d 20, 29 (1948) (Traynor, J., dissenting). The limitation on legislative authority has been expressed in at least two dissenting opinions: *Strumsky v. San Diego County Employees Retirement Ass’n*, 11 Cal. 3d 28, 53, 520 P.2d 29, 47, 112 Cal. Rptr. 805, 822, (1974) (Burke, J., dissenting) and *Southern Cal. Jockey Club v. California Horse Racing Bd.*, 36 Cal. 2d 167, 183-84, 223 P.2d 1, 11 (1950) (Traynor, J., dissenting).

95. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 346, 595 P.2d 579, 585, 156 Cal. Rptr. 1, 7 (1979).

tive agency in violation of the constitutional prohibition thereof.<sup>96</sup>

The correctness of Justice Traynor's assumption was proven almost a quarter of a century later by *Strumsky*. The Council had drafted Section 1094.5 on the theory that local boards could be delegees of judicial functions and would be subject to the substantial evidence scope of review whether the writ was called certiorari or mandamus.<sup>97</sup> In *Strumsky*, in 1974, the court found that the revision of the judiciary article of the California Constitution, Article VI, Section 1, in 1950 had withdrawn the legislature's power to delegate judicial functions to local boards. Therefore, the actions of such boards, which had heretofore been subjected to the substantial evidence review, became subject to the independent judgment review.<sup>98</sup>

But the independent judgment review applies only if there has been a delegation of "judicial" power. If there has been a delegation only of "administrative" power, the substantial evidence test applies. This distinction is based on *McDonough v. Goodcell*,<sup>99</sup> which held "that where the legislature has by statute clothed an administrative officer with the power to ascertain the facts with reference to the fitness of an applicant" and the evidence before the officer was conflicting and would have supported a decision either way, it could not be concluded that the officer had abused his discretion.<sup>100</sup> "With this state of the record our inquiry on this phase of the case is at an end."<sup>101</sup> Thus arose the California distinction between the scope of review in the application cases and the revocation cases.<sup>102</sup> In the current phraseology this distinction is phrased in terms of substantially affecting a "fundamental vested right." If the administrative decision affects a "fundamental vested right," such as the right to keep a license, the power to make final findings of fact must remain in the courts; but if the administrative decision affects only a "nonfundamental and not vested" right, such as the right to seek a license, the power to make final findings of fact may be delegated to an administrative agency.<sup>103</sup>

96. 36 Cal. 2d at 181-82, 223 P.2d at 10 (Traynor, J., dissenting) (emphasis in original).

97. TENTH BIENNIAL REPORT, *supra* note 28 at 26, 138 n.32, 140 nn.48 & 50.

98. *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 32, 39, 520 P.2d 29, 31, 36, 112 Cal. Rptr. 805, 807, 812 (1974).

99. 13 Cal. 2d 741, 91 P.2d 1035 (1939). See notes 185-200 and accompanying text *infra*.

100. 13 Cal. 2d at 748, 91 P.2d at 1040.

101. *Id.* at 749, 91 P.2d at 1040.

102. This distinction is reviewed in *Bixby v. Pierno*, 4 Cal. 3d 130, 139, 146, 481 P.2d 242, 248, 253, 93 Cal. Rptr. 234, 240, 245 (1971).

103. *Id.* at 143-44, 481 P.2d at 351-52, 93 Cal. Rptr. at 243-44; *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 32, 44-45, 520 P.2d 29, 31, 40, 112 Cal. Rptr. 805, 807, 816, (1974). "The distinctions [between 'an administrative act rather than a judicial act'] are difficult to follow because in both cases [*Drumme*y and *McDonough*] the practical results were identical." *Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 315, 66 Cal. Rptr. 183, 187 (1968).

So, having held that Section 1094.5 was applicable to the private hospital, the court in *Anton* had to determine whether staff membership was a "fundamental vested right." Its "fundamental" character was virtually conceded.<sup>104</sup> But the hospital argued that the doctor's staff privileges could not be considered "vested," because Business and Professions Code Section 2392.5 requires staff appointments to be made on an annual or biennial basis. The court held, however, that although the appointment was "formally limited in duration by force of law, [it nevertheless] gives rise to rights and obligations" that require it to be renewed unless good cause for denial of reappointment is shown in a "proceeding consistent with minimal due process requirements."<sup>105</sup> Although not cited, this holding is consistent with the occupational licensing cases holding that a refusal to renew an annual license is tantamount to a revocation and implying that renewal is a right that cannot be denied without the procedures required for revocation.<sup>106</sup>

Thus the court enabled itself to expand the portentous statement in *Bixby* that it has undertaken to protect "vested, fundamental rights . . . particularly the right to practice one's trade or profession, from untoward intrusions by the massive apparatus of government,"<sup>107</sup> and to extend it to what the court seems to believe are equally sinister intrusions by private groups.

On the basis of the foregoing, we think it manifest that the right affected by the decision here in question is both fundamental and vested within the meaning of *Bixby* and *Strumsky*. It therefore appears that the trial court was in error when it refused to exercise its independent judgment on the evidence presented before the administrative body [the private hospital] in order to determine whether the findings offered in support of the decision were supported by the weight of the evidence.<sup>108</sup>

#### THE PRIVATE HOSPITALS' REACTION TO *ANTON*

By Senate Bill 1472 (1978) the California Hospital Association attacked both aspects of *Anton*, *i.e.*, the holding that medical staff membership is a "fundamental vested right," and the holding that Section

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104. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 823, 567 P.2d 1162, 1173, 140 Cal. Rptr. 442, 453 (1977).

105. *Id.* at 824-25, 567 P.2d at 1174-75, 140 Cal. Rptr. at 454-55.

106. *Hall v. Scudder*, 74 Cal. App. 2d 433, 436, 168 P.2d 990, 992 (1946); *see* *Citrus Belt Sav. & Loan Ass'n v. California Franchise Tax Bd.*, 218 Cal. App. 2d 584, 591, 32 Cal. Rptr. 579, 583 (1963); *cf.* *Mass v. Board of Educ.*, 61 Cal. 2d 612, 619, 394 P.2d 579, 584, 39 Cal. Rptr. 739, 744 (1964) (renewal of teaching credential).

107. *Bixby v. Pierno*, 4 Cal. 3d 130, 143, 481 P.2d 242, 251, 93 Cal. Rptr. 234, 243 (1971).

108. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 825, 567 P.2d 1162, 1175, 140 Cal. Rptr. 442, 455 (1977); *California Dental Ass'n v. American Dental Ass'n*, 23 Cal. 3d 346, 357, 590 P.2d 401, 407, 152 Cal. Rptr. 546, 552 (1979).

1094.5 is applicable to private groups. As introduced, the bill would have amended Business and Professions Code Section 2392.5 to provide that staff membership was not a “vested” right<sup>109</sup> as well as language giving all “private tribunals, corporations, boards, or officers” the benefit of the substantial evidence rule.<sup>110</sup> Assembly amendments deleted the proposed change in Section 2392.5 and limited the substantial evidence rule to private hospitals. The bill was passed in its present form, new Section 1094.5(d).<sup>111</sup> The significance of the elimination of the proposed amendment to Section 2392.5 will be referred to hereafter.<sup>112</sup>

The California Hospital Association supported the constitutionality of new Section 1094.5(d) on the ground that it concerns only the management of the affairs of private institutions to which the constitutional guarantees of due process have no application.<sup>113</sup> The basis of the argument is that the due process clause of the California Constitution applies only to state, not private, action.<sup>114</sup> This argument assumes that a private hospital is not a “state instrumentality,” for if it were “we may arrive at judicial recognition that such institutions and enterprises should be considered agents of the state, so that those who deal with them will receive the protection not only of decisional law but of constitutional due process.”<sup>115</sup> Heretofore it has not been necessary for the court to characterize a private hospital as a state agency, because the cases have arisen in a context of interpretation of private regulations into which the court has read requirements of “fair procedure” applied as a matter of common law doctrine rather than constitutional neces-

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109. The bill would have added the following to California Business and Professions Code Section 2392.5: “[C]linical privileges . . . shall remain vested only during the annual or biennial period for which they were granted.” SB 1472, 1977-78 Regular Session, *as introduced*, February 2, 1978. The holder of a restricted license that grants “no property right” is entitled only to the substantial evidence test. *Foster v. McConnell*, 162 Cal. App. 2d 701, 329 P.2d 32 (1958).

