

I

ADMINISTRATIVE LAW

A. ADMINISTRATIVE INVALIDATION OF STATUTES

*Southern Pacific Transportation Co. v. Public Utilities Commission.*¹ The California Supreme Court held that “[u]nder the broad powers granted it, the [Public Utilities C]ommission may determine the validity of statutes.”² The case thus calls into question the rule that administrative agencies do not have the authority to refuse effect to a statute on the ground that it is unconstitutional.³

This Note examines *Southern Pacific* and uses the distinctions which that examination uncovers to formulate a standard for administrative constitutional review.⁴ Part I sets out the litigation background to the case. Part II describes and criticizes the court’s analysis of constitutional review. One part of the *Southern Pacific* analysis suggests that any administrator has the authority to find statutes unconstitutional, while the other suggests that constitutional or statutory provisions are needed to confer constitutional review authority on an agency. Part III considers the interests affected by a rule about when, if ever, administrative agencies may determine the validity of statutes. An investigation of the interests of the government, the individual dealing with an agency, and the administrator is needed because *Southern Pacific* leaves uncertain on which rationale its holding rests and fails to justify either rationale. This investigation assumes additional importance because the California Legislature has proposed a constitutional amendment overruling *Southern Pacific* by providing that no agency has the power to declare statutes unconstitutional.⁵ Part IV proposes a rule of law that summarizes the distinctions shown by an examination of *Southern Pacific* to

1. 18 Cal. 3d 308, 556 P.2d 289, 134 Cal. Rptr. 189 (1976) (Clark, J.) (5-2 decision) (Mosk, J., joined by Sullivan, J., concurred in the result, but dissented as to the authority of the Commission to find statutes invalid).

2. *Id.* at 311 n.2, 556 P.2d at 290 n.2, 134 Cal. Rptr. at 190 n.2.

3. See text accompanying notes 28-33 *infra*.

4. “Constitutional review” is used in this Note, as it is in the dissent in *Southern Pacific*, 18 Cal. 3d at 318, 556 P.2d at 295, 134 Cal. Rptr. at 195, to mean the examination of a statute to determine its constitutionality and, if it is found unconstitutional, the refusal to give it effect on that ground. “Judicial review” is not used for that purpose for two reasons. First, the term suggests that constitutional review is exclusively a judicial activity, and that might prejudice the results of an inquiry into whether nonjudicial government institutions may ever justifiably exercise constitutional review power. Second, “judicial review” in administrative law means not only court review of statutes for constitutionality, but also judicial reconsideration of administrative action. Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law* (pt. 2), 69 W. VA. L. REV. 249, 250-51 (1967).

5. See note 76 *infra*.

be relevant in deciding when administrative constitutional review can be justified.

I. *Litigation Background*

After a woman and her child were killed in a collision of an automobile and a train at the crossing of Blanchard Road and Southern Pacific's railroad tracks in Santa Clara County,⁶ the Public Utilities Commission (PUC) on November 2, 1971, ordered an investigation of the crossing.⁷ Ten days later, the governor approved section 1202.3 of the Public Utilities Code.⁸ That section provides that "[n]otwithstanding any other provision of this chapter, in any proceeding under Section 1202 [which deals generally with the PUC's exclusive power over railroad crossings], in the case of a crossing involving a publicly used road or highway not on a publicly maintained road system," the PUC must order the crossing "abolished by physical closing" unless it finds an actual or implied dedication of the road or highway at the crossing.⁹ The PUC held hearings in March 1972 and February 1973 and issued its decision in May 1974.

The PUC found the mandatory closure provision of section 1202.3 unconstitutional on the ground that "it attempts to delegate to individual litigants the police power of the State."¹⁰ The PUC reasoned that section 1202.3 does not apply to all publicly used crossings for which there is neither actual nor implied dedication, but only to such crossings that happen to become the subjects of section 1202 proceedings. Whether a section 1202 proceeding is commenced will depend on "the vagaries of individual litigants,"¹¹ and once a proceeding is brought, the PUC has no choice under 1202.3 but to close a crossing that has not been dedicated to public use. In the PUC's judgment section 1202.3 thus attempted an unconstitutional delegation of the state's police power.¹²

6. Crossing at Blanchard Rd., Decision No. 82933, slip op. at 9 (Cal. P.U.C. May 29, 1974).

7. *Id.* at 1.

8. An act to add Section 1202.3 to the Public Utilities Code, relating to grade crossings, ch. 1477, § 1, 1971 Cal. Stats. 2920.

9. CAL. PUB. UTIL. CODE § 1202.3 (West 1975).

10. Crossing at Blanchard Rd., Decision No. 82933, slip op. at 18.

11. *Id.* at 4-5. Southern Pacific pointed out the irony that in this case the individual litigant who had vaguely commenced the proceeding was the PUC itself. Petition for Writ of Review with Memorandum of Points and Authorities in Support Thereof at 15, 32-33, Southern Pac. Transp. Co. v. Public Util. Comm'n, 18 Cal. 3d 308, 556 P.2d 289, 134 Cal. Rptr. 189 (1976) [hereinafter cited as *Petition*].

12. The PUC cited the fourteenth amendment to the United States Constitution as well as California constitutional provisions concerning the uniform operation of laws, due process, and privileges and immunities. Crossing at Blanchard Rd., Decision No. 82933, slip op. at 9-10. It is very doubtful, however, that § 1202.3 violates any part of the California Constitution because the constitution grants the legislature "plenary power, *unlimited by the other provisions of this constitution* but consistent with this article, to confer additional authority and jurisdiction upon the commission" CAL. CONST. art XII § 4 (added 1974) (emphasis added). Thus any

Refusing to give effect to section 1202.3, the PUC did not order the Blanchard Road crossing closed. Instead it ordered automatic signals and gates installed and allocated half their cost to Southern Pacific.¹³ In its second decision in the case, the PUC in October 1974 granted limited rehearing on some issues, but reaffirmed its holding that section 1202.3 is unconstitutional.¹⁴ The supreme court granted Southern Pacific's petition for review,¹⁵ and oral argument was held in May 1975. The court did not hand down its decision until November 1976.

The court nullified both of the PUC decisions. Southern Pacific's principal argument was that the PUC's approach to defining a "publicly used crossing" was too broad.¹⁶ The railroad also argued that the PUC erred in holding section 1202.3 unconstitutional, for the reason that "[t]here is no constitutional principle that a statute is unconstitutional because it depends upon the decision of a litigant . . . to institute a proceeding which will bring the statute into play."¹⁷ The supreme court, however, avoided both of those issues. It chose instead to read a "standard of public convenience and necessity" into section 1202.3. As a consequence, "the vagaries of individual litigants" in commencing a section 1202 proceeding are not sufficient to force a closing under section 1202.3. The PUC's judgment that "necessity and convenience preclude continued use of the crossing in its existing condition" is also required.¹⁸ Supposing that the erroneous declaration of section 1202.3's invalidity may have affected the PUC's determination that the Blanchard Road crossing was a publicly used one, the court remanded without commenting on the PUC's method of deciding whether a crossing is publicly used.¹⁹

Several peculiarities of the litigation of this case are relevant in evaluating the court's holding that constitutional review is within the authority of the PUC. First, no party to the PUC's hearings, not even counsel for the PUC, contended that section 1202.3 was unconstitutional.²⁰ Rather, the examiner and the commission itself decided that the case required the PUC

legislative enactment concerning the PUC is superior to all other provisions of the constitution provided only that the powers granted by the statute are germane to the purposes of the commission. *Pac. Tel. and Tel. Co. v. Eshleman*, 166 Cal. 640, 658, 689, 137 P. 1119, 1125, 1138 (1913). The court's analysis of constitutional review authority draws no distinctions between the federal and state constitutions, however, and is apparently intended to apply to both. Thus, unless the context indicates otherwise, this Note's usage of the word "constitution" embraces both the federal and the state constitution.

13. Crossing at Blanchard Rd., Decision No. 82933, slip op. at 20.

14. Crossing at Blanchard Rd., Decision No. 83509, slip op. at 1 (Cal. P.U.C. Oct. 1, 1974).

15. Only the supreme court has jurisdiction to review a decision of the PUC. CAL. PUB. UTIL. CODE §§ 1756-1757 (West 1975).

16. Petition, *supra* note 11, at 19-21.

17. *Id.* at 15.

18. 18 Cal. 3d at 314, 556 P.2d at 292, 134 Cal. Rptr. at 192.

19. *Id.* at 315 n.7, 556 P.2d at 293 n.7, 134 Cal. Rptr. at 193 n.7.

20. Petition, *supra* note 11, at 6.

to consider the validity of the statute. Second, the arguments presented to the supreme court did not dispute the power of the PUC to declare statutes invalid. Indeed, Southern Pacific conceded that it "does not question the authority of the Commission, which has quasi judicial powers and is a court of special jurisdiction, to declare and hold a statute to be unconstitutional."²¹ It was only at oral argument that Justice Mosk raised the issue of the PUC's power to review legislation.²² This explains why the court's treatment of the difficult and important issue of administrative constitutional review is contained in a footnote four paragraphs long. Finally, because the court concluded that the PUC was in error in holding section 1202.3 unconstitutional, its holding that "the commission may determine the validity of statutes" is unnecessary for the remand it ordered and so, strictly speaking, is dictum. This holding, however, would also have been dictum even if the court had agreed with the PUC on the constitutionality of the statute.²³ Because the issue of administrative constitutional review is thus difficult to reach on judicial review, the court's decision to rule on the issue of the PUC's constitutional review power can be justified.

II. *The Court's Analysis*

Southern Pacific's discussion of whether the PUC may declare statutes invalid proceeds in two parts. The first sketches two "lines of authority" on administrative constitutional review and then argues that administrators are required to invalidate unconstitutional statutes. This duty arises not from any particular statutory grant of power, but from the administrator's duty not to deprive persons of constitutional rights. The second part resolves the issue of constitutional review as to the PUC by reference to the special status and powers granted the PUC by the state constitution and by statute.

a. *The Duty Not to Deprive Persons of Constitutional Rights*

The first "line of authority" presented by the court establishes the rule that "[o]bviously, administrative agencies, like police officers . . . , must obey the Constitution and may not deprive persons of constitutional

21. *Id.* at 12.

22. Letter from Richard D. Gravelle, General Counsel of the PUC, to the Clerk of the California Supreme Court (May 9, 1975).

23. In *Los Angeles Metropolitan Transit Auth.*, Decision No. 64151, 60 C.P.U.C. 125 (1962), the PUC decided that it had the authority to declare statutes unconstitutional but found the challenged statute constitutional. On review, the supreme court agreed that the statute was constitutional but did not address the issue of constitutional review by the PUC. *Los Angeles Metropolitan Transit Auth. v. Public Util. Comm'n*, 59 Cal. 2d 863, 382 P.2d 583, 31 Cal. Rptr. 463 (1963).

The California Supreme Court will soon have another opportunity to consider administrative constitutional review. In *Rice v. Alcoholic Beverage Control Appeals Bd.*, 67 Cal. App. 3d 985 (1st Dist. 1977) *hearing granted*, No. S.F. 23631 (Cal. Sup. Ct. May 16, 1977), the district court of appeal annulled an order of the board holding the retail price maintenance provisions of the Alcoholic Beverage Control Act unconstitutional. Of the numerous briefs filed with the

rights."²⁴ The court cited case law stating that the PUC must observe due process in adopting rules and said also that an agency's obligation to obey the constitution encompasses the application of legislation to facts as well as the promulgation of rules.²⁵ These duties are, as the court said, obvious.

