Spinning Gold into Straw: The Ordinary Use of the Extraordinary Writ of Mandamus to Review Quasilegislative Actions of California Administrative Agencies

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SPINNING GOLD INTO STRAW: THE ORDINARY USE OF THE EXTRAORDINARY WRIT OF MANDAMUS TO REVIEW QUASI-LEGISLATIVE ACTIONS OF CALIFORNIA ADMINISTRATIVE AGENCIES

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INTRODUCTION

A formidable line of cases1 supports the proposition that mandamus is routinely available to review quasi-legislative actions2 of California administrative agencies. The mere sight of

2. As used herein, "quasi-legislative" action refers to "the formulation of a rule to be applied in all future cases, while [a 'quasi-judicial']... act involves the actual application of such a rule to a specific set of existing facts." Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 35 n.2, 520 P.2d 29, 33 n.2, 112 Cal. Rptr. 805, 809 n.2 (1974).

The distinction between "quasi-legislative" and "quasi-judicial" administrative actions is sometimes difficult to draw, see id. at 42 n.14, 520 P.2d at 38 n.14, 112 Cal. Rptr. at 814 n.14 (difficulty due in part to intrinsic imprecision betrayed by the prefix "quasi"); Patterson v. Central Coast Regional Comm'n, 58 Cal. App. 3d 833, 840, 130 Cal. Rptr. 169, 172-74 (1976); Natural Resources Defense Council v. California Coastal Zone Conservation Comm'n, 57 Cal. App. 3d 76, 83, 129 Cal. Rptr. 57, 61-62 (1976); see also 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 5.01 (1958). The distinction may, in fact, not turn on the abstract nature of the decisions at all, but may
such a host should ordinarily overwhelm, if not persuade, all but the most stalwart of doubters. Nevertheless, the rule suffers from such a questionable genesis, is so patently at odds with the governing statutes and settled principles of equity practice, injects such procedural uncertainty and potential mischief into review proceedings, and has gone critically unexamined for so long that there is some reason to believe that the courts will follow up some broad hints and restore the writ to its traditional and legislatively sanctioned role.

HISTORICAL BACKGROUND OF THE RULE

A proper understanding of how the extraordinary writ of mandamus was transformed into one of the routine methods for reviewing quasi-legislative administrative actions leads directly to what should have been wholly irrelevant decisions concerning review of quasi-judicial acts.

The first of these cases is Standard Oil v. State Board of Equalization. Prior to that case it was "the law of this state, settled for many years, that certiorari might issue to review the quasi-judicial determinations of state-wide administrative bodies." In Standard Oil, however, the statutory provision for review of the acts of a nonjudicial administrative board by writ of certiorari was held invalid on the ground that the writ lies only to review the acts of judicial tribunals, and that the statute making it applicable to nonjudicial bodies was an attempt to enlarge the constitutional jurisdiction of the court.

A year later, in Whitten v. California State Board of Optome-

3. See text accompanying notes 100-22 infra.
5. Turrentine, Restores Certiorari to Review Statewide Administrative Bodies in California, 29 CALIF. L. REV. 275, 275 (1941).
try, the California Supreme Court likewise held unanimously that "prohibition would not lie to review statewide agencies empowered to exercise judicial functions." This sudden elimination of the only methods of review of statewide administrative agency decisions was the occasion for considerable discomfort. As one commentator described the situation:

The legal profession was aghast at these decisions. Had state administrative agencies been put beyond the reach of the courts? No matter what errors of law or procedure they might commit or how arbitrary might be their finding of facts, or what excesses of jurisdiction they might commit, the only writs known to our law could no longer be used.

Had these decisions any impact on court review of quasi-legislative administrative decisions? None at all. It had long before been held that certiorari did not lie to review decisions not arguably "judicial." Likewise, prohibition never did lie to review an action "[i]n no sense . . . judicial in its nature."

If the problem raised by these cases did not focus on quasi-legislative administrative actions, the supreme court’s solution would later be applied to such actions even in the absence of a problem. In Drummey v. State Board of Funeral Directors, the court seized the idea that "mandamus is the proper remedy to secure . . . where no other remedy exists."