110. SB 1472, 1977-78 Regular Session, *as introduced*, February 2, 1978, §2 at 3-4.

111. CAL. STATS. 1978, c. 1348, §1, at — (enacting CAL. CIV. PROC. CODE §1094.5(d)).

112. See text accompanying note 160 *infra*.

113. Letter from Joseph A. Saunders to Governor Edmund G. Brown, Jr., Sept. 26, 1978 (copy on file at the *Pacific Law Journal*).

114. *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 281, 578 P.2d 925, 933, 146 Cal. Rptr. 208, 217 (1978). The difference between the active language of the fourteenth amendment to the United States Constitution, “nor shall any State deprive any person of life, liberty or property, without due process of law,” and that of the fifth amendment and California Constitution Article I, Section 7(a), which state in the passive voice that a person shall not “be deprived of life, liberty or property without due process of law,” has not in the past made a difference in meaning. *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 366, 521 P.2d 441, 450, 113 Cal. Rptr. 449, 458 (1974). *Garfinkle* also finds no significance in the fact that the State due process clause is no longer linked, as it was originally, to the rights of those accused of crime. *Cf.* R. BERGER, *GOVERNMENT BY JUDICIARY* 193-200 (1977) (arguing historically that “due process” meant only that a criminal defendant should be proceeded against only by the law of the land and that the term had no substantive connotations).

115. *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 365, 521 P.2d 441, 449, 113 Cal. Rptr. 449, 457 (1974).

sity.<sup>116</sup> If all that were involved were common law doctrines affecting private groups dealing with nonconstitutionally protected rights, it would seem the legislature could alter the doctrines,<sup>117</sup> and no exception could be taken to the California Hospital Association's argument. In fact, however, the point is very slippery.

DELEGATION OF AUTHORITY TO A PRIVATE GROUP AS "STATE ACTION"

In *Ascherman v. Saint Francis Memorial Hospital*<sup>118</sup> the court cited with approval cases from other jurisdictions holding that receipt of federal funds was enough to make a private hospital a state agent for purposes of subjecting it to the constitutional requirements.<sup>119</sup> Although these cases have not been universally accepted under the federal constitution,<sup>120</sup> there is no reason why the California courts could not apply them under the state constitution. That they intend to do so may be inferred from some of the language in *Anton* that elides the meticulous distinction between common law and constitutional requirements made in *Pinsker II*,<sup>121</sup> and the copious citation of *Ascherman* describing it with approval as:

[c]oncluding that there should be no essential difference between public and private hospitals with respect to the scope of protections available at the administrative level to a physician seeking to become or remain a member of the medical staff. . . .<sup>122</sup>

Are such statements merely the loose use of language to describe an existing situation? Or are they portents of things to come? A recent expression repeats rather than resolves the issue:

We place the word 'private' in quotes because, as respects the exclusion or expulsion of physicians from staff membership and the procedures requisite thereto, there is little difference legally between public and private hospitals.<sup>123</sup>

In *California Dental Association v. American Dental Association*,<sup>124</sup> in a dictum because the case did not involve "application of common law principles of fair procedure," the court said "the holding in *Anton* was

116. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550 n.7, 526 P.2d 253, 259, n.7, 116 Cal. Rptr. 245, 251 n.7 (1974) (*Pinsker II*).

117. Goldberg, *Horseshoers, Doctors and Judges and the Law on Medical Competence*, 9 PAC. L.J. 107, 141-42 (1978).

118. 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1975).

119. *Id.* at 512-13, 119 Cal. Rptr. at 510.

120. *Hodge v. Paoli Memorial Hosp.*, 576 F.2d 563 (3d Cir. 1978).

121. See text accompanying note 163 *infra*.

122. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 815 n.12, 567 P.2d 1162, 1169 n.12, 140 Cal. Rptr. 442, 448 n.12 (1977).

123. *Lewin v. St. Joseph Hosp. of Orange*, 82 Cal. App. 3d 368, 376 n.3, 146 Cal. Rptr. 892 n.3 (1978).

124. 23 Cal. 3d 346, 590 P.2d 401, 152 Cal. Rptr. 546. (1979).

based on our application of common law principles of fair procedure.”<sup>125</sup> This does not necessarily mean that *Anton* was not also based on constitutional grounds as the language in *Anton* seems to indicate. But assuming that the characterization of *Anton* was intended to exclude the constitutional grounds, it raises the question whether it makes any difference whether the basis is common law or constitution. In short, are there common law principles of fair procedure that the legislature cannot change?<sup>126</sup>

The question is not whether Section 1094.5 was intended to apply to private groups, for clearly it was not; nor is it whether a private hospital is an “administrative” agency, for clearly it is not; it is whether the state by either common law or statute can delegate authority to a private hospital to make a final determination of facts resulting in barring a physician from effectively practicing his profession or whether such a final determination can be made in this state only by a court.<sup>127</sup> The mere fact that Section 1094.5(d) was enacted, in a sense, constitutes “state action.”<sup>128</sup> By this action the state delegated to private hospitals the authority to make determinations of fact subject only to substantial

125. *Id.* at 357, 590 P.2d at 407, 152 Cal. Rptr. at 553.

126. Omitted is an extensive discussion of the possibility that regardless of constitutional limitations there may be rights of such a fundamental character that they cannot be changed because of the limitations inherent in the very concept of “legislative” power. Such seems to be the holding of *Loan Association v. Topeka*, 87 U.S. 655 (1874).

It must be conceded that there are such rights in every free government beyond the control of the State. . . . There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

*Id.* at 662-63. There was a dissent arguing that reliance by the Court on the “vague ground . . . [of] a general latent spirit supposed to pervade or underlie the constitution . . . would convert the government into a judicial despotism.” *Id.* at 669 (Clifford, J., dissenting). See generally E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 141 (11th ed. 1965); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §8-1, at 427-31 (1978). The “common law principles of fair procedure” required of private groups dealing with “fundamental vested rights” could perhaps be put in this “higher law” or “natural law” or “extra constitutional” category as the process of assimilation of private to public agencies continues. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-17 (1975) (suggests these are constitutional categories); R. BERGER, *GOVERNMENT BY JUDICIARY* 257 n.38 (1977).

127. If these [public function] decisions are recast as raising questions of whether government actors can constitutionally decide to leave certain decisions to private actors, analysis of the cases becomes much more straightforward.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §18-5, at 1163-64 (1978). “The general proposition that common law is state action is hardly controversial.” *Id.* §18-6, at 1168.

[T]he question whether procedural due process is accorded by the system of rules through which a state allocates powers and duties in disputes between [doctors and private hospitals] . . . focuses attention at once on an aspect of state law; that aspect either is or is not constitutional; that it is ‘state action’ could hardly be clearer. And that more power is left to the [private hospital] . . . than in schemes in which government plays a more active role . . . adds to, rather than subtracts from, the procedural infirmity of the state’s law.

*Id.* §18-6 at 1171.

128. See *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 273-74, 578 P.2d 925, 928, 146 Cal. Rptr. 208, 211-12 (1978); *Connolly Development, Inc. v. Superior Court*, 17 Cal. 3d 803, 815, 553 P.2d

evidence review, or, conversely, deprived the courts of authority to reweigh the evidence in decisions depriving doctors of a property right, *i.e.*, a substantial, vested and fundamental right in the current phraseology. It is "manifest" that a doctor's hospital privileges are in either or both of these categories, and the hospital "has not contended otherwise."<sup>129</sup> The state cannot delegate to a private person the absolute discretion to deprive another private person of a substantial right; it must afford the person deprived of the right the protections of due process.<sup>130</sup>

#### STATE DUE PROCESS AND INDEPENDENT JUDGMENT REVIEW

The special problem in California is whether due process under the state constitution requires opportunity to have the evidence reweighed by a court.<sup>131</sup> *Bixby*, with its approving reiteration of *Drumme*y, says that before a person may be deprived of a fundamental right by an administrative (governmental) agency, he must be given an opportunity to obtain an independent judgment of the court on the facts.<sup>132</sup> This is because (with constitutional agency exceptions not material here) the exercise of the power to make final determinations of fact from conflicting evidence in cases involving "fundamental vested rights" is a judicial function, and a judicial function can be exercised only by a court.<sup>133</sup>

As already explained in its historical context, this rule is based only in part on the judiciary article and separation of powers provisions of the state constitution; it is also based on the California court's conception of due process. *Drumme*y invoked the federal constitution only, but *Laisne* relied on the state constitution.<sup>134</sup> The state due process aspect of *Laisne* was reinforced by *Bixby*, because *Laisne* is cited in

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637, 645, 132 Cal. Rptr. 477, 485 (1976); *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 20, 300 N.E.2d 710, 714 (1973).