But it is much less obvious how the duty not to deprive persons of constitutional rights is relevant to the authority of agencies to refuse effect to legislation. In fact that duty implies an unlimited authority to invalidate statutes only if two different duties—the general duty of government officials to obey the constitution and the particular duty of judges to interpret it—are conflated. If neither a legislative enactment nor a judicial pronouncement tells an agency what the constitution requires in a particular situation, then of course the agency must consider the constitution in deciding what to do. Once the legislature has made a constitutional judgment by enacting a statute, however, the duty of an agency to respect constitutional rights in performing its functions does not confer on it the authority to reverse the legislature by interpreting the constitution in a different way. The duty to obey the law is not the same as the duty to declare the law—except for those whose role it is to say what the law is, and it has been supposed that this is peculiarly the province of courts.²⁶ That these two duties must be distinguished is the point made in Justice Mosk's dissent in rejecting the argument that constitutional review power can be inferred from a commissioner's oath to obey the constitution: "A commissioner faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid."²⁷

In contrast to the law establishing a government official's duty to adhere to the constitution, the court presents a second line of authority: "[i]n a few cases involving the question whether a litigant may raise constitutional issues in court when he has not exhausted administrative remedies, it has been indicated that administrative agencies may not determine the validity of statutes, invalidating the legislative will."²⁸ The court, however, greatly understates the strength of this line of authority by saying that it is "indicated" in a "few cases." Numerous cases²⁹ in addition to those cited by the dissent³⁰ deny agencies constitutional review power. This

supreme court in the case, only one deals with the question of whether the board exceeded its jurisdiction by overruling the price maintenance statute. Application of Cal-State Package Store & Tavern Owners Association for Permission To File Brief as Amicus Curiae at 5-12.

24. 18 Cal. 3d at 311 n.2, 556 P.2d at 290 n.2, 134 Cal. Rptr. at 190 n.2.

25. *Id.*

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

27. 18 Cal. 3d at 319, 556 P.2d at 295, 134 Cal. Rptr. at 195.

28. *Id.* at 311 n.2, 556 P.2d at 290 n.2, 134 Cal. Rptr. at 190 n.2.

29. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 497 n.5 (plurality opinion), 525 (Burger, C. J., dissenting) (1977); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

30. 18 Cal. 3d at 316, 556 P.2d at 294, 134 Cal. Rptr. at 194.

is generally the position of administrative agencies themselves,³¹ including the PUC's predecessor, the Railroad Commission.³² It is also the stance of the text writers: "We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body."³³

To demonstrate that the authority denying administrators the power to find statutes unconstitutional is inconsistent with their duty to obey the law, the court used an argument by hypothetical. Suppose the Supreme Court repudiates the separate but equal doctrine established by the statutes of one state. The school boards of other states with the same statutes have three alternatives: they may apply the statutes until they are found unconstitutional by a court, they may "enforce the Constitution on a case by case basis without considering whether the statutes may be enforced in some other cases," or they may recognize the invalidity of the statutes. The court's analysis of these alternatives is that the first will deny constitutional rights and the second "is wasteful, ignores reality and compels intellectual dishonesty," while "[o]nly the third complies with the board's duty to determine and follow the law."³⁴

The court's hypothetical is somewhat appealing. The time required to implement *Brown v. Board of Education*³⁵ might well have been less had school boards acted as if they were under a duty to invalidate separate but equal statutes. The appeal of the hypothetical diminishes sharply, however, when one considers how greatly the model of administrative constitutional review implied by the hypothetical differs from the judicial model of constitutional review. It is significant that the court built its hypothetical on a local school board rather than an agency more like the PUC. Because the

31. See the administrative holdings collected in the *Public Utilities Review Digest*, and the *Public Utilities Review Digest, 2d Series*, and supplements thereto, under Commissions, § 30.

32. Morel, Decision No. 29162, 40 C. R. C. 103, 105 (1936); Fresno, Decision No. 21513, 33 C. R. C. 502, 504 (1929).

33. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04, at 74 (1958). See also L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 438-40 (1965).

Strong, *supra* note 4, at 256-71 attempts to reconcile cases involving legislative restriction of judicial review with the degree of finality to be accorded to administrative findings of fact in terms of the Supreme Court's unwillingness to yield any element of constitutional review to agencies. If Strong is correct, the Court's reluctance to acknowledge the power of constitutional review in agencies may stem from a concern that once agencies are recognized to have that power, legislatures may be tempted to limit constitutional review of legislation to the agency enforcing it. The arguments of this Note that administrative constitutional review may sometimes be justified are not intended to suggest any enlargement of the power of Congress or state legislatures to restrict judicial review of the constitutionality of statutes. See Note, *The Authority of Administrative Agencies To Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1691 n.48 (1977).

34. 18 Cal. 3d at 311 n.2, 556 P.2d at 290 n.2, 134 Cal. Rptr. at 190 n.2.

35. 347 U.S. 483 (1954).

task of evaluating legislation for constitutionality has been consigned to courts, the natural way to argue that agencies may find statutes unconstitutional is to show how agencies are like courts.³⁶ The PUC's own assertion of constitutional review authority³⁷ was based on the supreme court's recognition that the broad powers possessed by the PUC include judicial powers.³⁸ A local school board, however, does not ordinarily have judicial powers. A board's refusal to enforce a separate but equal statute would be administration, not adjudication. This part of *Southern Pacific's* analysis makes no distinction between quasi-judicial and nonjudicial agencies, nor even between administrative bodies and government officials such as police officers.

One consequence of the court's rejection of the judicial model for administrative constitutional review is that, as the dissent suggests,³⁹ in some cases the administrator's refusal to give effect to a statute will be unappealable. When a trial court in an adversary proceeding refuses effect to a statute, the party adversely affected by the decision can ordinarily appeal and "represent" the interests protected by the statute. The same is true of an adversary quasi-judicial administrative proceeding. The adversariness again insures, at least in theory, that someone will represent the statute in administrative and judicial review. In contrast, when a statute is refused effect in a nonadversary administrative proceeding, there may be no participant favoring the statute and thus no one to appeal its invalidation. If, for example, the legislature imposes a limitation on the licensing of teachers that is rejected as unconstitutional by a school board, the board's action cannot be appealed. No teacher will have been denied a license because of the limitation, and no one else is a party to the licensing proceedings. A separate action against the board for failure to perform its duties will be required to challenge the invalidation. Whether such an action is brought will depend on whether anyone with standing is motivated to challenge the board and on whether the board's duty to invalidate statutes renders it immune from such suits.

A second consequence of the rejection of the judicial model is more serious. The school board hypothetical suggests that administrative constitutional review is not subject to the many restraints imposed on judicial constitutional review by the requirement that constitutional questions be decided in concrete cases. The authority of courts to find statutes unconstitutional is derived from the power to decide cases.⁴⁰ In deciding a case, a court

36. See, e.g., *Commonwealth v. Atlantic Coast Line R. Co.*, 106 Va. 61, 55 S.E. 572 (1906).

37. *Los Angeles Metropolitan Transit Auth.*, Decision No. 64151, 60 C.P.U.C. 125, 127-31 (1962).

38. *People v. Western Air Lines*, 42 Cal. 2d 621, 632, 268 P.2d 723, 729 (1954).

39. 18 Cal. 3d at 320-21, 556 P.2d at 296-97, 134 Cal. Rptr. at 196-97.

40. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803).

has two alternatives: it may give effect to a statute, or it may refuse it effect. When a court finds a statute unconstitutional, it is only refusing to give it effect in the case before the court. This is so even when the court makes it clear that it will refuse effect to the statute in all other cases. But according to *Southern Pacific*, an agency may do more. It is the agency's duty in fact not merely to "enforce the Constitution on a case by case basis," but to "invalidate" the statute. Although "invalidating" a statute as opposed to refusing it effect case by case may mean no more than declaring a statute unconstitutional "on its face," it may also mean that school boards and other agencies, already able to invalidate statutes in nonadjudicative and nonappealable cases, need not even wait for a case before declaring a statute unconstitutional.

b. Special Characteristics of the PUC

Taken literally, *Southern Pacific's* analysis of constitutional review as extending to all persons bound to obey the constitution would be a substantial departure from basic principles of constitutional law. Because the court followed its general discussion of administrative constitutional review with a discussion of the particular powers of the PUC, however, it is not at all clear how literally the court intended that analysis to be taken. If every administrator has the duty to recognize and refuse effect to unconstitutional statutes, it is at least superfluous to point to constitutional and statutory authority implying that a particular agency has constitutional review authority. The difference between the statutory and nonstatutory approaches is especially pronounced when the PUC is involved. Because the PUC is probably the most powerful state regulatory agency in the nation,⁴¹ *Southern Pacific's* justification of constitutional review in terms of the PUC's powers can be used to distinguish cases involving any other agency and so to confine administrative constitutional review to the PUC. That the court does not explain how the PUC's powers imply constitutional review authority particularly makes such distinctions possible.

After noting that the California Constitution and various statutes grant the PUC broad administrative, legislative, and judicial powers, the court pointed to two statutory provisions governing judicial review of PUC actions. The first, section 1757 of the Public Utilities Code, makes the commission's findings of fact final and restricts judicial review of the PUC to the supreme court and to a determination there of "whether the commission has regularly pursued its authority, *including* a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State."⁴² By emphasizing the inclusion of constitutional rights within the scope of re-

41. Mitchell, *The History and Scope of Public Utilities Regulation in California*, 30 S. CAL. L. REV. 118, 121 (1957).

42. CAL. PUB. UTIL. CODE § 1757 (West 1975) (emphasis added by the court).

view, the court apparently meant either to point out that the PUC is under a duty not to violate constitutional rights and so must, according to the court's understanding of that duty, invalidate statutes it finds unconstitutional, or to indicate that a determination whether a PUC order will violate constitutional rights is included within the regular pursuit of the PUC's authority.⁴³ The former construction merely repeats the court's novel expansion of the duty to obey the constitution. The latter is implausible because the statute probably means that the supreme court is to determine whether the order or decision violates constitutional rights. The cases cited by the court on this point construe section 1757 as having the purpose of restricting review of the PUC to the supreme court in order to reduce judicial intrusion into the PUC's operations.⁴⁴ But it is not clear how constitutional review by the PUC would serve that purpose. Indeed, one consequence of the PUC's refusing effect to statutes might be to involve the supreme court in additional inquiries into PUC action, since the supreme court would probably be more likely to grant review when the PUC had invalidated a statute than in the ordinary PUC case.

The other statute cited in *Southern Pacific*, section 1732 of the Public Utilities Code,⁴⁵ prohibits persons from raising in any court any issue not presented to the PUC on petition for rehearing. Apparently the court read section 1732 to include constitutional issues, and then inferred from the requirement that constitutional issues be presented to the PUC that the PUC must be able to decide such issues, because the law does not require idle acts.⁴⁶ The supreme court reached the opposite conclusion, however, in construing a comparable provision for the Workers' Compensation Appeals Board. In *Mathews v. Workmen's Compensation Appeals Board*,⁴⁷ the court decided that the waiver prescribed by section 5904 of the Labor Code⁴⁸ does not apply to constitutional challenges to statutes. The court in *Mathews* reasoned that claims that a statute is unconstitutional are not waived when

43. The difficulty of construing § 1757 is increased by the fact that § 1760 provides an exception to the scope of review set forth in § 1757:

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

Id. § 1760 (West 1975).