While the court might have expected at least some faint expression of gratitude for this discovery, none is detectible. Condemnations centered around two issues. First, the court’s solution, as it later admitted, is impossible to reconcile with any previous understanding concerning the functions of mandamus, even ignoring the statutes:

7. 8 Cal. 2d 444, 65 P.2d 1296 (1937).
10. E.g., Brown v. Board of Supervisors 124 Cal. 274, 277-78, 57 P. 82, 83 (1899); People v. Oakland Bd. of Educ., 54 Cal. 375, 376 (1880).
12. 13 Cal. 2d 75, 87 P.2d 848 (1939).
13. Id. at 82-83, 87 P.2d at 852-53.
Historically, the writ has been used for far narrower purposes . . . . Mandamus has traditionally been merely a proceeding to compel the performance of ministerial duties . . . . In jurisdictions where other means exist for reviewing the acts and decisions of administrative bodies . . . . there has been no necessity for enlarging the writ of mandamus beyond its conventional sphere . . . . Our later decisions have recognized that the use of mandamus to review acts of administrative agencies is a departure from the traditional purpose of the writ . . . .

As one author less charitably put it, "[M]andamus has been expanded into a veritable lis mirabilis unknown before on land or sea."15 The second problem centered about the court's somewhat vague but expansive pronouncements concerning the scope of judicial review under this newly devised remedy.16

The furor over these issues largely subsided17 when "the Legislature by enacting Civil Procedure Code section 1094.5 in effect ratified such judicially developed remedy so far as it could constitutionally do."18

In contrast to the controversy surrounding judicial review of quasi-judicial administrative actions, we hear nothing comparable from the courts or the commentators concerning review of quasi-legislative actions from the founding of the State until the fifth decade of this century. There are several

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15. Turrentine, supra note 5, at 276. So far as the author has been able to discover, the phrase lis mirabilis is itself "unknown before on land or sea." As the words have no appropriate meaning in this context, they are perhaps best understood as an expression, and possibly a product, of Professor Turrentine's consternation. See also McGovney, supra note 9, 15 S. CAL. L. REV. at 400; McGovney, Administrative Decisions and Court Review Thereof, in California, 29 CALIF. L. REV. 146, 149 (1941).


18. Grant v. Board of Medical Examiners, 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270, 274 (1965). The court did not develop the seeming implication that the judicially developed remedy was in part irreconcilable with the Constitution. See also note 99 infra; Temescal Water Co. v. Department Pub. Works, 44 Cal. 2d 90, 105, 280 P.2d 1, 10 (1955).
reasons for this silence.

In the first place, the farther one goes back in time, the fewer regulations existed to provide fodder for judicial review.\(^\text{19}\) This, however, was scarcely less true of quasi-judicial decisions.\(^\text{20}\) Part of the reason for the early silence concerning quasi-legislative actions doubtless inheres in the fact that it was no simple matter, until at least 1943, to determine the content of such rules and regulations which had been adopted.

\[\text{T}he\] California legislature did not generally require that the rules or regulations of state administrative agencies be formalized or registered anywhere until the adoption of the amendments to the Government Code to this end [in 1941]. In order to implement such notoriety as could be accomplished by filing existing rules with the Secretary of State, the statute further provided that any rule not so filed would be deemed repealed. Even this modest beginning was rendered ineffectual until 1943 by the absence of appropriation for the codification and indexing of such rules created by the 1941 legislation. At that time there was no provision for publication of such rules as so filed and most administrative agencies did not make the rules adopted by them generally available to the public and to the persons directly affected in any usable form.\(^\text{21}\)

Such ignorance must have posed a significant barrier to the contents of regulations being called to the attention of the courts.

Most fundamental, however, is that the courts were never required to cast about in search of a remedy for allegedly arbitrary or invalid quasi-legislative actions. First, an injunction could be sought, in a proper case, against the enforcement of the allegedly invalid regulation.\(^\text{22}\)

20. Id.
22. E.g., Carter v. Stevens, 211 Cal. 281, 295 P. 28 (1930) (attempt to enjoin "the threatened enforcement of the rules promulgated by the state fire marshal . . . on the ground that as applied to [appellants] the requirements of said rules were oppressive and burdensome and entailed unreasonable and unnecessary expense to them." Id. at 283, 295 P. at 32-33); see Brock v. Superior Court, 11 Cal. 2d 682, 81 P.2d 931 (1938). Attempts to enjoin the enforcement of local ordinances were fairly common, see, e.g., Parker v. Colburn, 196 Cal. 169, 170, 236 P. 921, 922 (1925); Gaylord v. City of Pasadena, 175 Cal. 433, 435, 166 P. 348, 349 (1917); Wilson v. City of
The development of an additional remedy was launched in 1921—a year before Standard Oil—with the enactment of the Declaratory Relief Act. While at first it was held that this remedy was unavailable against the State and its subdivisions, the state supreme court ruled otherwise in 1942. Although the curious rule became established that declaratory relief could not be had to review quasi-judicial administrative decisions, no doubt was ever expressed concerning the availability of declaratory relief to review the validity of regulations and ordinances.