129. *Anton v. San Antonio Community Hosp.* 19 Cal. 3d 802, 823, 567 P.2d 1162, 1173-74, 140 Cal. Rptr. 442, 453-54 (1977).

130. *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 153, 520 P.2d 961, 965, 113 Cal. Rptr. 145, 153 (1974); *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 3d 623, 647, 114 Cal. Rptr. 681, 696 (1974); *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 20-21, 300 N.E.2d 710, 714 (1973). *But see* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 807 n.3 (1975).

131. The Legislative Counsel's Report on Enrolled Bill, see note 2 *supra*, concludes that it does, but the Report does not analyze the question beyond citing *Anton*.

132. *Bixby v. Pierno*, 4 Cal. 3d 130, 143-45, 481 P.2d 242, 251-53, 93 Cal. Rptr. 234, 243-45 (1971).

133. "It is the essence of judicial action that finality is given to findings based on conflicting evidence." *Drumme*y v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 84, 87 P.2d 848, 853 (1939).

134. *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 845, 123 P.2d 457, 465 (1942). See text accompanying note 47 *supra*.

*Bixby* as a proper application of *Drumme*.<sup>135</sup> If the delegation of “conclusive” factfinding authority to a public agency violates state due process, it would seem to follow a fortiori that such delegation to a private group would also violate state due process. Delegation by a scheme where the private party plays a more powerful and the state government a less active role, in Tribe’s language, “adds to, rather than subtracts from, the procedural infirmity of the state’s law.”<sup>136</sup>

Nevertheless, despite the constitutional implications of *Bixby*, *Laisne*, and *Drumme*, the most recent judicial statement, that of the plurality in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board*,<sup>137</sup> is that the legislature has authority to determine the standard courts must use in reviewing the factual determinations of statewide agencies, provided that procedural safeguards are provided at the administrative level.<sup>138</sup>

Tex-Cal challenged California Labor Code Section 1160.8 providing that in reviewing decisions of the Agricultural Labor Relations Board (ALRB), the body responsible for enforcement of the Agricultural Labor Relations Act (ALRA),<sup>139</sup> the court is bound by the ALRB’s factual determinations that are supported by substantial evidence.<sup>140</sup> The ALRB had found on the basis of substantial evidence that Tex-Cal had committed various unfair labor practices and had ordered Tex-Cal to refrain from such practices, required reinstatement and reimbursement of certain employees who had been illegally laid off, and required notices in both Spanish and English to be mailed, posted, distributed, and read telling employees of their rights under the ALRA.<sup>141</sup> Tex-Cal challenged only the mailing and reading requirements,<sup>142</sup> and contended that it was entitled to the independent judgment of a superior court on the evidence since the ALRB was not a constitutional agency to which judicial powers could be delegated. The Court of Appeal, however, held that the ALRB was an agency to which judicial power could be granted under Article XIV, Section 1 of the California consti-

135. *Bixby v. Pierno*, 4 Cal. 3d 130, 138-40, 481 P.2d 242, 247-48, 93 Cal. Rptr. 234, 239-40 (1971). See text accompanying note 51 *supra*.

136. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §18-6, at 1171 (1978).

137. 24 Cal. 3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

138. *Id.* at 346, 595 P.2d at 585, 156 Cal. Rptr. at 7.

139. See generally CAL. LAB. CODE §§ 1140-1166.3.

140. Section 1160.8 provides in relevant part: “The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive.”

141. 24 Cal. 3d at 354, 595 P.2d at 590, 156 Cal. Rptr. at 12.

142. 24 Cal. 3d at 355, 595 P.2d at 590-91, 156 Cal. Rptr. at 12-13. The facts and Tex-Cal’s contentions were stated more clearly by the court of appeal, *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 144 Cal. Rptr. 149, 162 (1978), than by the plurality of the supreme court.



tution.<sup>143</sup> The supreme court ignored the opinion of the Court of Appeal, although that opinion fit neatly into the conventional pattern of California administrative law, and dismissing the authorities cited by *Tex-Cal* without expressly overruling them, the plurality, without mentioning Article XIV, Section 1, said:

We therefore hold that the Legislature may accord finality to the findings of a statewide agency that are supported by substantial evidence on the record considered as a whole and are made under safeguards equivalent to those provided by the ALRA for unfair labor practice proceedings, whether or not the California Constitution provides for that agency's exercising "judicial power."<sup>144</sup>

Here, as in *Bixby*, the plurality appears to attempt to foist the responsibility for the dual standard in Section 1094.5 on the legislature rather than acknowledge that it is a description of what the court itself created.<sup>145</sup> They then go on to say that a statute providing for substantial evidence review might pass "constitutional muster" if it were accompanied by a guarantee of "administrative due process,"<sup>146</sup> thereby implying that the reason for the independent judgment rule was lack of due process before the administrative agency but disparaging the fact that, regardless of the process before the agency, the state due process clause has been held to entitle a person deprived of what is now called a "fundamental vested right" to the independent judgment of a court on the evidence.<sup>147</sup>

The plurality rest their "holding" on two grounds. Since the petitioner had attacked only the notice requirements of the ALRB's order, and those only in part, it would appear arguable that no "vested fundamental right" was involved, and, therefore, that the substantial evidence standard applied. The plurality foreclosed this, because it "would cause the standard for reviewing an unfair labor practice order to vary" from case to case, and such variance would be "a prolific source of litigious delay that the Legislature indisputably sought to avoid."<sup>148</sup> Thus the plurality would have obliterated the distinctions between vested and nonvested and fundamental and nonfundamental rights in the context of judicial review of administrative action. One can agree with this conclusion without agreeing with the method by

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143. "The legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers." The history of Article XIV, Section 1 is related in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 144 Cal. Rptr. 149, 152, 156 (1978). See note 24 *supra* on constitutional agencies.

144. 24 Cal. 3d at 346, 595 P.2d at 585, 156 Cal. Rptr. at 7.

145. *See id.*

146. *Id.* at 344, 595 P.2d at 584, 156 Cal. Rptr. at 6.

147. *See id.* at 343-44, 595 P.2d at 583-84, 156 Cal. Rptr. at 5-6. See notes 92 to 103 and accompanying text *supra*.

148. *Id.* at 346, 595 P.2d at 585, 156 Cal. Rptr. at 7.

which it was reached. Certainly a doctrine which has become, rightly or wrongly, so embedded in California constitutional law deserves a more decent extinction than suffocation by the legislature's desire to avoid delays of litigation in a particular area.

The constitutional limitations on legislative authority to delegate finality of factfinding power to administrative agencies expressed in the cases since 1936 were dismissed as dicta, because none of them involved a statute containing "a deliberate choice of a legislative standard."<sup>149</sup> Of course none of them involved a choice of legislative standard. Before *Standard Oil* a choice was unnecessary because the general law provided it, and after *Standard Oil* it was only exceptionally permissible. Between 1936 and *Tex-Cal* in 1979 the Legislature had no reason to think that it had authority to make a choice,<sup>150</sup> except in cases like *Tex-Cal* itself where there was a particular grant of constitutional authority as pointed out by the Court of Appeal.<sup>151</sup>

As in *Anton*, the opinion appears to be one in which history is dissembled to achieve a foregone conclusion. A question that remains unanswered is why the plurality went through this exercise when a simple answer conformable to the precedents was so readily available and would have yielded the same result. One can speculate that there are still too few justices willing to accept the position of Justice Burke in *Bixby* and *Strumsky* and overrule *Standard Oil* and its progeny outright. Further one can speculate that there are now too few justices willing to adopt or continue the historical dichotomy between constitutional and statutory agencies. But since the result in *Tex-Cal* would be the same under either of the two approaches, there were enough justices to agree on the conclusion. Thus whether *Tex-Cal* will have any bearing outside the constitutional area of "the general welfare of employees" remains to be seen. And since *Tex-Cal* contains its own *caveat* warning that not even the plurality have considered the "standards applicable to local or private agencies,"<sup>152</sup> the balance of this paper proceeds on the assumption that it will not be usable as a precedent of general application. If this assumption is wrong, then *Tex-Cal* can be invoked in support of the constitutionality of Section 1094.5(d), and the arguments of unconstitutionality derived from the cases since *Standard Oil* can be disregarded.