44. In one of the cases cited, *Pacific Tel. and Tel. Co. v. Superior Court*, 60 Cal. 2d 426, 430, 386 P.2d 233, 235, 34 Cal. Rptr. 673, 675 (1963), the court said, "The mandate of the Legislature . . . is to place the commission, insofar as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the code itself."

45. CAL. PUB. UTIL. CODE § 1732 (West 1975).

46. CAL. CIV. CODE § 3532 (West 1970).

47. 6 Cal. 3d 719, 493 P.2d 1165, 100 Cal. Rptr. 301 (1972) (Sullivan, J.).

48. "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (West 1971).

not raised before the board because the board lacks the power to resolve constitutional issues.⁴⁹

Even if section 1732 is construed differently from the Labor Code waiver provision so that constitutional issues must be presented to the PUC on petition for rehearing, it does not follow that the only purpose served by presenting the issues is to permit the PUC to decide them. The purpose might instead be to inform the PUC of what is at stake in its treatment of the challenged statute. Aware of questions about the constitutionality of the statute, the PUC may be able to prevent the deprivation of constitutional rights not by invalidating the statute, but by construing and applying it in such a way as to render a constitutional decision by either the PUC or the supreme court unnecessary.⁵⁰ Or, if avoidance by statutory construction is not possible, the PUC will at least be able to develop the record of the case with the challenge to the statute in mind, so that when the reviewing court considers the statute's constitutionality, it will have the benefit of the agency's specialized perspective on the statute even though the agency did not decide the constitutional question.⁵¹

Thus neither *Southern Pacific's* general reference to the PUC's broad powers nor its mention of the judicial review and waiver provisions applicable to the PUC indicates how these powers add up to the authority to declare statutes unconstitutional. Confronted with the problem of determining the extent to which *Southern Pacific* applies in other cases, one appellate court has decided that only agencies created by the state constitution may invalidate statutes. In *Hand v. Board of Examiners in Veterinary Medicine*,⁵² the board argued that Dr. Hand had waived the issue of a statute's constitutionality by not raising it before the board. The court was troubled by the apparent inconsistency between *Southern Pacific* and *State v. Superior Court*,⁵³ a recent supreme court exhaustion of remedies case in which the court said that "an administrative agency is not the appropriate forum in

49. 6 Cal. 3d at 737-38, 493 P.2d at 1177, 100 Cal. Rptr. at 313.

50. 3 K. DAVIS, *supra* note 33, § 20.04, at 75.

51. Thus it is not so anomalous, as one commentator has suggested, that "reviewing courts that proclaim that agencies may not pass upon the constitutionality of a statute insist that they will not hear the challenge unless it was raised before the agency." Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1695 n.67. The Harvard Note argues in this way that benefits will be realized from allowing agencies to invalidate statutes: if an agency is "forced to proceed as though [the challenges] had never been raised," it will reach its decisions "in a vacuum"; but if the agency can apply constitutional norms, "it may be able . . . to fill some of the gaps in the competence of reviewing courts." *Id.* at 96. An agency need not, however, proceed as if the challenges had never been raised even if it cannot decide them, for it can take the challenges into account without deciding them. The benefit of supplementing the court's competence with the expert knowledge of the administrator can thus be obtained without allowing administrative constitutional review.

52. 66 Cal. App. 3d 605, 136 Cal. Rptr. 187 (1st Dist. 1977).

53. 12 Cal. 3d 237, 251, 524 P.2d 1281, 1290, 115 Cal. Rptr. 497, 506 (1974) (Mosk, J.).

which to challenge the constitutionality of the basic statute under which it operates." The *Hand* court avoided a clash between the two cases by distinguishing *State v. Superior Court* as involving an agency created by statute, while *Southern Pacific* involved an agency created by constitution.⁵⁴ *Hand* concluded that *Southern Pacific* allows "only the [PUC] and other administrative agencies which are of constitutional origin to determine whether a statute enacted by the Legislature is constitutional."⁵⁵ Because the veterinary medicine board is not of constitutional origin, the court in *Hand* found no waiver.

One problem with *Hand's* reading of *Southern Pacific* is that there is little support for it in *Southern Pacific*. The distinction between constitutional and statutory agencies has in other contexts been treated as important⁵⁶ because the activities of a constitutional agency are not restrained by the separation of powers doctrine or theories of unconstitutional delegation of legislative and judicial power⁵⁷ and because constitutional origin places the dissolution of an agency beyond the legislature's authority. Nevertheless, *Southern Pacific's* only mention of the PUC's constitutional origin is that "the Constitution *and* statutes of this state grant the commission wide . . . powers."⁵⁸ It is questionable that *Southern Pacific* would have relied also on the statutory judicial review and waiver provisions applicable to the PUC if the court had meant the agency's constitutional origin to be decisive.

In any event, *Hand's* adoption of constitutional origin as the single criterion for finding constitutional review authority in an agency raises other difficulties as well. The historical accident that one agency was established by constitutional provision⁵⁹ is hardly sufficient reason for concluding that nonconstitutional agencies may never exercise constitutional review power. In addition, what constitutes "constitutional origin" is not self-evident. Although the California constitution clearly mandates the existence of some

54. CAL. CONST. art. XII, §§ 1-9 (added 1974).

55. 66 Cal. App. 3d at 617-20, 136 Cal. Rptr. at 194-96.

56. See, e.g., *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 81, 87 P.2d 848, 852 (1939).

57. [The PUC's extraordinary] sweep of powers derives particular strength from the 1911 constitutional amendments which have enabled the Commission to function unfettered by the doctrine of the separation of powers and the theories about unwarranted delegation of legislative or judicial power which so long plagued federal administrative agencies under former interpretations of the Federal Constitution and which continue to affect California agencies born under a less generous star.

Lakusta, *Operations in an Agency Not Subject to the APA: Public Utilities Commission*, 44 CALIF. L. REV. 218 (1956).

58. 18 Cal. 3d at 311 n.2, 556 P.2d at 290 n.2, 134 Cal. Rptr. at 190 n.2 (emphasis added.)

59. Some other constitutional agencies are: Regents of the University of California, CAL. CONST. art. IX, § 9 (1879, amended 1918, 1970, 1972, 1976); Board of Equalization, CAL. CONST. art. XIII, § 17 (added 1976); State Personnel Board, CAL. CONST. art. VII, § 2 (added 1976); and Alcoholic Beverage Control Appeals Board, CAL. CONST. art. XX, § 22 (added 1932, amended 1934, 1954, 1956).

agencies,⁶⁰ it vests the legislature with the power to create others.⁶¹ Still others are only mentioned in the constitution.⁶² And while the constitution merely establishes some agencies, it makes others “supraconstitutional” by giving the legislature plenary power to confer authority on the agency notwithstanding any other provision of the constitution.⁶³ Whatever argument there is that constitutional origin implies constitutional review power, it does not apply with equal force at every point on this range of constitutional agencies.

Before considering the interests affected by a rule about administrative constitutional review, it may be useful to explore another way in which *Hand* might have distinguished *Southern Pacific* and *State v. Superior Court*. The issue in *State v. Superior Court* was whether the constitutionality of the Coastal Zone Conservation Act had to be argued before the commission the Act established in order to exhaust administrative remedies.⁶⁴ *Hand* considered but rejected the possibility that *State v. Superior Court* “stands for the limited proposition that administrative remedies need not be exhausted if and only if the constitutional challenge is to the basic statute under which [the agency] operates.”⁶⁵

Although the distinction between basic, or enabling, statutes and other statutes finds no more support in *Southern Pacific* than the distinction between constitutional and statutory agencies, there is good reason for using it in the area of administrative constitutional review.⁶⁶ As Justice Mosk pointed out in *State v. Superior Court*, “[i]t would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay

60. For example, “There is a Fish and Game Commission of 5 members” CAL. CONST. art IV, § 20(b) (added 1966).

61. The Legislature is hereby expressly vested with plenary power unlimited by any provision of this Constitution, to create, and enforce a complete system of workers’ compensation, by appropriate legislation A complete system of workers’ compensation includes . . . full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character” CAL. CONST. art. XIV, § 4 (added 1976).

62. “It shall be competent in all [city] charters . . . to provide . . . the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualification, compensation and removal, and for the number which shall constitute any one of such boards.” CAL. CONST. art IX, § 16 (added 1972).

63. See notes 12 and 61 *supra*.

64. 12 Cal. 3d at 250-51, 524 P.2d at 1289-90, 115 Cal. Rptr. at 505-06.

65. 66 Cal. App. 3d at 619, 136 Cal. Rptr. at 195-96.

66. The distinction has been made, if not emphasized, by the commentators. L. JAFFE, *supra* note 33, at 438, says, “The agency it is argued is not basically the organ for the decision of a constitutional issue, a point that can be put at its highest if the issue goes to the validity vel non of the agency’s own existence or primary activity.” 3 K. DAVIS, *supra* note 33, § 20.04, which concerns exhaustion and the raising of constitutional issues, is entitled “Challenge of Constitutionality of Basic Statute.”

membership on the constitutionality of the statute establishing its status and functions."⁶⁷ If it would be too much to force a party to choose between the tactically unwise move of challenging an agency's very existence and waiving such a challenge, it would also be too much to expect administrators to administer a statute and at the same time to consider the constitutionality of their role in government. Agencies, like courts, can deal with specific questions of jurisdiction,⁶⁸ but they cannot reasonably be expected to inquire into their basic grants of jurisdiction. An agency should not be asked, nor permitted, to dissolve itself.⁶⁹

The usefulness of the distinction between enabling and nonenabling statutes is not without limitations. Deciding whether a specific law is a "basic statute" will sometimes prove difficult. If a single piece of legislation establishes an agency and describes its functions, some of its sections will define the agency while others will be only incidental to the creation of the agency. A statute concerning an already existing agency may merely add a new function to the agency, or it may so modify the agency's jurisdiction and authority that in some important sense it "establishes" the agency. Moreover, although the distinction sets an outer limit on an agency's constitutional review power, the argument that an agency should not judge the constitutionality of the statute that creates it does not answer the question of when the agency may exercise constitutional review power over other kinds of statutes.

III. *Interests Affected by a Rule on Administrative Constitutional Review*

Southern Pacific, read for all it is worth, abolishes the rule that administrative agencies may not find statutes unconstitutional.⁷⁰ Confined to its facts, however, the case means only that constitutional review power may be conferred on an agency by statute or by statute and constitution and may be exercised over a nonbasic statute.⁷¹ Moreover, *Southern Pacific* adequately explains neither of these alternative rationales for holding that the PUC may determine the validity of statutes. This ambiguity makes it difficult for courts to make principled decisions when, on appeal, the question arises whether a party has failed to exhaust administrative remedies or has waived an issue by not raising it before an agency, or when an administrator's refusal to give effect to a statute is questioned in mandamus or a similar proceeding. More importantly, the ambiguity affects parties

67. 12 Cal. 3d at 251, 524 P.2d at 1290, 115 Cal. Rptr. at 506. In *Southern Pacific Justice Mosk* also emphasizes the lay-membership of agencies. 18 Cal. 3d at 321, 556 P.2d at 297, 134 Cal. Rptr. at 197.