Alhambra, 158 Cal. 430, 111 P. 254 (1910). See also Challenge Cream & Butter Ass'n v. Parker, 23 Cal. 2d 137, 142 P.2d 737 (1943) (suit to enjoin principle order of the Director of Agriculture); Ray v. Parker, 15 Cal. 2d 275, 279, 101 P.2d 665, 668 (1910). 23. 1921 Cal. Stats. ch. 463, § 1, at 689 (current version at CAL. CIV. PROC. CODE § 1060 (West Supp. 1979)) which reads in part:

Any person interested under a . . . written instrument, . . . or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract.


The Administrative Procedure Act, enacted in 1947,\(^28\) specifically authorized declaratory relief as a means of reviewing the validity of regulations\(^29\) adopted pursuant to that Act. The new Government Code section 11440 provided in part:

> Any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure . . . .\(^30\)

Finally, the validity of regulations could be challenged in actions brought to review quasi-judicial enforcement proceedings.\(^31\)

In sum, at no time could it be said of the quasi-legislative acts of state administrative agencies, as it was of their quasi-judicial acts, that "[t]he only possible remedy of the person adversely affected is by writ of mandate."\(^32\) If the clarion call to judicial innovation is inaudible to our ears, it was clearly perceived in 1952 by a court which was, unfortunately, unable to reproduce the notes.

\(^1\) ten instrument" within the terms of the statute); Andres v. City of Piedmont, 100 Cal. App. 700, 700-01, 281 P. 78, 78 (1929) (relying on the more obvious "declaration of . . . rights or duties" language). But see Honeywell, Inc. v. State Bd. of Equalization, 43 Cal. App. 3d 907, 912-13, 122 Cal. Rptr. 243, 246-47 (1975) and cases cited therein, which can be read to suggest that prior to the enactment of CAL. GOV'T CODE § 11440 (West 1966) the regulations of state governmental agencies were beyond the scope of declaratory relief. The reasoning, however, would also place local regulations, to this day, beyond the reach of declaratory relief, a proposition refuted by the above cases.

\(^28\) 1947 Cal. Stats., ch. 1425, § 1, at 2984 (current version at CAL. GOV'T CODE § 11370 (West 1966 & Supp. 1979)).

\(^29\) The term "regulation" was defined as meaning:

> [E]very rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the organization or internal management of the state agency.

Id. at 2985 (current version at CAL. GOV'T CODE § 11371(b) (West 1966)) (Article 1 of the Administrative Procedure Act).

\(^30\) Id. at 2990 (current version at CAL. GOV'T CODE § 11440 (West 1966)) (Article 5 of Administrative Procedure Act).

\(^31\) See Hutchinson, supra note 21 at 275; Chas. L. Harney, Inc. v. Contractors' State License Bd., 39 Cal. 2d 561, 564-65, 247 P.2d 913, 915 (1952).

\(^32\) Drummey v. State Bd. of Funeral Directors & Embalmers, 13 Cal. 2d 75, 84, 87 P.2d 848, 853 (1939).
The Rule Established: Brock v. Superior Court

The historic occasion evoking the rule that mandamus is ordinarily available to review quasi-legislative administrative actions was a challenge to a regulation governing lima beans. In Brock v. Superior Court, dealers and growers filed a petition for a writ of mandate pursuant to Code of Civil Procedure section 1094.5 to challenge a "marketing order" that was designed to coordinate and regulate the production and merchandising of the beans. It was contended, based solely on materials outside the record, that the findings of the Director of Agriculture were not supported "by the weight of, or substantial, evidence." The trial court did not examine the evidence in the record and, additionally, refused to consider new evidence offered by the dealers and growers. Instead, it issued a peremptory writ of mandate commanding the Director to exercise his statutory power to call a hearing and reconsider the marketing order in light of the new evidence. Pending the outcome of this hearing, and a report thereon by the Director, a previously issued preliminary injunction against the enforcement of the order was continued in effect. The Director appealed and requested writs of prohibition and supersedeas against the trial court, these petitions generated the instant appellate decision.