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149. *Id.* at 345, 595 P.2d at 585, 156 Cal. Rptr. at 7.

150. TENTH BIENNIAL REPORT, *supra* note 28 at 26-27 and 133. See notes 92 to 98 and accompanying text *supra*.

151. 144 Cal. Rptr. at 152. See note 24 *supra* on constitutional agencies.

152. Our holding does not, of course, affect review of administrative findings where the Legislature has left the choice of review standard to the courts [e.g. as in §1094.5]. We need not now consider standards applicable to the findings of local or private agencies. 24 Cal. 3d at 346, 595 P.2d at 585, 156 Cal. Rptr. at 7. See note 5 *supra*.

On the assumption that the *Drummey, Laisne* and *Bixby* line of authority is still viable, a proper question is whether new Section 1094.5(d) amounts to a statutory waiver of the rights a staff physician would otherwise have against a hospital. Although there are circumstances where due process rights may be held to have been waived by contract,<sup>153</sup> Section 1094.5(d) is a statutory, not a consensual waiver. Even if it had preceded *Anton*, it would have had no application to the case, because if the relationship of Dr. Anton to the hospital were viewed as a contract, the hospital bylaws, which would have been part of the contract, assured the doctor he would receive "due process."<sup>154</sup> And if the contract had not assured due process or had expressly required a waiver of due process, the waiver could have been disregarded as an adhesive provision violating the public policy of this state.<sup>155</sup>

But there is a more fundamental reason why Section 1094.5(d) cannot be dismissed as a waiver. *Anton* characterizes staff membership as a "fundamental" and "vested" right,<sup>156</sup> which it treats, in effect, as a "property" or "liberty" right within the meaning of the due process clauses. Whatever label is used, the right is one that Business and Professions Code Section 2392.5 requires the doctor to acquire before he can practice in a hospital with a staff of five or more physicians, and it further fixes some of the requirements of the hospital staff rules. But the fact that the state provides for the creation of the right, let alone that it requires its acquisition, does not mean that the state may attach whatsoever conditions it pleases to the right. "[A] property entitlement once created, cannot be limited in scope by procedural qualifications."<sup>157</sup> To avoid due process requirements the state must carefully make clear that there is no entitlement.<sup>158</sup>

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153. *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 282, 578 P.2d 925, 934, 146 Cal. Rptr. 208, 217 (1978).

154. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 812 n.6, 819 n.17, 829-30, 567 P.2d 1162, 1166 n.6, 1171 n.17, 1177-78, 140 Cal. Rptr. 442, 446 n.6, 451 n.17, 457-58 (1977).

155. *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 480-81, 551 P.2d 410, 419, 131 Cal. Rptr. 90, 99 (1976); see *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 3d 623, 649-50, 114 Cal. Rptr. 681, 697-98 (1974).

156. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d at 825, 567 P.2d at 1175, 140 Cal. Rptr. at 445 (1977). See text accompanying notes 104-108 *supra*.

157. *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361, 367 n.16 (9th Cir. 1976), citing *Goss v. Lopez*, 419 U.S. 565, 572-74 (1975); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §10-8, at 509-10 (1978).

158. The fourteenth amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the due process clause. Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the due process clause.

*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). See also *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (no entitlement; refusal to rehire after termination of employment contract that "made no provision for renewal whatsoever"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §10-9, at 515 n.4 (1978).

But the California legislature not only did not make the required clarification of no entitlement, it refused to do so when it rejected the proposed amendment to Business and Professions Code Section 2392.5, which would have declared the rights under that section not to be "vested."<sup>159</sup> The deletion of the proposed amendment to Section 2392.5 by the Assembly, and passage of the bill amending only Code of Civil Procedure Section 1094.5 is an indication that the legislature considered staff privileges a vested property right and chose to leave them in that status.<sup>160</sup> Having left them as property rights, the legislature could not then authorize any agency, public or private, to deprive the holders of their rights without affording the holders due process, and if due process requires the independent judgment of a superior court on the evidence, Section 1049.5(d) is unconstitutional as to dismissals from medical staffs although constitutional as to denials of initial appointments.

At a number of points *Anton* refers to "minimal due process" and actually holds that "'minimal due process'" does not guarantee the doctor a right to counsel before a hospital's judicial review committee.<sup>161</sup> Transposing this into the language of the United States Supreme Court, in *Anton* the right to counsel was not part of the process that was "due."<sup>162</sup> From this one could try to argue that the right to the independent judgment test was only part of "due process" but not of "minimal due process." But since *Anton* elides rather than articulates the distinction made in *Pinsker II* between "due process" and the "common law doctrine [of] . . . a 'fair procedure'"<sup>163</sup> and holds that the independent judgment review is required even though "the proceedings at the administrative [private hospital] level were conducted in a manner consistent with the minimal requisites of fair procedure demanded by established common law principles,"<sup>164</sup> such an argument

159. See text accompanying notes 109-111 *supra*.

160. *Cf. Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 848, 123 P.2d 457, 467 (1942) (court referred to legislature's failure to adopt different procedures for reviewing private board's decisions as evidence of constitutional limits on such action).

161. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 827, 567 P.2d 1162, 1177, 140 Cal. Rptr. 442, 457 (1977). See also *id.* at 824-26, 567 P.2d at 1174-76, 140 Cal. Rptr. at 454-56.

162. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 12 (1978). "[D]ue process is flexible . . ." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

163. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550 n.7, 526 P.2d 253, 259 n.7, 116 Cal. Rptr. 245, 251 n.7 (1974). Compare *id.* with *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 825, 829-30, 567 P.2d 1162, 1175, 1178-79, 140 Cal. Rptr. 442, 455, 458-59 (1977).

164. 19 Cal. 3d at 830, 567 P.2d at 1179, 140 Cal. Rptr. at 459. Exactly opposite results have been reached in New Jersey; the right to counsel was upheld, and the right to a court's independent judgment was denied. See *Gareeb v. Weinstein*, 161 N.J. Super. 1, —, 390 A.2d 706, 714 (1978). I am indebted to Mr. Joseph A. Saunders for this reference. This uncertainty is not resolved by the statement in *California Dental Association v. American Dental Association*, 23 Cal. 3d 346, 357, 590 P.2d 401, 407, 152 Cal. Rptr. 546, 552 (1979), "*Anton* was based on our application of common law principles of fair procedure," because *Dental* did "not require the application of

at this time does not seem to have great probability of success.

The proposition that the state cannot authorize a private agency to deny a constitutional right helps to explain *Ezekial v. Winkley*.<sup>165</sup> Ezekial, a resident at a private hospital, successfully challenged his dismissal without being afforded his common law rights of "fair procedure," to which he was entitled to protect his alleged expectation that completion of his residency would enable him fully to utilize his medical license by attaining some speciality status. The court cited *Stretten v. Wadsworth Veterans Hospital*,<sup>166</sup> which on similar facts found no showing that the resident could not continue in his medical specialty and, therefore, that there was "no infringement of liberty and hence no deprivation of due process on that account."<sup>167</sup> But in *Ezekial* the plaintiff alleged his "dismissal will effectively prevent his entry into the medical specialty for which his residency training was preparing him,"<sup>168</sup> i.e., he invoked the very liberty interest not found in *Stretten*. And, if one takes *Drumme* at face value, as *Bixby* apparently does, a liberty interest is as much entitled to protection as a property interest.<sup>169</sup>

#### THE CONTINUING INCONSISTENCY IN REVIEW OF ADMINISTRATIVE DECISIONS IN CALIFORNIA

Despite the misgivings one may have as to disciplinary processes in hospitals and the general problems of peer review within the medical profession,<sup>170</sup> it seems ridiculous even to suggest the conclusion that a statute as well-intended and apparently harmless as Section 1094.5(d) is in any way unconstitutional. The vice in the suggestion is, however, not the result of fallacious reasoning; it is one result of the schizoid character of California administrative law—a consequence of its split personality. The split is the difference in review afforded denials of applications and that given to revocations. *Bixby* is as clear an illustration as has been found:

[T]he courts . . . consider . . . whether . . . such a fundamental right . . . is possessed by, and vested in, the individual or merely sought by him. In the latter case, since the administrative agency must engage in the delicate task of determining whether the individ-

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common law principles of fair procedure." Thus whether the principles are common law, constitutional, or even extra-constitutional, see note 126 *supra*, did not have to be considered.