68. See, e.g., *Highway Carriers Ass'n v. City of Burbank*, Decision No. 71804, 66 C.P.U.C. 705 (1967).

69. See *United States v. Kissinger*, 250 F.2d 940, 942 (3d Cir.), cert. denied, 356 U.S. 958 (1958).

70. See text accompanying notes 24-40 *supra*.

71. See text accompanying notes 41-69 *supra*.

dealing with agencies and the agencies themselves. Parties should neither be able to evade exhaustion and waiver rules when they apply to constitutional issues nor be forced to raise such issues needlessly. Administrative officers should know when, if ever, they are not bound simply to enforce a statute without reflecting on its effect on constitutional rights. A standard for identifying appropriate cases of administrative constitutional review is needed to resolve this uncertainty. Formulating that standard should depend on the interests affected by a rule about administrative constitutional review.

a. Government's Interest in Efficiency

The rule that agencies may not declare statutes unconstitutional is rooted in exhaustion of remedies cases, and the effect of administrative constitutional review on the government's interests is most evident there. As an exception to the general rule that judicial relief will not be granted to one who has not pursued all available administrative remedies,⁷² a challenge to a statute's constitutionality will often be permitted by a court even though it was not first raised before the agency.⁷³ The justification for this exception is that agencies cannot consider constitutional issues. In contrast, if agencies do have constitutional review power (or if, as is the case after *Southern Pacific*, it is not clear when an agency has that power), then the prudent course for parties dealing with agencies is to raise their constitutional claims before the agencies in order to avoid exhaustion and waiver problems. The effect this would have on the machinery of government is obvious. Government efficiency would be greatly impaired if school boards, police officers, tax officials, state personnel officers, vehicle registration clerks, and all other officials heard constitutional claims not only from persons resisting an obviously unconstitutional action such as an illegal search, but also from persons prudently preserving for judicial review their doubts about a statute's constitutionality. Of course the legislature may decide that constitutional issues must be raised before certain agencies,⁷⁴ but the abolition of the rule against administrative constitutional review would counsel parties to raise constitutional issues when dealing with any government official. The impact on government efficiency would be even more damaging if officials not only heard the constitutional claims, but also decided them by refusing effect to the statutes it is their role in government to implement.

A rule that agencies may not find statutes unconstitutional is thus justified by government efficiency. "It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the

72. 3 K. DAVIS, *supra* note 33, § 20.01, at 56-57.

73. *Id.* at § 20.04.

74. See text accompanying notes 50-51 *supra*.

constitution."⁷⁵ It is generally the role of administrative agencies to provide efficient government while the courts oversee the identification of constitutional rights, and that is basically a sound division of labor. Constitutional rights are not unprotected in the administrative process. On the contrary, orderly, efficient administrative processes are usually an important barrier against the violation of constitutional rights. Only the determination of constitutional rights through an examination of the validity of statutes is restricted by prohibiting administrative constitutional review.

Applied uncritically, *Southern Pacific's* analysis that the duty not to violate constitutional rights implies the duty to invalidate statutes would pose a serious threat to government efficiency. If *Southern Pacific* does authorize not only the PUC, but also all other government officials, to refuse effect to statutes whenever they see a conflict with a constitution, then the appropriate legislative response would be to propose an amendment to the California constitution overruling *Southern Pacific*, as the legislature has already done.⁷⁶ Statutory provisions prohibiting agencies from invalidating statutes would not be sufficient because *Southern Pacific's* analysis appears to be based on the duty of officials to obey the constitution, a duty which could not be abolished by statute. Under the court's analysis, in fact, even a state constitutional amendment providing that no agency can invalidate statutes will not be sufficient to overrule *Southern Pacific* entirely, for it would conflict with an official's duty not to deprive persons of their rights under the Federal Constitution.

It would be almost as much a mistake, however, to constitutionalize the rule against administrative constitutional review as it would be to abandon the rule entirely. In addition to giving the rule an inflexible and absolute character, a constitutional provision would thwart developments in the area of constitutional review. Even if the rule that agencies may not invalidate statutes is generally sound, in a society where more and more of government is being delegated to agencies, reexamination of the rule should be available

75. *Panitz v. District of Columbia*, 112 F.2d 39, 42 (1940) (Vinson, J.).

76. Senate Constitutional Amendment 25, 1977-78 Session of the California Legislature, provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Section (c), like sections (a) and (b), would restrict a power which the PUC has exercised. In Proposed General Order Concerning Sanitary Facilities on Locomotives, Decision No. 66446, 62 C.P.U.C. 6 (1963), the PUC found it had no jurisdiction under certain sections of the Public Utilities Code and the Labor Code to issue the proposed order because the field had been preempted by the Federal Boiler Inspection Act.

at a level short of constitutional amendment. Constitutionalizing the rule against administrative invalidation of statutes would have the additional disadvantage of resolving by name the issue of whether an entity is a court within the meaning of the rule that courts, but not agencies, may declare statutes unconstitutional. Whether a government body is called a "court" could be decisive of the question whether the institution may refuse effect to statutes. It would be too simple for the legislature to insulate a statute from constitutional review by committing its enforcement to courts of special jurisdiction which were, however, denominated "agencies" and so were subject to the constitutional prohibition of administrative constitutional review.

b. The Individual's Interest in Asserting Constitutional Rights

Against the government's interest in efficiency, which argues against administrative constitutional review, must be weighed the interests of individuals dealing with an agency who claim that statutes according to which the agency intends to act are unconstitutional. A rule against administrative constitutional review obviously makes the individual's assertion of constitutional rights more difficult and more costly by postponing a decision on constitutional claims until administrative action becomes subject to judicial review. The interests of individuals in obtaining early consideration of their constitutional claims and in avoiding the delay and costs of judicial litigation are generally not sufficient to overrule the government's interest in preserving the efficiency of its administrative agencies. Nevertheless, when access to the courts for the purpose of challenging a statute is limited because the legislature has entrusted enforcement of the statute to an agency and has restricted judicial review of the agency's enforcement in an unusually severe way, the individual's interest is more significant. When an agency is vested with a large measure of power in the form of insulation from judicial review, what is at stake for the individual is not just prompt constitutional review, but fully effective constitutional review. In such cases, an exception to the general rule prohibiting administrative constitutional review tailored to the individual's interest in obtaining effective review of constitutional claims could be justified. Indeed, a concern for these interests appears to underlie *Southern Pacific's* discussion of the statutes governing judicial review of PUC actions.⁷⁷

At first it seems mistaken to read the vesting of extensive power in an agency to imply constitutional review authority. Indeed the opposite appears to be the case. It would appear that agencies are created by constitutional provision in order to preclude judicial inquiry into separation of powers and unconstitutional delegation issues. Statutes narrowing the scope of judicial review and explicit, harsh waiver provisions seem similarly designed to

77. See text accompanying notes 42-51 *supra*..

limit judicial control of agencies. The legislature's intent to have its statutes implemented by agencies unhampered by courts is defeated, however, if the agencies themselves engage in the court-like activity of refusing effect to statutes. It could be argued, then, that the more power an agency has been granted, the less likely it is that the agency was intended to perform constitutional review.

The answer to this argument, however, is that if broad powers, including quasi-judicial powers, are conferred on an agency, the government is "estopped" from denying the confidence it has shown in the agency's competence to deal with questions of law. Constitutional government requires that there be a forum in which constitutional rights can be asserted, and a court is ordinarily the appropriate forum in which to claim that a statute violates constitutional rights.⁷⁸ But if the decisions of an agency are substantially insulated from judicial scrutiny, then the individual's interest in asserting constitutional rights justifies making that agency the forum for constitutional review of that statute. The individual is justified in relying on the government's representations that the agency is empowered to decide questions of law. Moreover, an agency given the benefit of unusually restrictive scope of judicial review and waiver provisions should take responsibility for deciding constitutional challenges to statutes. The impact on government efficiency of permitting constitutional review when an agency has been granted very broad final decisionmaking powers can be tolerated because agency adjudication is only rarely so insulated from judicial review⁷⁹ that the individual's interest in asserting constitutional claims can justify permitting decision of the constitutional claim by the agency rather than a court.

c. The Administrator's Interest in Not Harming Persons Unconstitutionally

In addition to the individual's interest in asserting constitutional rights, a rule about administrative constitutional review affects the administrator's interest in acting justly. This interest underlies *Southern Pacific's* analysis of constitutional review in terms of the administrator's duty not to deprive persons of constitutional rights. There is an important difference, however, between a duty not to deprive persons of constitutional rights and an interest in not doing so. The duty can reasonably be limited to complying with statutes until a court finds them unconstitutional and to observing settled

78. *Panitz v. District of Columbia*, 112 F.2d 39, 41 (1940) (Vinson, J.).

79. In California the adjudicative actions of most agencies are subject to the broad judicial review provision of the Administrative Procedure Act. CAL. GOV'T CODE §§ 11501, 11523 (West Supp. 1977). The limiting provision of § 11501(a), however, does enable the legislature to narrow judicial review of any particular agency's actions or of actions relating to any particular statute. See *Serenko v. Bright*, 263 Cal. App. 2d 682, 689-92, 70 Cal. Rptr. 1, 5-7 (2d Dist. 1968); Newman, *Two Decades of Administrative Law in California: A Critique*, 44 CALIF. L. REV. 190, 192 (1956).

constitutional rights when deciding what action to take in the absence of legislative or judicial direction. In contrast, the interest in not harming persons unconstitutionally requires administrators to think about the constitutionality of the statutes they are enforcing.

Under a rigid rule against administrative constitutional review, the administrator's interest in not harming persons unconstitutionally would force him into a sometimes unreasonable choice between enforcing a statute he thought unconstitutional and resigning. A judge whose decision that a statute is unconstitutional is overruled is not subject to removal from office or other sanctions for her complicity in disobedience of the statute. Neither is she liable to persons harmed by an erroneous decision.⁸⁰ But an administrator who, under a rule prohibiting administrative constitutional review, refuses effect to a statute would be subject to sanctions. The administrator must choose between enforcing a statute he believes unconstitutional, with a possible defense of superior orders if the statute is later found unconstitutional, and refusing to enforce the statute at the risk that he must answer for his civil disobedience.⁸¹ It is not unreasonable that a private citizen who refuses effect to a statute in applying the law to herself should bear the risk that she is wrong about the statute's constitutionality. And it is of course a feature of human life that no one can escape moral responsibility for what she does to others, even if her role immunizes her from legal responsibility for her acts. But it may sometimes be too much to ask a person, acting with the authority of government in applying the law to others, to choose between enforcing a statute he is convinced violates constitutional rights and giving up his role in government. If there were no moral dimension to this choice, it might be sufficient answer that the rule restricting constitutional review to courts relieves the administrator of responsibility for thinking about the constitutionality of the statute he is applying. But there is a moral dimension, not only because a person's moral sensitivities are eroded by acting under instructions not to reflect on what he is doing, but also because parts of the federal and state constitutions have come to define for us at least the minimal elements of social and political morality.

When it is only a matter of postponing constitutional review until

80. W. PROSSER, *LAW OF TORTS* § 132 (4th ed. 1971).

81. The Supreme Court has recognized that such an interest at least gives an administrator standing. In *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the board challenged the constitutionality of a statute requiring it to lend textbooks to parochial schools. The Court said of the board members' standing:

Appellees do not challenge the standing of appellants to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing [the statute] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the statute]—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation.

Id. at 241 n.5.

judicial review of the agency's action becomes timely, the administrator's interest in not using the government's power to harm persons unconstitutionally is not greatly threatened. There may be unusual cases, however, in which a court would be incapable of granting an adequate remedy for the harm suffered between the time the agency enforces the challenged statute and the court's decision on the challenge. For example, a statute might instruct the PUC to require suppliers of electricity to terminate service to customers whose accounts are below a certain amount and remain unpaid for a certain period. It might be in the interest of the electricity companies not to object to the enforcement of the statute. If it appears to the PUC that due process might require a hearing before termination of service, and if it appears that the small customers affected by the statute will be harmed either by a loss of electricity service or by the expense of pursuing a challenge to the statute to the supreme court while an order enforcing the statute is stayed, then the PUC should have the authority to refuse effect to the statute. The effect of administrative constitutional review in such a case would be to place the burden of defending the statute's constitutionality on the companies that benefit from it while avoiding serious harm to the small customers. Such a case would be unusual. Because agency action will only infrequently result in harm so serious or irreparable that it cannot be corrected on judicial review, allowing administrative constitutional review in such cases will not disrupt government efficiency unjustifiably.

An administrator should also have the authority to refuse effect to a statute rendered obviously unconstitutional by the development of the law. This way of protecting an administrator's interest in not violating constitutional rights is implicit in *Southern Pacific's* hypothetical of a school board administering a separate but equal statute after the Supreme Court found such a statute unconstitutional.⁸² The persuasiveness of the hypothetical depends altogether on the obvious unconstitutionality of the statute, which in turn depends on there having been a dramatic development in the law. It is unnecessary to conclude from that hypothetical, however, that any agency must possess constitutional review authority so that it will be available when the challenged statute is obviously unconstitutional, and that if an agency possesses constitutional review power at all it must be able to exercise it in all cases. Instead, the lesson of the hypothetical is that agencies may justifiably refuse effect to a statute that is as obviously unconstitutional as a separate but equal statute after such a statute has been invalidated by the Supreme Court. The effect of a rule that an administrator may refuse to enforce an obviously unconstitutional statute would be to excuse administrators from knowing violations of constitutional rights. Such a rule seems eminently justified, for no one sworn to obey the constitution should be asked knowingly to violate constitutional rights even when a statute

82. See text accompanying note 34 *supra*.

commands the violation.⁸³ When a statute poses an intricate and subtle puzzle in constitutional law, no one knows whether the statute violates constitutional rights until the statute's constitutionality has been adjudicated. In other cases, however, the competence of a court may not be required to say that a statute that may once have been constitutional is no longer so because of a fundamental court decision, a constitutional amendment, or even the gradual development of the law.⁸⁴

IV. *A Proposed Standard*

The distinctions brought up by an examination of *Southern Pacific* can be summarized in a standard for determining when administrative constitutional review can be justified. Taking judicial constitutional review as the rule to which administrative constitutional review is the exception, that standard would direct inquiry to (a) the extent to which final power to deal with a particular matter has been entrusted to the agency, (b) the extent to which the agency's decision will effectively deny judicial review either of the statute or to the party challenging it, and (c) the extent to which the statute is especially susceptible to administrative constitutional review.

The first factor bearing on the appropriateness of administrative constitutional review in a particular case is the degree to which final power has been granted to the agency to deal with such a case.⁸⁵ Constitutional origin may be important in determining how much power has been conferred on an agency,⁸⁶ but it should not be either a necessary or a sufficient condition for the agency's exercise of constitutional review power.⁸⁷ Scope of judicial review and waiver provisions should be considered, as should any other indications that the agency has been empowered to dispose of so many of the questions of law raised by the case that the individual's interest in asserting constitutional rights would be seriously impeded if the challenge to the statute could not be decided by the agency.

The effect the agency's decision will have on the possibilities for judicial review is also relevant in determining whether administrative constitutional review is justifiable in a particular case. If constitutional review is best handled by courts in the adjudication of cases, then the

83. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) said of the judges' oath to support the Constitution: "How immoral to impose it on them, if they were to be used as the instruments, and the *knowing* instruments, for violating what they swear to support!" (emphasis added.)

84. An official who violates constitutional rights in "ignorance or disregard of settled, indisputable law" can claim no immunity for his actions. *Wood v. Strickland*, 420 U.S. 308, 321 (1975). But if officials are to be held to a "knowledge of the basic, unquestioned constitutional rights" of the persons over whom they have control, *id.* at 322, it is not at all unreasonable that they be permitted to use that knowledge in considering the constitutionality of statutes.

85. See text accompanying notes 77-79 *supra*.

86. See text accompanying note 57 *supra*.

87. See text accompanying notes 52-63 *supra*.

agency's action should not so change the status of the statute and parties that judicial review of the statute's validity is effectively foreclosed. An agency should be reluctant to decide on a statute's constitutionality if a decision against constitutionality will leave no one with standing to seek judicial review so that the decision would have to be questioned, if at all, in a collateral proceeding against the administrator.⁸⁸ Instead the agency should enforce the statute and place the burden of pursuing judicial review on the party who believes the statute to be unconstitutional. If, on the other hand, enforcing a questionable statute is likely to deprive a party of judicial review in the sense that enforcement will cause the party serious or irreparable injury, then the agency should refuse effect to the statute.⁸⁹

The justifiability of administrative constitutional review in a particular case will depend finally on the challenged statute. To the extent that a statute appears to be part of the agency's basic grant of jurisdiction so that invalidating the statute would change the purpose or character of the agency, constitutional review by that agency is inappropriate.⁹⁰ On the other hand, to the extent that the statute's purposes or the means it employs have been made unconstitutional by a development in the law, refusing effect to the statute does not require the agency to make new law and so is justifiable.⁹¹

This standard must of course be distinguished from the standards courts use to decide on the merits whether a statute is constitutional. Whether a statute is ultimately found unconstitutional will be relevant to, but not decisive of, the question whether it was reasonable for a party charged with waiver or failure to exhaust remedies to suppose that the agency could not under the circumstances decide a constitutional issue. The same is true of the question whether an administrator charged with failure to carry out his duties could reasonably have believed that under the circumstances he was justified in refusing effect to a statute. Also to be distinguished from this standard for administrative constitutional review are statutory construction based on a presumption of validity, disposing of a case on nonconstitutional grounds, and all the other devices courts use to avoid finding statutes unconstitutional. Even though an agency concludes that it may justifiably consider a statute's validity, it must also first consider whether it can avoid the constitutional question.

The standard proposed here merely organizes the distinctions uncovered in an examination of *Southern Pacific*.⁹² An attempt to rationalize

88. See text accompanying note 39 *supra*.

89. See text accompanying notes 81-82 *supra*.

90. See text accompanying notes 66-69 *supra*.

91. See text accompanying notes 82-84 *supra*.

92. Applying the standard to *Southern Pacific*, one would find it altogether appropriate for the PUC to refuse effect to § 1202.3 of the Public Utilities Code. (1) Judicial review of the PUC is unusually restricted. (2) Applying the mandatory closure provision to the Blanchard Road crossing would have caused serious or irreparable harm, for the PUC found that "Blanchard Road is the sole access to a number of orchard ranches occupied by 13 families."

Southern Pacific in the context of prior California law, it accommodates the court's two alternative bases for the holding that the PUC may determine the validity of statutes. It does so by taking account of difficulties in and interests underlying the court's two approaches to administrative constitutional review. Either experience in applying the standard or the results of an investigation of administrative constitutional review not governed by the language and context of *Southern Pacific* might suggest modifications to the standard. Nevertheless, it does appear that the standard is an administrable rule of law and that the limitations it sets on constitutional review by administrative agencies should be incorporated into any standard for deciding when an agency can justifiably refuse effect to a statute.

Conclusion

After *Southern Pacific* the status in California jurisprudence of the rule that administrative agencies may not declare statutes unconstitutional is unsettled. The court's argument that constitutional review authority is implied by the duty every administrator has not to deprive persons of constitutional rights can be read as radically disarranging the roles of courts and agencies, or it can be treated as pure dictum accompanying the limited holding that only agencies as powerful as the PUC may invalidate statutes. While too relaxed a rule for constitutional review by agencies would interfere with the government's interest in efficiently carrying out its programs, an examination of the interests underlying *Southern Pacific's* analysis indicates that a rigid rule against administrative constitutional review would leave too unprotected both the individual's interest in asserting constitutional rights and the administrator's interest in not harming persons unconstitutionally. These interests, as well as other distinctions that an examination of *Southern Pacific* brings up, can be accommodated in a standard for administrative constitutional review that asks whether an agency's refusing effect to a statute can be justified in a particular case in terms of the agency's power, the consequences the agency's decision will have on the effectiveness of judicial review, and the nature of the challenged statute.

Charles R. Myers

B. CIVIL PROCEDURE CODE SECTION 1094.5: THRESHOLD TO JUDICIAL REVIEW OF PRIVATE AGENCY ACTIONS

Anton v. San Antonio Community Hospital.¹ Traditionally, it has been assumed that mandate review of administrative decisions pursuant to section

Crossing at Blanchard Rd., Decision No. 82933, slip op. at 14. (3) Finally, although § 1202.3 is by no means clearly unconstitutional, neither is it part of the PUC's basic grant of jurisdiction.

1. 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977) (Sullivan, J.) (5-1 decision) (Clark, J., dissenting in a separate opinion).

1094.5 of the California Code of Civil Procedure² is available only with respect to decisions by *governmental* agencies.³ In *Anton*, however, the California Supreme Court has held that such administrative mandamus may apply to decisions of *non-governmental* agencies. Moreover, if a non-governmental agency makes a determination that is subject to review under section 1094.5 and such decision affects a fundamental vested right of an individual, the reviewing court must exercise its independent judgment on the evidence.⁴ In so holding, the court has extended the scope of judicial substantive power, checking the discretion of private associations.

I. Facts of the Case

For thirteen years plaintiff Achilles P. Anton, a licensed physician and surgeon, was a member of the medical staff of defendant San Antonio Community Hospital, a private unincorporated association. In October 1973 the medical staff commenced two investigations of plaintiff's medical practices. Both committees reported poor medical judgment and overuse of the hospital facilities by plaintiff.⁵ In December 1973 the hospital's board of directors decided, based on the committee reports, to table action on plaintiff's reappointment while extending reappointment to all other staff members.⁶ In January 1974 plaintiff's hospital privileges were summarily sus-

2. CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1977).

3. *Temescal Water Co. v. Department of Pub. Works*, 44 Cal. 2d 90, 280 P.2d 1 (1955).

4. In most cases seeking writs of mandate under § 1094.5, the substantial evidence test is applied when it is claimed that there has been an abuse of discretion because the findings are not supported by the evidence. This test requires only that the court find reasonable evidence in the light of the whole record to support the agency decision. But if the agency decision affects a right which is deemed too important to be left solely to administrative extinction, then the court must exercise its independent judgment on the evidence, abuse of discretion being established if the court determines that the findings are not supported by the weight of the evidence. CAL. CIV. PROC. CODE § 1094.5(c) (West Supp. 1977).

5. The first committee reported that "there is evidence of poor medical judgment and overutilization of the hospital. Many of these patients did not appear to need actual hospital care, multiple tests were performed without medical indication, and there were several questionable industrial cases." 19 Cal. 3d at 809, 567 P.2d at 1164, 140 Cal. Rptr. at 444.