165. 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977).

166. 537 F.2d 361 (9th Cir. 1976).

167. *Id.* at 366 (property interest found and held adequately protected).

168. *Ezekial v. Winkley*, 20 Cal. 3d 267, 278, 572 P.2d 32, 39, 142 Cal. Rptr. 418, 425 (1977).

169. *Bixby v. Pierno*, 4 Cal. 3d 130, 138, 481 P.2d 242, 247, 93 Cal. Rptr. 234, 239 (1971).

170. See, e.g., *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 486, 551 P.2d 410, 423, 131 Cal. Rptr. 90, 103 (1976); J. BERLANT, *PROFESSION AND MONOPOLY* 85-89 (1975).

ual qualifies for the sought right, the courts have deferred to the administrative expertise of the agency. If, however, the right has been acquired by the individual, and if the right is fundamental, the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review. The abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction. . . .

Once the agency has initially exercised its expertise and determined that an individual fulfills the requirements to practice his profession, the agency's subsequent revocation of the license calls for an independent judgment review of the facts underlying any such administrative decision.<sup>171</sup>

Why should administrative expertise be the subject of deference in the application cases and not in the revocation cases? There is no point in reviewing the truisms that the professional information and responsibility do not differ in the two situations. That question was put by the late Dean McGovney almost four decades ago,<sup>172</sup> and many times since,<sup>173</sup> but it has never been answered.

The California court invokes in support of its position Professor Jaffe's language about protecting "mavericks and unconventional practitioners."<sup>174</sup> Jaffe concluded that "it would not be easy to draft or apply a single formula" for judicial review, because the competence, composition and processes of administrative agencies vary so widely. Instead the California court has developed a single formula applied a priori without regard to the character of the agency and the subject matter involved. It has fallen into the pit of declaring a "[j]udicial categorization [that] will generally carry with it an inevitable ultimate conclusion . . . the danger that through [the] use of labels the underlying

171. *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 146, 481 P.2d 242, 252, 254-55, 93 Cal. Rptr. 234, 244, 246-47 (1971).

172. McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CALIF. L. REV. 110, 131-34 (1941).

173. *Bixby v. Pierno*, 4 Cal. 3d 130, 161, 481 P.2d 242, 264, 93 Cal. Rptr. 234, 256 (1971) (Mosk, J., concurring) (suggesting that the right of a qualified applicant is as "vested or fundamental" as the right of a holder of a license); *Southern Cal. Jockey Club v. California Horse Racing Bd.*, 36 Cal. 2d 167, 180, 223 P.2d 1, 9 (1950) (Traynor, J., dissenting) ("a double standard for a single problem"); *Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 315, 66 Cal. Rptr. 183, 186 (1968) ("the practical results [are] identical"); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §10-9, at 519 (1978) ("inconsistent with any intelligible rational underlying due process protection. . . ."); Note, *Judicially Compelled Admission to Medical Societies: The Falcone Case*, 75 HARV. L. REV. 1186, 1198 (1962) ("From the standpoint of the seriousness of the injury to the individual, there is no real basis for a distinction between expulsion and exclusion where in either case nonmembership seriously impairs one's ability to pursue an occupation."); Note, *De Novo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217, 1222 (1952) (the distinction between application and revocation cases "showed superficial logic").

174. *Bixby v. Pierno*, 4 Cal. 3d 130, 145, 146 n.18, 161, 481 P.2d 242, 253, 254 n.18, 256, 93 Cal. Rptr. 234, 245, 246 n.18, 256 (1971), citing L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 191-92 (1965).

factors may be neglected.”<sup>175</sup> What in Jaffe’s book appears to be an attempted rationalization of the California rule has in *Bixby* been construed as an endorsement.

What has been subordinated is, of course, the inability of judges to make better decisions on matters of medicine than doctors. Despite the various laudations of administrative expertise and recognition of the need for hospitals to attempt to protect themselves from malpractice suits,<sup>176</sup> the California court still feels that it must protect professional practitioners “from untoward intrusions by the massive apparatus of government” and private entities,<sup>177</sup> and that the way to guard against “administrative evil” is to allow only courts to exercise “the conclusiveness of the factfinding” power.<sup>178</sup> The court still seems to fail to appreciate that an administrative agency may be the servant of the public rather than the enemy of a licensee. A “maverick” hospital that disciplines a deficient doctor may do so to assure the quality of care to patients. This “maverick and unconventional” hospital may be as much deserving of protection as an individual practitioner. Why should the legislature be denied the opportunity to decide that it is so deserving? One might be disposed to say that there has been no change between now and the 40 years since *Drummey*, but there has been. Although the words are different, the song is the same except now it is sung by the “liberals” rather than the “conservatives.”<sup>179</sup> Under the attractive mantle of protecting individual rights, the present “liberals” seem to have adopted the attitudes of judicial activism their predecessors decried when those attitudes were used to protect “outmoded rights of property and . . . shibboleths of freedom of contract.”<sup>180</sup> When the court speaks of “arbitrary power” it refers only to that exercised by “a personal monarch” or “impersonal multitude” or “contemporaneous and fluid majority.”<sup>181</sup> Judicial omphaloskepsis might reveal one con-

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175. Note, *De Novo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217, 1221 (1952). Jaffe cites this note, but in *Bixby* Jaffe’s notes are omitted.

176. *Ezekial v. Winkley*, 20 Cal. 3d 267, 277-78 572 P.2d 32, 39, 142 Cal. Rptr. 418, 425 (1977); *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 486, 551 P.2d 410, 423, 131 Cal. Rptr. 90, 103 (1976); *Ascherman v. San Francisco Medical Soc’y*, 39 Cal. App. 3d 623, 643, 114 Cal. Rptr. 681, 693 (1974); *McGovney, The California Chaos in Court Review of the Decisions of State Administrative Agencies*, 15 S. CAL. L. REV. 391, 410-11 (1942); Note, *Judicially Compelled Admission to Medical Societies: The Falcone Case*, 75 HARV. L. REV. 1186, 1194 (1962).

177. *Ezekial v. Winkley*, 20 Cal. 3d 267, 272, 572 P.2d 32, 35, 142 Cal. Rptr. 418, 421 (1977); *Bixby v. Pierno*, 4 Cal. 3d 130, 143, 481 P.2d 242, 251, 93 Cal. Rptr. 234, 243 (1971).

178. *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 846, 123 P.2d 457, 466 (1942).

179. *Bixby v. Pierno*, 4 Cal. 3d 130, 159, 481 P.2d 242, 263, 93 Cal. Rptr. 234, 255 (1971) (Burke, J., dissenting).

180. *Id.* at 142, 481 P.2d at 250, 93 Cal. Rptr. at 242; Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711, 717-18 (1975).

181. 4 Cal. 3d at 141 & n.8, 481 P.2d at 249-50 & n.8, 93 Cal. Rptr. at 241-42 & n.8.

spicuous item that has been omitted.<sup>182</sup>

#### THE DERIVATION OF "FUNDAMENTAL VESTED RIGHTS"

*Anton* held that the independent judgment rule applied because the private hospital's decision substantially affected a "fundamental vested right."<sup>183</sup> Obvious questions are: (1) is there such a concept as an "un-fundamental unvested" right that the courts protect,<sup>184</sup> (2) where does the expression "fundamental vested right" come from; and (3) is a "fundamental vested right" anything different than a constitutional right of liberty or property?