A second committee reviewed eight consecutive admissions by the plaintiff and found the charts "to be lacking in several areas, both in regard to over and underutilization as well as continued lack of completeness of histories and physicals. . . ." *Id.*

6. Hospital appointments to the staff are for the term of one year in compliance with the provisions of § 2392.5 of the Business and Professions Code, which provides, in part, that it constitutes unprofessional conduct for a physician to practice in a hospital having five or more physicians which does not have rules established by the board of directors which include:

(a) Provision for the organization of physicians and surgeons . . . permitted to practice in the hospital into a formal medical staff with appropriate officers and bylaws and with staff appointments on an annual or biennial basis.

(b) Provision that membership on the medical staff shall be restricted to . . . practitioners competent in their respective fields, worthy in character and in professional ethics. . . .

(c) . . .

(d) Provision that adequate and accurate medical records be prepared and maintained for all patients.

CAL. BUS. & PROF. CODE § 2392.5 (West 1974).

pending⁷ due to the failures alleged in the reports.

Pursuant to the medical staff bylaws, plaintiff requested and was given a preliminary hearing in which the suspension of the hospital privileges was upheld. Plaintiff then requested a formal hearing, and a judicial review committee was appointed from members of the medical staff.⁸ The formal hearing was conducted by an attorney appointed as hearing officer and a court reporter transcribed all proceedings.⁹ The judicial review committee recommended that plaintiff's privileges be suspended and that he not be reappointed to the medical staff.

Plaintiff then requested an appellate review of the hearing decision as authorized by the bylaws. The board of directors, conducting the appellate review hearing, sustained the decision of the judicial review committee. Upon notification of the decision, plaintiff brought this action in mandate pursuant to section 1085 of the Code of Civil Procedure¹⁰ to compel the defendant hospital to reappoint him to its medical staff.

The trial court chose to treat the complaint as though it had been brought pursuant to the provisions of section 1094.5 of the Code of Civil Procedure, the so-called "administrative mandate," perceiving the action before it as a review of an administrative decision based upon a full administrative record.¹¹ The court determined that plaintiff was not entitled

7. The 1968 medical staff bylaws provided:

Summary Suspension: In any case where the President of the Staff or the Chief of any Department shall have determined that there exists probable cause . . . a member may be summarily suspended for so long as is necessary to protect patient welfare. The suspended member may then request an immediate preliminary hearing before the Advisory Committee at which time it shall be determined whether or not the suspension should be removed pending a hearing as requested by Section 6 [providing for the appointment of a judicial review committee for purposes of formal hearing].

19 Cal. 3d at 810 n.2, 567 P.2d at 1165 n.2, 140 Cal. Rptr. at 445 n.2.

8. Plaintiff urged that he was denied a fair hearing claiming that three of the five members of the committee were prejudiced against him. The court ruled that plaintiff could not make this contention since he had not raised it at either the formal hearing or at the appellate review hearing. *Id.* at 826-27, 567 P.2d at 1176, 140 Cal. Rptr. at 456.

9. Prior to the hearing, the board of directors approved a revised set of medical staff bylaws. Plaintiff urged that the hearing should have been conducted pursuant to the 1968 bylaws rather than the 1974 revised bylaws. The supreme court found that all changes in the bylaws were procedural and properly applicable to the hearing, and that in any case, plaintiff had failed to show that he had been prejudiced thereby. *Id.* at 826, 567 P.2d at 1175-76, 140 Cal. Rptr. at 455-56.

10. California Code of Civil Procedure § 1085 provides for the traditional mandamus review:

It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, . . . or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

CAL. CIV. PROC. CODE § 1085 (West 1955).

11. The scope of judicial review on administrative mandamus is governed by § 1094.5 of the California Code of Civil Procedure, which provides, in part:

(a) Where the writ is issued for the purpose of inquiring into the validity of any final

to a trial *de novo* but only a judicial review of the administrative record, *i.e.*, that the "substantial evidence" test rather than the "independent judgment" test applied to the hospital board's decision.¹² It concluded that plaintiff had been accorded "minimal due process of law" and that all but one of the charges were supported by substantial evidence in the record.¹³

The California Supreme Court reversed, stating that it was an error for the trial court to refuse to exercise its independent judgment on the evidence. The court held that the substantial evidence standard is not to be applied when an administrative decision extinguishes a fundamental vested right.

II. Inspection of the Court's Holding

Anton expands the area of judicial review beyond that announced in *Bixby v. Pierno*¹⁴ and *Strumsky v. San Diego County Employees Retirement Ass'n*.¹⁵ Now decisions of a *private* agency that satisfy certain statutory requirements are subject to the *Bixby-Strumsky* rule of judicial review under section 1094.5.¹⁶

a. Section 1094.5

Section 1094.5 of the Code of Civil Procedure is available for review in cases:

where the writ is issued for the purpose of inquiring into the validity of any *final* administrative order or decision¹⁷ made as the result of a proceed-

administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. . . .

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

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

CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1977).

12. The independent judgment test is also known as the "weight of the evidence" review or "limited trial *de novo*." See note 4 *supra*.

13. The suspension was based upon four charges and the court found that all charges were supported by substantial evidence except the charge that plaintiff failed to complete "hospital records in general." 19 Cal. 3d at 813, 567 P.2d at 1167, 140 Cal. Rptr. at 447.

14. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

15. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

16. See text accompanying note 26 *infra*.

17. Section 1094.5 review is available only with regard to adjudicatory decisions, as opposed to legislative actions, of an administrative agency. Generally, legislative action

ing in which *by law* [a] a hearing is required to be given, [b] evidence is required to be taken and [c] discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer. . . .¹⁸

The scope of judicial review to be applied is set forth in subdivision (c) of the section:

[I]n cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the inferior tribunal, corporation, board or officer. . . .¹⁸

Therefore, once it is determined that a proceeding is properly brought pursuant to section 1094.5, the court must determine the proper rule of review that is required in the circumstances.

b. *The Bixby rule of review*

Bixby concerned a writ of mandamus brought under section 1094.5 regarding a governmental agency decision.²⁰ The trial court applied the substantial evidence test in upholding the agency decision. The supreme court, in an attempt to define the scope of review under section 1094.5, reasoned that some rights are too important to the individual to be abrogated exclusively through the administrative process.²¹ The court explained:

If . . . 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.²²

Thus *Bixby* held that in section 1094.5 proceedings involving a decision of a state agency of statewide jurisdiction that affects a "fundamental vested right," the trial court, in determining whether there has been an abuse of discretion, is authorized *by law* to exercise its independent judgment on the evidence. However, if the decision does not involve, or substantially affect, any fundamental vested right, the court's review will be limited to a determination whether the findings are supported by substantial evidence in light of the whole record.

(rulemaking) is the procedure "whereby the agency formally seeks to develop and articulate policy which it will apply in the future. . . . Adjudication applies . . . policy to a set of past actions and results in an order against (or in favor of) the named party." G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 31 (1974).

18. CAL. CIV. PROC. CODE § 1094.5(a) (emphasis added).

19. *Id.* § 1094.5(c).

20. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234. Plaintiff, a minority stockholder in a closely held corporation, sought judicial review of a decision of the Commissioner of Corporations that a proposed recapitalization was "fair, just and equitable."

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

22. *Id.*

c. *The Strumsky extension of the Bixby rule*

Strumsky involved a section 1094.5 proceeding that questioned the proper scope of review of a decision by a local agency or state agency of local jurisdiction.²³ The supreme court concluded that there existed no legal justification for distinguishing between local agencies and state agencies with regard to judicial review. The court held "that the rule of judicial review applicable to adjudicatory orders or decisions of . . . [state] agencies—which was explained by us in *Bixby*²⁴—is also applicable to adjudicatory orders or decisions of [local] agencies. . . ."²⁵ Thus, if an order or decision of an agency substantially affects a fundamental vested right, the trial court, in determining under section 1094.5 whether there has been an abuse of discretion, must exercise its independent judgment on the evidence.²⁶

d. *The Anton holding*

In *Anton* the supreme court first considered whether all of the requisite elements²⁷ were present to support the trial court's conclusion that the action should be treated as a section 1094.5 proceeding. The court found the hospital board's decision clearly to be final and adjudicatory in nature. More important, it concluded that a hearing and evidence were required *by law* in decisions such as that facing the hospital board where discretion is vested in such board.²⁸

In reaching this decision, the court relied upon *Pinsker v. Pacific Coast Society of Orthodontists*,²⁹ which viewed a long line of cases and declared

23. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805. The plaintiff, a widow of a member of a county employees' retirement association, sought judicial review of a decision of the county retirement board denying her certain death benefits. The court concluded that the widow's right to receive a death allowance was a fundamental vested right.

24. See text following note 22 *supra*.

25. 11 Cal. 3d at 32, 520 P.2d at 31, 112 Cal. Rptr. at 807. In *Bixby* the court relied upon the separation of powers doctrine to hold that such doctrine required judicial review of decisions of state administrative agencies lacking judicial powers which affected fundamental vested rights. 4 Cal. 3d at 141-44, 481 P.2d at 249-52, 93 Cal. Rptr. at 241-44. But *Strumsky* involved a local agency, to which the separation of powers doctrine is not applicable, and defendant thus urged that local agencies were not prevented from exercising judicial powers. The court dismissed such contention by stating that although the local agencies were not prevented from exercising judicial powers by the separation of powers doctrine, local bodies, like government entities, derive their powers from the state Constitution, and that in the absence of such constitutional grant of power, a local agency's decision is subject to the same rules of review which are applicable to all decisions by administrative agencies lacking judicial powers. 11 Cal. 3d at 36-44, 520 P.2d at 34-40, 112 Cal. Rptr. at 810-16.

26. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805.

27. For a discussion of the "threshold" elements necessary for § 1094.5 review, see text accompanying notes 17 & 18 *supra*.

28. 19 Cal. 3d at 815, 567 P.2d at 1168, 140 Cal. Rptr. at 448.

29. 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974). The plaintiff, a licensed dentist with sufficient training and background for orthodontia accreditation, sought judicial review of a decision of a professional society denying him admission into the society.

that neither hospital staffs nor medical associations, *whether public or private*, could expel or exclude a physician from membership without providing a procedure comporting with the minimum common law requirements of "fair procedure."³⁰ Also cited was *Ascherman v. Saint Francis Memorial Hospital*³¹ which concerned admission to the staff of a private hospital and which affirmed *Pinsker*.³² The court construed these authorities as requiring that "fair procedure" include provisions for hearing and evidence where the administrative tribunal uses its discretion in the determination of facts.³³

Concluding that the requisite elements for section 1094.5 review were present in *Anton*, the supreme court held that the trial court had erred in refusing to exercise its independent judgment on the evidence. The hospital board's decision not to reappoint plaintiff affected a fundamental vested right; thus the trial court was required to exercise its independent judgment to determine if the findings were supported by the weight of the evidence—according to the rule laid down in *Bixby* and *Strumsky*.³⁴ The right to hospital privileges is fundamental within the meaning of *Bixby* and *Strums-*

30. *Id.* at 549-50, 526 P.2d at 259-60, 116 Cal. Rptr. at 251-52. See note 40 *infra* and accompanying text.

31. 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1st Dist. 1975). The plaintiff, a licensed practicing surgeon, sought judicial review of a decision of a private hospital denying him staff privileges and membership.

32. The *Ascherman* court relied upon its previous findings in *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1st Dist. 1974), where the court made a comparison of the protections developed in both the *private* and *public* medical areas and announced:

It is concluded that the power of a nonprofit hospital, whether public or private, to pass on an application for appointment to or renewal of staff membership is a fiduciary power to be exercised reasonably and for the public good; that the applying physician is entitled to minimal due process of law protection.

Id. at 631, 114 Cal. Rptr. at 685.

33. The court also examined the statutory language and legislative material regarding §§ 1085 and 1094.5. It found that there was nothing in the language limiting § 1094.5 review to administrative decisions by *governmental* agencies as opposed to nongovernmental agencies, and that § 1094.5 was intended to apply to the same types of agencies to which § 1085 was applicable—§1085 being applicable to both governmental and nongovernmental bodies. 19 Cal. 3d at 815-17, 567 P.2d at 1169-70, 140 Cal. Rptr. at 449-50.

Finally, the court recognized that almost all hospitals which seek accreditation from the Joint Commission on Accreditation of Hospitals (JCAH), the national body responsible for accreditation of hospitals, must comply with standards and guidelines which include requirements for hearing procedures. This assures that nearly all hospitals will meet the requisite procedural protections for § 1094.5 review. *Id.* at 818-20, 567 P.2d at 1170-72, 140 Cal. Rptr. at 450-52.

34. *Id.* at 821, 567 P.2d at 1172, 140 Cal. Rptr. at 452. See text accompanying note 26 *supra*.

The defendant in *Anton* urged that the separation-of-powers doctrine did not apply to private agencies and hence, that the *Bixby-Strumsky* rule did not apply. See note 25 *supra*. The court dismissed this argument stating, "It is clear . . . that the agency whose decision we here consider has not been invested with judicial powers by the Constitution. Accordingly its adjudicatory decisions are subject to review under the same rules which are applicable to all decisions by administrative agencies lacking judicial powers." *Id.* at 822, 567 P.2d at 1173, 140 Cal. Rptr. at 453.

ky because such privileges directly relate to the pursuit of a physician's livelihood.³⁵ And such right is vested, even though staff appointments at defendant hospital are only for the duration of one year, since admission to staff membership creates a relationship between physician and hospital which gives rise to certain rights, one of which is the right to reappointment.³⁶

As a result, the California Supreme Court extends the scope of judicial review laid down in *Bixby* and *Strumsky* into private agency decisions. A decision of a private, nongovernmental agency may be subject to review

35. *Id.* at 823, 567 P.2d at 1174, 140 Cal. Rptr. at 454. "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." *Bixby v. Pierno*, 4 Cal. 3d at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244.

Whether the court was correct in finding that plaintiff's right was fundamental is not considered in the scope of this Note. *See generally* Note, *Scope of "Independent Judgment" Review*, 63 CALIF. L. REV. 27 (1975).

See also *Brush v. Los Angeles*, 45 Cal. App. 3d 120, 119 Cal. Rptr. 366 (2d Dist. 1975) (reversal of the trial court's application of the substantial evidence test where police officer discharged for lying to departmental investigators); *Lake v. Civil Serv. Comm'n of Fire Dept.*, 47 Cal. App. 3d 224, 120 Cal. Rptr. 452 (5th Dist. 1975) (fireman discharged for cause; public employment which allows discharge only for cause is a fundamental vested interest); *Quintana v. Board of Administration, Public Employees' Retirement Sys.*, 54 Cal. App. 3d 1018, 127 Cal. Rptr. 11 (2d Dist. 1976) (denial of highway patrol officer's application for a disability pension held to affect a fundamental vested right, since an officer has a fundamental vested right if he in fact was disabled).

36. 19 Cal. 3d at 824-25, 567 P.2d at 1174-75, 140 Cal. Rptr. at 454-55. The court stated:

[I]t is clear to us that the admission of a physician to medical staff membership establishes a relationship between physician and hospital which, although formally limited in duration by force of law, gives rise to rights and obligations . . . [T]he previously admitted physician, unlike the normal applicant for a license or franchise, may not be denied reappointment to the medical staff absent a hearing and other procedural prerequisites consistent with minimal due process protections. . . . [A] hospital board, through its act of initially admitting a physician to medical staff membership, has thereby, in the exercise of its discretion, necessarily determined his fitness for such membership at the time of admission *and granted him the full rights of membership*. The fact that review of this appointment is made mandatory on an annual or biennial basis . . . can by no means be said to render it probationary or tentative in effect. . . . In short, the full rights of staff membership *vest* upon appointment, subject to divestment upon periodic review only after a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements.

Id. (footnotes and citations omitted). This Note does not inspect the validity of the court's conclusion above. *But see, e.g.*, *Northern Inyo Hosp. v. Fair Employment Practice Comm'n*, 38 Cal. App. 3d 14, 112 Cal. Rptr. 872 (4th Dist. 1974) (local hospital district did not have vested right to establish employment practices, procedures, and conditions free of reasonable governmental rules and regulations).

The *Anton* court relied upon a line of cases distinguishing between license revocation and license denial in reaching the conclusion that plaintiff's right was vested. But beyond that, the court has offered no standards to assist courts in determining whether a particular right is vested. As Justice Burke stated in his *Bixby* concurrence:

[T]he courts have experienced difficulty in determining what rights are "vested" for purposes of applying [the *Bixby*] rule, with the result that decisions have been made on an undesirable "case-by-case" basis. Aside from distinguishing between license revocation and license denial cases, this court has not attempted to establish any useful guidelines for the lower courts to follow, and the precedent value of our decisions in this area has been minimal.

4 Cal. 3d at 153, 481 P.2d at 258, 93 Cal. Rptr. at 250 (footnotes omitted).

under section 1094.5, and if the decision affects a fundamental vested right then the trial court must exercise its independent judgment on the evidence.

III. "Fair Procedure" at Common Law

Section 1094.5 review is available when inquiring into the validity of any final agency decision "in which *by law* a *hearing* is required . . . , *evidence* is required . . . and *discretion* . . . is vested in the inferior tribunal, corporation, board or officer. . . ." ³⁷ Since the court concluded that private medical boards are required "by law" to provide such procedural elements in reappointment decisions, ³⁸ the question arises as to the legal source of this requirement. Neither constitutional "due process" protections ³⁹ nor statutory provisions are applicable to private actions such as this: the legal procedural duties imposed on such medical organizations arise from the common law. ⁴⁰

The common law principle requiring "fair procedure" has been a part of California law since before the turn of the century. ⁴¹ It began as a procedural protection of the right of a member of an association not to be *expelled* from membership arbitrarily ⁴² and developed to protect applicants from arbitrary *exclusions*. ⁴³ These developments in the common law are determined by the social needs of the times. ⁴⁴ In California, such social

37. CAL. CIV. PROC. CODE § 1094.5 (a) (West Supp. 1977) (emphasis added). See text accompanying notes 16-18 *supra*.

38. 19 Cal. 3d at 815, 567 P.2d at 1168, 140 Cal. Rptr. at 448. See text accompanying notes 28-33 *supra*.

39. CAL. CONST. art. I, § 13.

40. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d at 550 n.7, 526 P.2d at 259 n.7, 116 Cal. Rptr. at 251 n.7. While constitutional principles require "due process," common law doctrine demands "fair procedure." The common law is generally derived from broad and comprehensive principles, rather than rules, which are based on justice, reason and common sense as determined by the social needs of the community at a given time.

41. *Otto v. Tailors' P. & B. Union*, 75 Cal. 308, 17 P. 217 (1888). This common law principle has been reiterated in a long line of California decisions. See *Cason v. Glass Bottle Blowers' Ass'n*, 37 Cal. 2d 134, 231 P.2d 6 (1951); See *Taboada v. Sociedad Espanola de Beneficencia Mutua*, 191 Cal. 187, 215 P. 673 (1923); *Von Arx v. San Francisco G. Verein*, 113 Cal. 377, 45 P. 685 (1896); *Grand Grove A. O. of D. v. Duchein*, 105 Cal. 219, 38 P. 947 (1894); *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 254 P.2d 587 (2d Dist. 1953).

42. "It is a principle of natural justice that no one shall be condemned without an opportunity to be heard It is well settled that a member of a benevolent association cannot be expelled without being given a hearing. . . ." *Grand Grove A. O. of D. v. Duchein*, 105 Cal. 219, 224-25, 38 P. 947, 948 (1894). See also *Willis v. Santa Ana Community Hosp. Ass'n*, 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962); *Kronen v. Pacific Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965).

43. See *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944) (exclusion from union); *Wyatt v. Tahoe Forest Hosp. Dist.*, 174 Cal. App. 2d 709, 345 P.2d 93 (3d Dist. 1959) (exclusion from hospital staff); *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961) (exclusion from membership in medical association).

44. "[I]n recent decisions our courts have repeatedly acknowledged that public policy is the dominant factor in the molding and remolding of common law principles to the high end that they may soundly serve the public welfare and the true interests of justice." *Falcone v.*

policy has insisted that "fair procedure" include certain minimal protections of the rights of members with regard to adjudicatory decisions of private associations, including notice, evidence and hearing,⁴⁵ even if not provided for in the bylaws or charters of such associations.⁴⁶

In the medical field alone there is a long line of California decisions holding that medical staffs and associations are required by common law fair procedure to provide certain procedural protections with regard to their adjudicatory decisions.⁴⁷ Yet, while "fair procedure" parallels "due process" in protecting individuals in situations generally regarded as private, the content of "fair procedure" is far more flexible than that required by "due process,"⁴⁸ while maintaining the minimal procedures requisite to section 1094.5 review.

Originally the courts were hesitant to interfere with the decisions of private associations, which in the main were religious, social or fraternal organizations. The courts were not impressed with any need to intervene in these personal relationships. However, once trade and professional associa-

Middlesex County Medical Soc'y, 34 N.J. 582, 589, 170 A.2d 791, 795 (1961), where a doctor was dropped from the staffs of several hospitals as a result of the refusal of the county medical association to admit him into membership. This case was cited by the *Pinsker* court as the seminal decision in this country regarding the common law protections which surround members of the medical field. 12 Cal. 3d at 550, 526 P.2d at 260, 116 Cal. Rptr. at 252.

45. More than fifty years ago the supreme court stated:

It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights without an opportunity to make his defense. This rule is not confined alone to courts of justice and strictly legal tribunals, but is applicable to every tribunal which has the power and authority to adjudicate questions involving legal consequences. . . . The proceedings of the society . . . must, therefore, provide for notice to the accused and afford him an opportunity to be heard.

Taboada v. Sociedad Espanola De Beneficencia Mutua, 191 Cal. 187, 191, 215 P. 673, 674 (1923). See also *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal. 2d 134, 231 P.2d 6 (1951) (suspension from union); *Von Arx v. San Francisco G. Verein*, 113 Cal. 377, 45 P. 685 (1896) (expulsion from benevolent society); *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 254 P.2d 587 (2d Dist. 1953) (suspension from real estate society).

46. *Tatkin v. Superior Court*, 160 Cal. App. 2d 745, 326 P.2d 201 (2d Dist. 1958) (exclusion from medical association); *Curl v. Pacific Home*, 108 Cal. App. 2d 655, 239 P.2d 481 (2d Dist. 1952) (expulsion from old age home); *Ellis v. American Fed'n of Labor*, 48 Cal. App. 2d 440, 120 P.2d 79 (1st Dist. 1941) (expulsion from labor association); *Knights of Ku Klux Klan, Inc., v. Francis*, 79 Cal. App. 383, 249 P. 539 (1st Dist. 1926) (expulsion from fraternal society).