The short conventional response to the first question is that in *Bixby*. Relying on *McDonough v. Goodcell*,<sup>185</sup> which "drew a line between the review of an agency decision affecting restoration of a license and the attempted acquisition of such a right," the court says "the attempt to *obtain* a license did not involve a fundamental, vested right. . . ."<sup>186</sup> But this conventional response is no answer. Justice Mosk, concurring in *Bixby*, put the question more poignantly: why should a licensee be treated better than an applicant who "is equally well qualified by virtue of his investment of time and treasure[?]"<sup>187</sup> Although the question has been put in other forms such as the inexplicable difference between "administrative" action in granting a license and "judicial" action in revoking one,<sup>188</sup> no one has ever been able to give a rational answer.<sup>189</sup> Justice Mosk tries to soften the bluntness of this fact by saying that the distinction "arises primarily because of chronology . . . ."<sup>190</sup> Behind these innocent appearing words lurks a bit of California legal history that shows why a rational answer is impossible.

It is easier to explain the genesis of the *McDonough* distinction than its longevity. The McDonough brothers had been in the bail bond

182. *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 58, 520 P.2d 29, 49-50, 112 Cal. Rptr. 805, 825-26 (1974) (Roth, J., dissenting); R. BERGER, GOVERNMENT BY JUDICIARY 257 n.38 (1977) ("Unquenchable judicial thirst for extra constitutional power").

183. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 822, 567 P.2d 1162, 1173, 140 Cal. Rptr. 442, 453 (1977).

184. "[R]ights, if any, which may be tolerantly regarded as non-fundamental and not vested" *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 58, 520 P.2d 29, 50, 112 Cal. Rptr. 805, 826 (1974) (Roth, J., dissenting).

185. 13 Cal. 2d 741, 91 P.2d 1035 (1939).

186. *Bixby v. Pierno*, 4 Cal. 3d 130, 139, 481 P.2d 242, 248, 93 Cal. Rptr. 234, 240 (1971) (emphasis in original).

187. *Id.* at 161, 481 P.2d at 264, 93 Cal. Rptr. at 256.

188. See text accompanying notes 171-173 *supra*.

189. See, e.g., *Southern Cal. Jockey Club, Inc. v. California Horse Racing Bd.*, 36 Cal. 2d 167, 180-82, 223 P.2d 1, 10-11 (1950) (Traynor, J., dissenting); *Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 315-16, 66 Cal. Rptr. 183, 186-87 (1968); McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CALIF. L. REV. 110, 132, 149 (1941).

190. *Bixby v. Pierno*, 4 Cal. 3d 130, 161, 481 P.2d 242, 264, 93 Cal. Rptr. 234, 256 (1971) (Mosk, J., concurring).



business in San Francisco for some thirty years. In 1936-37 they became the subjects of an investigation by the grand jury circumspectly described in the superseded opinion of the District Court of Appeal as: "held to determine if certain police officers were levying and collecting graft fees from certain businesses. The investigation was much discussed in the municipality and many items appeared in the public press."<sup>191</sup> The "businesses" so delicately mentioned were largely prostitution, including an "asserted monopoly on medical examination of women arrested by the police vice squad," and organized gambling.<sup>192</sup> And the press accounts included the whole of the lurid "Atherton Report," which characterized the firm of McDonough Brothers as "a fountain head of corruption willing to interest itself in almost any matter designed to defeat or circumvent the law."<sup>193</sup> The degree of public agitation can be inferred from the fact that almost forty-one years later "The Fountain Head of Corruption" was an expression that could still tingle in the popular ear.<sup>194</sup>

The legislative response to this furor was the passage of the Bail Bond Act,<sup>195</sup> which required bail bond brokers to obtain licenses although the business had theretofore been unregulated. Licenses were to be issued only to one whom the Insurance Commissioner found to be "a fit and proper person to engage in such business."<sup>196</sup> "The Bail Bond Act was drafted by, and introduced and sponsored in the Legislature by, The State Bar of California."<sup>197</sup> What was not expressly said but what can be inferred from subsequent litigation is that the Bail Bond Act was passed to put McDonough Brothers out of business. "[W]hen McDonough appeared before a jury in an extraordinary proceeding, [sic] matter or in a criminal case based upon the 'license' question, McDonough won, and when matters of 'license' appeared before the commissioner, the commissioner won."<sup>198</sup> From the temper of the

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191. *McDonough v. Goodcell*, 84 P.2d 231, 285 (1939) (superseded opinion).

192. *San Francisco Chronicle*, March 17, 1937, at 1F-8F (special section).

193. For a full text of Atherton's Graft Report, see *San Francisco Chronicle*, March 17, 1937, at 2F, col. 3 (special section). Edwin Newton Atherton, a colorful figure in his own right, was the investigator for the grand jury.

194. Herb Caen, *San Francisco Chronicle*, Jan. 15, 1978, Sunday Punch, at 1, col. 1.

195. CAL. INS. CODE §§1800-1822.

196. *McDonough v. Goodcell*, 13 Cal. 2d 741, 743-44, 91 P.2d 1035, 1037 (1939).

197. Golden, *The Bail Bond Act*, 13 CAL. ST. B.J. 9 (1938).

198. *McDonough v. Garrison*, 68 Cal. App. 2d 318, 359, 156 P.2d 983, 1004 (1945) (Ward, J., dissenting). The immediately accessible information on the McDonough litigation in chronological order follows: *In re McDonough*, 27 Cal. App. 2d 155, 80 P.2d 485 (1938) (denying habeas corpus following indictment for conspiracy to violate the Bail Bond Act and holding act constitutional); *In re Rice*, 27 Cal. App. 2d 768, 80 P.2d 491 (1938) (denying habeas corpus to McDonough employee); Golden, *The Bail Bond Act*, 13 CAL. ST. B.J. 9 (1938) (Superior Court opinion overruling demurrer to conspiracy indictment); *McDonough v. Goodcell*, 84 P.2d 281 (1938) (superseded opinion of District Court of Appeal granting writ of mandate against the commissioner); *Newport v. Caminetti*, 56 Cal. App. 2d 557, 132 P.2d 897 (1943) (upholding denial of license to husband of McDonoughs' niece, a "dummy"); *McDonough v. Garrison*, 68 Cal. App. 2d 318, 156

times it seems clear that there is no way the McDonoughs could have obtained a license and that the Supreme Court was bent on accommodating this temper. If such accommodation could be achieved by an *ad hominem per curiam* opinion drawing an artificial distinction between applicants and licensees, so be it.<sup>199</sup> But why has a distinction with such a sinister background remained so viable? No comprehensible answer to this question has ever been given. This void may be an illustration of the philosopher's proposition:

What can be said at all can be said clearly; and whereof one cannot speak thereof one must be silent.<sup>200</sup>

The explanation of the source of "fundamental vested rights" is less colorful and rather complicated, but it may show how something may come from nothing, an example of legal abiogenesis. The expression "fundamental vested right" got its currency from *Bixby* and *Strumsky*.<sup>201</sup> The origin of "fundamental" in the present context is tolerably clear. Except for its discriminating use three decades ago to distinguish between fundamental constitutional rights and the limitations of the judiciary clause of the state constitution,<sup>202</sup> the word does not seem to have been used relative to the scope of judicial review until it appeared in *Bixby*.<sup>203</sup>

The origin of "vested" is more obscure and requires some tracing. *Bixby* cites two cases that refer to effect on "vested rights" as the criterion for applying the "independent judgment" scope of judicial review.<sup>204</sup> Though the cited cases give the impression that the earlier cases, *Drummev*, *McDonough*, *Laisne*, *Dare*, etc. distinguish between

P.2d 983 (1945) (reversing grant of mandate against commissioner after jury "trial de novo" on review of denial of subsequent application for license).

199. "In other situations there is no discernible reason for the unsigned opinion; i.e., the case is one that ordinarily would be decided with an opinion by a disclosed author and concurring justices. But intense public and partisan interest in the outcome, or the difficulty of reaching agreement on a particular draft opinion, may make anonymity the only way to achieve unanimity." B. WITKIN, MANUAL ON APPELLATE COURT OPINIONS §130 at 254 (1977), noted in *Kanner*, *Book Review*, 25 U.C.L.A.L. REV. 893, 902 (1978).