47. See *Willis v. Santa Ana Community Hosp. Ass'n*, 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962); *Rosner v. Eden Township Hosp. Dist.*, 58 Cal. 2d 592, 375 P.2d 431, 25 Cal. Rptr. 551 (1962); *Smith v. Kern County Medical Ass'n*, 19 Cal. 2d 263, 120 P.2d 874 (1942); *Cal-Medicon v. Los Angeles County Medical Ass'n*, 20 Cal. App. 3d 148, 97 Cal. Rptr. 530 (2d Dist. 1971); *Martino v. Concord Community Hosp. Dist.*, 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 (2d Dist. 1965); *Wyatt v. Tahoe Forest Hosp. Dist.*, 174 Cal. App. 2d 709, 345 P.2d 93 (3d Dist. 1959); *Tatkin v. Superior Court*, 160 Cal. App. 2d 745, 326 P.2d 201 (2d Dist. 1958); *Bernstein v. Alameda-Contra Costa Medical Ass'n*, 139 Cal. App. 2d 241, 293 P.2d 862 (1st Dist. 1956).

48. As Justice Tobriner stated in *Pinsker*, "The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position." *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d at 555, 526 P.2d at 263, 116 Cal. Rptr. at 255.

tions began to grow in power and influence, the courts became aware that such power could affect an individual's opportunity to earn a livelihood and to practice a chosen trade.⁴⁹ Apparently, the controlling policy consideration for common law protections was the growing monopolistic control over employment opportunities. Fiduciary obligations were imposed upon such organizations with regard to their membership policies. As the California Supreme Court stated:

Where a union has . . . attained a monopoly [over employment opportunities] . . . such a union occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.⁵⁰

More recent decisions do not emphasize so much the monopolistic power of an association as the impact of the organization's decision upon an individual's economic needs and interest in practicing a chosen trade or profession.⁵¹ If a private association's decision has a substantial effect upon economic advantages or the ability to fully practice a trade, the courts have viewed the association as having a fiduciary responsibility to consider the decision in a manner comporting with the fundamentals of common law fair procedure.⁵²

49. See, e.g., *Falcone v. Middlesex Medical Soc'y*, 34 N.J. 582, 597, 170 A.2d 791, 799 (1961).

50. *James v. Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944). This principle was reiterated by other cases dealing with associations exercising monopoly, or quasi-monopoly, powers. See *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958); *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal. 2d 134, 231 P.2d 6 (1951); *Greenberg v. Hollywood Turf Club*, 7 Cal. App. 3d 968, 86 Cal. Rptr. 885 (2d Dist. 1970).

51. Indeed, in *Anton* the hospital did not have a monopoly over the practice of medicine in the geographic area. But the court recognized the possible economic hardship and interference with plaintiff's ability to successfully practice medicine should he be denied readmission to the staff. These interests are fundamental and thus protected at common law. 19 Cal. 3d at 823 & n.20, 567 P.2d at 1174 & n.20, 140 Cal. Rptr. at 454 & n.20.

52. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 166, 460 P.2d 495, 499, 81 Cal. Rptr. 623, 627 (1969). In *Pinsker*, though the association was the sole certifying board recognized by the American Dental Association, membership was not essential to practice orthodontics. However, membership was beneficial for substantial economic advantages and allowed orthodontists to join other societies which would expand their opportunity to fully practice their profession. The membership decision affected substantially significant economic and professional concerns so as to clothe the societies with a "public interest."

See also *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 2d 623, 114 Cal. Rptr. 681 (1st Dist. 1974). In *Ascherman* the defendant medical board contended that since they did not exercise a monopoly over medical facilities, they were not subject to the typical common law requirement of fair procedure. The court indicated that a showing of monopoly power was not the controlling factor, and that even absent such power, the board's decision could substantially deprive plaintiff of substantial economic advantages. Hence, the court held that the board must afford plaintiff the right to a hearing before denial of staff privileges. 39 Cal. App. 2d at 650 & n.9, 114 Cal. Rptr. at 698 & n.9.

Compare the above cited authorities with *Blatt v. University of So. Calif.*, 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (2d Dist. 1970), where plaintiff was refused admission to the private

Based on these developments in the common law, the California courts have established procedural protections for physicians with regard to decisions of private medical hospitals and associations affecting admissions to, or expulsions from, membership. It is this "fair procedure" that the *Anton* court found requires "by law" a hearing and evidence in the discretionary decisions of private medical associations.

IV. Implications

Anton, the first case to extend the *Bixby-Strumsky* rule to private agency action, dealt with a final adjudicatory decision of a hospital board regarding expulsions from the staff of the hospital. To what other private actions affecting individual rights can we expect the California Supreme Court to extend judicial review via section 1094.5?

As indicated in part III, the basis for the court's review under section 1094.5 and the subsequent application of the independent judgment rule of review were premised upon common law "fair procedure" which requires that medical boards provide physicians a hearing before denying reinstatement.⁵³ Absent any constitutional or legislative protections, it appears that the *Anton* holding may be extended to other private actions in which the "common law" exacts the "fair procedure" protections necessary to qualify for section 1094.5 review.⁵⁴

Generally, only actions of associations and societies have been required to comport with "fair procedure" protections, and typically only those decisions denying admission to, or reinstatement in, the association or society.⁵⁵ The courts appear to scrutinize in particular those decisions made by bodies possessing some influence or power over the health and welfare of their members.⁵⁶ Actions by bodies possessing monopoly power especially are required to conform with the elements of fair procedure, and thus would qualify for section 1094.5 review.⁵⁷ Usually this power is reflected by

university chapter of the Order of the Coif, although he had met the grade requirement (top 10% of his class). He urged that the courts have compelled admission to associations that have some effect upon professional or economic success. The court found that membership in the Order would neither give the plaintiff the right to practice his profession nor affect his basic right to earn a living; that case authority in California is limited in application to decisions affecting the *right to work* in a chosen occupation. 5 Cal. App. 3d at 941-42, 85 Cal. Rptr. at 605-06.

53. There is some authority which indicates that "state action" could be attributed to hospitals and thus require that decisions comport with "due process" as compared with common law "fair procedure." However, the California courts have not considered such contention, relying upon the common law for procedural protections. See generally *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 192 A.2d 817 (1963); *Sussman v. Overlook Hosp. Ass'n*, 95 N.J. Super. 418, 231 A.2d 389 (1967).

54. See notes 17 & 18 *supra* and accompanying text.

55. See notes 42 & 43 *supra*.

56. See note 32 *supra*.

57. See cases cited notes 49 & 50 *supra* and accompanying text.

control over labor opportunities.⁵⁸ But monopoly power is not an indispensable factor. The fact that an association's decision would have a substantial economic effect on the individual would appear to be sufficient to apply the *Anton* rule.⁵⁹ Similarly, an association's decision affecting an individual's interest in pursuing a chosen trade or profession should invoke the *Anton* standard of judicial review.⁶⁰

On the whole, the cases invoking fair procedure protections concern membership decisions affecting employment-related factors. Beyond the decisions of medical *staffs*, the *Anton* court indicated that the holding would be similarly applicable to medical *associations* or *societies*.⁶¹ And following the court's rationale, the *Anton* rule would appear to apply to decisions regarding membership in unions, trade associations, and professional societies where such decisions would have a substantial effect upon the basic right to practice the chosen trade and to obtain the attending economic advantages. The common law requires that these decisions be conducted pursuant to procedural elements such as hearing, notice and evidence. And, if these procedural protections are required *by law*, section 1094.5 would be the proper means of judicial review of any alleged abuse of discretion, in accordance with the *Bixby-Strumsky* rule.⁶²

There is, however, a well-established line of cases concerning membership decisions of social and fraternal societies which generates the same requirement of "fair procedure" as found in the employment-related decisions.⁶³ In these cases, there is no monopoly power of any significance, no effect upon economic advantages and no obstruction of the right to pursue a profession, yet because of the common law protections surrounding such decisions they appear to meet the threshold standards for judicial review pursuant to section 1094.5.⁶⁴ Unless the court is able to distinguish such fraternal societies from the trade-oriented associations, *Anton* may expose the courts to the burden of reviewing the membership selection policies of

58. "Public policy strongly dictates that this power should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of the interests of the . . . profession and the public generally. . . ." *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 597, 170 A.2d 792, 799 (1961).

59. *Directors' Guild of America, Inc. v. Superior Court*, 64 Cal. 2d 42, 409 P.2d 934, 48 Cal. Rptr. 710 (1966).

60. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).

61. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245; *Ascherman v. Saint Francis Memorial Hosp.*, 45 Cal. App. 3d 507, 119 Cal. Rptr. 507.

62. See text accompanying note 26 *supra*.

63. *Taboada v. Sociedad Espanola de Beneficencia Mutua*, 191 Cal. 187, 215 P. 673 (1923); *Supreme Lodge v. L.A. Lodge No. 386*, 177 Cal. 132, 169 P. 1040 (1917); *Von Arx v. San Francisco G. Verein*, 133 Cal. 377, 45 P. 685 (1896); *Curl v. Pacific Home*, 108 Cal. App. 2d 655, 239 P.2d 481 (2d Dist. 1952); *Knights of Ku Klux Klan, Inc. v. Francis*, 79 Cal. App. 383, 249 P. 539 (1st Dist. 1926).

64. See notes 41-46 *supra* and accompanying text.

every voluntary organization.⁶⁵ Conceivably, the courts could distinguish voluntary social associations from the professional societies by revising their determinations of the common law protections required in the membership decisions of such social associations. If the courts can determine that "fair procedure" in decisions of social societies does not require all of the procedural elements normally required in the professional association decisions, then such social society decisions would fall outside the scope of section 1094.5 review.⁶⁶ This would limit judicial review to membership decisions of trade or professional associations.

It does not appear that the *Anton* rule will extend much further. Beyond these "membership" decisions, there exist no other cases in which the courts require that the decisions of private associations comport with "fair procedure." Hence, most private decisions still will be shielded from judicial intervention, while certain rights too basic to relegate to exclusive administrative extinction will be protected by judicial review.

Conclusion

Anton recognizes that where a fundamental vested right is concerned, a decision of a private agency may be as significant to an individual as any decision by a public agency. As a result, a decision of a private association may be subject to review under Civil Procedure Code section 1094.5 where public policy dictates that "fair procedure" be afforded an individual with regard to such decision.

Presently, only *membership* decisions of associations possessing certain powers or influence are subject to section 1094.5 review. This stems from the court's interpretation of the common law protections to be afforded various interests in the private sector. So far the courts have sought to protect the interests of individuals with regard to membership decisions of trade unions, associations and societies.

Does *Anton* pose a danger that the courts will be flooded with a multitude of cases seeking judicial review of private actions? Probably not. Since the courts ultimately determine what interests are too fundamental to relegate to final administrative extinction, they ultimately control the "flood gates."

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65. However, even if the courts should become responsible for reviewing the membership decisions of voluntary social organizations, at least the courts would not have to exercise their independent judgment on the evidence. Since it is difficult to imagine membership in a fraternal society as being a *fundamental vested right*, § 1094.5 would require only that the courts utilize the "substantial evidence" test in reviewing such decisions.

66. *Blatt v. University of So. Calif.*, 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (2d Dist. 1970), may indicate that the line of fraternal society cases should be discarded and that such societies will *not* be subject to judicial review under § 1094.5. In *Blatt* the court held that membership decisions of a private honorary society were distinguishable from decisions of trade or professional societies and therefore not subject to judicial review.