200. L. Wittgenstein, as quoted in F. HUXLEY, THE RAVEN AND THE WRITING DESK 9 (1976).

201. *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971); *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 34, 520 P.2d 29, 32-33, 112 Cal. Rptr. 805, 808-09 (1974) ("Vested, fundamental rights").

202. *Modern Barber College v. California Employment Stabilization Comm'n*, 31 Cal. 2d 720, 726, 192 P.2d 916, 919 (1948).

203. The majority opinion herein unfortunately enhances the confusion and uncertainty of earlier cases by introducing the further concept of 'fundamental' rights . . . . If the single-factor 'vested rights' test has led to confusion and anomaly, consider the difficulties . . . in applying this new test . . . .

*Bixby v. Pierno*, 4 Cal. 3d 130, 153, 481 P.2d 242, 259, 93 Cal. Rptr. 234, 251 (1971) (Burke, J., dissenting).

204. *Id.* at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244, citing *Merrill v. Department of Motor Vehicles*, 71 Cal. 2d 907, 914-15, 458 P.2d 33, 37, 80 Cal. Rptr. 89, 93 (1969) and *Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 314-17, 66 Cal. Rptr. 183, 186-87 (1968).

“vested” and “non-vested” rights, they do not. *Drumme*y, the first case to require the independent judgment review in a mandamus proceeding to secure the restoration of an occupational license, refers to “constitutional rights,” deprivation “of an existing valuable privilege,” and quotes the United States Supreme Court on the involvement of “constitutional rights of liberty and property.”<sup>205</sup>

*McDonough*, the first case to distinguish between applications and revocations, holds that “[t]he legislature has the power to vest in a public officer the discretion to deny an application,” which it thereafter characterizes as an “administrative” function with which it will not interfere if the officer’s action, like the action of a court, was based on substantial evidence.<sup>206</sup> *McDonough* distinguished *Drumme*y by pointing out that the petitioners in *Drumme*y “were possessed of licenses, . . . which were recognized to be valuable property rights” that federal due process protected by requiring the “independent judgment on the facts” of some court or other body exercising “judicial functions.”<sup>207</sup> Although *McDonough* refers to “constitutional rights” and “due process,” it does not use the word “vested” except for the inapposite use stated above.<sup>208</sup> *Laisne*, another revocation case, quotes a concurring opinion of the late Chief Justice Beatty to the effect that the facts on which “[v]ested rights of property or contract” depend can be decided only by courts, and adds some similar language, but it actually turns on the reiteration of *Drumme*y and its own extension of the due process clause of the state constitution to protect “a property right.”<sup>209</sup> *Dare*, a revocation case, cites *Drumme*y and similarly refers to deprivation “of a constitutional right either of liberty or property.”<sup>210</sup> Section 1094.5 is largely a codification of *Dare*,<sup>211</sup> but the *Tenth Biennial Report* of the Judicial Council of California (1944), which is generally considered the

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205. *Drumme*y v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 84-85, 87 P.2d 848, 853-54 (1939).

206. *McDonough* v. Goodcell, 13 Cal. 2d 741, 746, 91 P.2d 1035, 1039 (1939).

The testimony before the commissioner was voluminous and highly conflicting . . . [and] would sustain a conclusion either way . . . . If the trial had been before a court the evidence was sufficient to support findings . . . [of] a verdict either way . . . . With this state of the record our inquiry on this phase of the case is at an end. . . .

*Id.* at 749, 91 P.2d at 1040.

207. *Id.* at 752-53, 91 P.2d at 1042.

208. See text accompanying note 206 *supra*.

209. *Laisne* v. California State Bd. of Optometry, 19 Cal. 2d 831, 836, 838, 846-47, 123 P.2d 457, 461, 462, 466 (1942).

210. *Dare* v. Board of Medical Examiners, 21 Cal. 2d 790, 795, 136 P.2d 304, 306 (1943).

211. *Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 314, 66 Cal. Rptr. 183, 186 (1968); TENTH BIENNIAL REPORT, *supra* note 28, at 140-41 and n.60; Netterville, *Judicial Review: The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262, 267-68 (1956).

authoritative legislative history of the section,<sup>212</sup> has not been found to contain any reference to either “fundamental” or “vested” rights.<sup>213</sup> Thus it seems safe to say that the current expression was not used before the enactment of Section 1094.5 in 1945.

The use of “vested” and “non-vested” as a test to determine the scope of judicial review of administrative determinations of fact appears to have begun in 1950. Mr. Ralph N. Kleps, the principal draftsman of Section 1094.5 analyzed *McDonough v. Goodcell* under the caption: “*State-wide Agencies Whose Decisions Do Not Involve Vested Rights*,” and said, “[A]nother class of state-wide agencies which is exempted from the operation of the *Standard Oil* and *Drummeys* cases includes those whose decisions are said to involve matters of privilege, rather than vested right.”<sup>214</sup> But he gave no clue as to who said this or where or when. The one case he cites that uses the word “vested” does so in the context of holding that a probationary public employee had only a statutory right, not a constitutional right, to continued employment and was, therefore, not entitled to an independent judgment review of his dismissal.<sup>215</sup>

The distinction between a “vested right” and a “privilege” does not seem to have survived.<sup>216</sup> In 1952 the court refused to apply the “vested right”/“privilege” distinction and held that an applicant for a form of gambling license was entitled to a hearing on denial even though he had no “vested right” to engage in such a business.<sup>217</sup> Nor

212. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 817, 567 P.2d 1162, 1170, 140 Cal. Rptr. 442, 450 (1977).

213. No reference to the *McDonough* litigation has been found in the Report except to the collateral case of *Newport v. Caminetti*, 56 Cal. App. 2d 557, 132 P.2d 897 (1943). See note 198 *supra*; TENTH BIENNIAL REPORT, *supra* note 28 at 142 n.66.

214. Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285, 293 (1950). See also *id.* at 294-96.

215. *Boutwell v. State Bd. of Equalization*, 94 Cal. App. 2d 945, 950, 212 P.2d 20, 23 (1949), cited in Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285, 296 n.39 (1950). Compare *Pipkin v. Board of Supervisors*, 82 Cal. App. 3d 652, 660-62, 147 Cal. Rptr. 502, 507-08 (1978) (permanent public employee has no “property right” to employment under federal constitution but, nevertheless, has “a fundamental vested right” entitling him to independent judgment review).

216. Note, *De Novo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217, 1221-22 (1952). This note gives the impression that *McDonough v. Goodcell* expressly turned on a distinction between “rights” and privileges and criticizes it for doing so. In fact, *McDonough* refers to “privileges” only in rejecting an argument that the Bail Bond Act was *ex post facto* and not in considering the scope of review. 13 Cal. 2d 741, 750, 91 P.2d 1035, 1041 (1939). The demise of the distinction between “rights” and “privileges” is beyond the scope of this article, but see *Board of Regents v. Roth*, 408 U.S. 564, 571 n.9 (1972).

217. *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 270-71, 246 P.2d 656, 662 (1952). *McDonough* is so cryptic that there was for some time some doubt whether there was any judicial review of denials of applications. McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CALIF. L. REV. 110, 132 (1941); McGovney, *The California Chaos in Court Review of Decisions of State Administrative Agencies*, 15 S. CAL. L. REV. 390, 401, 411 (1942). “The court, in *Fascination*, emphatically rejected the distinction between vested rights and privileges as a relevant criterion in this context [right to hearing on denial of application].” CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS §2.5 (1966).

did they quickly adopt Mr. Kleps' characterization of "vested." Later in 1952 the court spoke of deprivation of a "property right" as the criterion for determining the scope of review.<sup>218</sup> But in 1954 Mr. Witkin adopted Mr. Kleps' terminology by using it in the first edition of *California Procedure*. He wrote:

A party whose vested right is affected by the agency's order, e.g., by suspension or revocation of a business or professional license, may have something in the nature of a judicial trial de novo on the facts . . . . But where no vested right is affected, e.g., where the aggrieved party is an unlicensed person whose application for a license has been denied, there is no right to a trial de novo.<sup>219</sup>

And in 1955 the court held that applicants for old age benefits were not entitled to a "trial de novo," because "they were not possessed of a vested right."<sup>220</sup> This seems to be the judicial debut of "vested" in the present context. Mr. Kleps then repeated his use of "vested" in describing *McDonough*,<sup>221</sup> and Professor Jaffe, discussing California cases such as *McDonough* and *Drummey*, referred to "the determination of a vested right" but did not give the source of his quotation.<sup>222</sup> The effective source of the present currency of "vested" seems to be its use by Judge Deering in *California Administrative Mandamus* in 1966 where he defines it circularly, perhaps as a counsel of despair, as a "[t]ype of right granted special constitutional protections."<sup>223</sup> If a right is "vested" because it is given special protection rather than being specially protected because it is "vested," it seems that the word states a result rather than a reason and its use is descriptive rather than analytical.

The first extensive judicial discussion of "vested" and "nonvested" is *Beverly Hills Federal Savings and Loan Association v. Superior Court*,<sup>224</sup> which understandably but erroneously attributes its origin to *McDonough*.<sup>225</sup> The dichotomy was used by the California Supreme Court in

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218. *Thomas v. California Employment Stabilization Comm'n*, 39 Cal. 2d 501, 504, 247 P.2d 561, 562 (1952).

219. 3 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §16 (1954) (citing 2 STAN. L. REV. 285, 294). See also *id.* §19.

220. *Bertch v. Social Welfare Dep't*, 45 Cal. 2d 524, 529, 289 P.2d 485, 488-89 (1955).

221. Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions—1949-1959*, 12 STAN. L. REV. 554, 565-66 (1960).

222. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 191 (1965).

223. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS xxii, §§5.69-5.72 (1966).

224. 259 Cal. App. 2d 306, 312-16, 66 Cal. Rptr. 183, 185-87 (1968).

225. The court distinguished the *Drummey* decision on the ground that *Drummey* involved the revocation of a license, a vested right, and the revocation process was a 'judicial' one, whereas the *McDonough* case involved a denial of a permit, a nonvested right, and, apparently for that reason, an administrative rather than a judicial act. *Id.* at 315, 66 Cal. Rptr. at 187.

*Merrill v. Department of Motor Vehicles*,<sup>226</sup> which relied on *Beverly Hills* and the first edition of Witkin's *California Procedure*.<sup>227</sup> Mr. Witkin in his second edition, of course, was then able to cite *Merrill* as citing his own prior text.<sup>228</sup> Thus he had the pleasure of reaping the fruit after cultivating the plant.<sup>229</sup>

Is there a difference between "fundamental vested rights" and constitutional rights of liberty and property? If there is, it has not become apparent. The expression "fundamental vested" seems to be no more than the coupling of exalting adjectives to provide a rhetorical foundation for the results the court has reached. Every effort to define the expression becomes as circular as Judge Deering's effort to define "vested" alone. All the coupling does is add a little panache to the opinions.

#### A SHORT CODA

California administrative law is riddled with enigmas and paradoxes some of which I have sought to explain, some I have hinted at, and some I have not mentioned. The following personal catalogue is offered by way of illustration without in any way purporting to be definitive. (1) The intransigent adherence to the "independent judgment" rule, indeed its expansion, as shown in *Bixby* and *Strumsky* based solely on the source of the agency's authority rather than its competence. (2) The persistent distinction between denials of licenses and revocation of licenses that can be explained, but not on rational grounds. (3) The preference for the judgment of an individual superior court judge rather than for the collegial opinion of an appellate court based on the identical record,<sup>230</sup> which may be explainable as a rule of judicial convenience but not of common sense. (4) The problems latent in what is now Code of Civil Procedure Section 1094.5(e) (formerly (d)) relative to taking evidence before the superior court because such evidence could not have been obtained before a private body without subpoena power.<sup>231</sup> If *Tex-Cal* is the law, the absence of compulsory

226. 71 Cal. 2d 907, 458 P.2d 33, 80 Cal. Rptr. 89 (1969).

227. *Id.* at 915 n.12, 458 P.2d at 37-38 n.12, 80 Cal. Rptr. at 93 n.12.

228. 5 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §217. *See also id.* §222 (2d ed. 1971).

229. *Cf. Kanner, Book Review*, 25 U.C.L.A. L. REV. 893, 894 (1978) ("selectively chosen expressions of others in Mr. Witkin's skillful hands become transformed into a sort of Charlie McCarthy device which, while appearing to have a life of its own, in fact voices Mr. Witkin's own predilections.").

230. *Bixby v. Pierno*, 4 Cal. 3d 130, 143 n.10, 481 P.2d 242, 251 n.10, 93 Cal. Rptr. 234, 243 n.10 (1971).

231. *See Ezekial v. Winkley*, 20 Cal. 3d 267, 278, 572 P.2d 32, 39, 142 Cal. Rptr. 418, 425 (1977). *Compare id. with* *Netterville, Judicial Review: The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262, 270-77 (1956).

process before a private body presents a particular problem. *Tex-Cal* predicates the availability of the substantial evidence review of administrative action on "ample safeguards of fair procedure at the administrative level,"<sup>232</sup> and excuses the retention of the independent judgment review as a device "to cure due process violations at the administrative level."<sup>233</sup> Since compulsory process may be necessary to assure cross-examination and confrontation, for example, it is possible to foresee a result where, contrary to the former case law,<sup>234</sup> the review of actions of private bodies may be more extensive than the review of those of public agencies. Playing *Anton* and *Tex-Cal* back to back may thus create a new incongruity in lieu of the one *Anton* purported to eliminate. (5) *Anton's* holding that the physician had no right to counsel before the hospital board opens the whole area of the appositeness of the adversary process to such hearings. Considering that staff membership is said to be in part, at least, a device to insure the continuing education of doctors, are hearings before such boards going to have to be characterized as "disciplinary" or "educational" in order to determine what kind of process is "due?"<sup>235</sup> (6) Since *Bixby* acknowledges that "fundamental vested" "yields no fixed formula and guarantees no predictably exact ruling in each case,"<sup>236</sup> "an enormous proportion of California litigation is going to be devoted to the somewhat futile task of deciding what rights are fundamental and what rights are not fundamental."<sup>237</sup> This exercise is proceeding as predicted.<sup>238</sup> (7) What are the "common law principles of fair procedure," and to what extent may the legislature alter them? These questions could be put with reference to particular procedural aspects. As *Anton* shows, one may conclude that the right to counsel before the administrative body is of lesser stature than the right to an "independent judgment review." And *Anton* leaves in doubt the question of whether the burden of proof can be shifted to the respondent.<sup>239</sup>

The constitutional nouns "liberty" and "property" are elastic and imprecise. The California court has obscured rather than clarified them by adding its meliorative adjectives "fundamental and vested." But these are ecumenical times, and perhaps baptism in a turbid pool is

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232. 24 Cal. 3d 335, 346, 595 P.2d 579, 585, 156 Cal. Rptr. 1, 7 (1979).

233. *Id.* at 344, 595 P.2d at 584, 156 Cal. Rptr. at 6.

234. See notes 12-14 and accompanying text *supra*.

235. Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 86-91 (1978).

236. 4 Cal. 3d at 146-47, 481 P.2d at 254, 93 Cal. Rptr. at 246.

237. K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT §68, at 70 (2d ed. 1975).

238. Kilpatrick's Bakeries v. Unemployment Ins. Appeals Bd., 77 Cal. App. 3d 539, 143 Cal. Rptr. 664 (1978) (is typical); G.B. v. Lackner, 80 Cal. App. 3d 64, 145 Cal. Rptr. 555 (1978) (is titillating). *But see* note 8 and accompanying text *supra*.

239. Pipkin v. Board of Supervisors, 82 Cal. App. 3d 652, 658, 147 Cal. Rptr. 502, 505 (1978).

as good as that in a clear one, and since I have already invoked Ben Gurion and the Pentateuch, I shall now call on my favorite Anglican cleric, the late Reverend Sydney Smith, and apply his words to the court:

I shall pray for your salvation but with no very lively hope of success.