The court of appeal granted the relief requested by the Director. The only thing the trial court was adjudged to have done wrong, however, was to entertain an action demanding reconsideration of the order in light of new evidence without the exhaustion of the administrative remedy of asking the Director to call a hearing to amend the order. While

34. Id. at 596-98, 241 P.2d at 285-86.
35. Id. at 608, 241 P.2d at 292.
36. Id. at 597, 241 P.2d at 286.
37. Id. at 607, 241 P.2d at 291-92.
38. Id. at 597, 241 P.2d at 286.
39. Id.
40. Id.
41. Id. at 610, 241 P.2d at 294.
42. It is a familiar rule that where an administrative remedy is available, failure to exhaust it deprives the courts of jurisdiction to grant any relief. United States v. Superior Court, 19 Cal. 2d 189, 194, 120 P.2d 26, 29 (1941); Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 291-92, 109 P.2d 942, 949 (1941); see also Metcalf v.
the court of appeal concluded that certain of the trial court's rulings, rulings in the Director's favor, were rightly decided; these issues were obviously neither within the scope of the Director's petition, nor were they the basis of the ruling disapproving the trial court's action. It was in the course of examining those rulings that the court concluded, in dicta, that the proper method of review was by way of mandamus proceedings.

In so concluding, the court first established the indisputable premises that the Director's action was quasi-legislative, and that the legislative history makes it "crystal clear" that section 1094.5 of the Code of Civil Procedure was intended to apply only to quasi-judicial acts.

Having ascended to this sturdy platform, the court stepped resolutely into thin air. Feeling impelled to answer "the question, to what extent, independently of section 1094.5 of the Code of Civil Procedure, can the writ of mandate be

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If the Director's hostility to the trial court's order was in part caused by his disagreement with the proposition that a hearing ought to be held, there was little point to ruling that he should have been asked to do so; exhaustion is excused when futile. See 17 Cal. 2d at 301-02, 109 P.2d at 953-54. It may be assumed, therefore, that his objection was to the order restraining the enforcement of the marketing order pending the modification hearing and return thereon.

43. The trial court was held to have rightly refused to examine evidence outside the record. 109 Cal. App. 2d at 606, 241 P.2d at 292. Likewise, it was held that no error was committed when the trial court failed to examine the evidence in the record to determine its sufficiency, as the respondents were "proceeding wholly upon the theory that they were entitled to upset the director's action by events occurring subsequently to the proceeding before him." Id.


45. As the trial court's action was disapproved, any "statement in the opinion that a contrary finding could not have been sustained is necessarily dicta." Windsor v. Windsor, 42 Cal. App. 2d 464, 466, 109 P.2d 363, 364 (1941); see People v. Goree, 240 Cal. App. 2d 304, 310, 49 Cal. Rptr. 392, 395 (1966).

46. The holding on exhaustion would not have been at all impacted by a different finding concerning the nature of the proceedings below, as exhaustion of administrative remedies is required not only in "traditional" mandamus actions, as the court held, but also in "administrative" mandamus actions pursuant to the Code of Civil Procedure section 1094.5. See Miller v. Department of Alcoholic Beverage Control, 160 Cal. App. 2d 658, 325 P.2d 601 (1958), W. Deering, California Administrative Mandamus § 6.18, at 103 (1967). See also id., § 6.19, at 103-04 (actions for declaratory relief or injunction); Bleeck v. State Bd. of Optometry, 18 Cal. App. 3d 415, 432, 95 Cal. Rptr. 860, 871 (1971).

used to review the quasi-legislative action of an administrative body," the court first quoted various authorities for the proposition that mandate will issue in the absence of other available remedies.

Seemingly poised to apply that proposition to the case at bar, the court posited:

[T]here certainly must be some way of reviewing the quasi-legislative acts of an administrative officer, at least to the extent of determining whether in issuing the order in question the proceedings were as prescribed by law, there was any evidence upon which to base his action, etc., and if there is no other adequate remedy, then the historic remedy of mandate must apply.

The other shoe never did drop, however. The court could not escape recognizing that there were available remedies in declaratory and injunctive relief. It therefore abandoned, indeed contradicted, this line of reasoning entirely and abruptly sailed off on an entirely new tack:

While originally mandate would not lie if there were other remedies available, that is no longer the situation in California . . . Therefore, the fact that an action in declaratory relief lies . . . and there is some indication that in a proper case injunction will lie . . . does not prevent the use of mandate.

48. Id. at 601, 241 P.2d at 289.
49. Historically, the writ of mandate was invented to provide a remedy where no other remedy existed. As is stated in 9 Halsbury’s Laws of England, 744, section 1269, in speaking of the writ of mandamus:

“‘Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice will be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right.’ (See also, 16 Cal. Jur. 764, sec. 4)” (Drummey v. State Board of Funeral Directors, 13 Cal. 2d 75, 82 [87 P.2d 848]).

In the Drummey [case] and other cases following it [footnote omitted] our Supreme Court laid down some rules concerning mandate which, although there referring only to the review of license cases, probably would apply to any administrative board action reviewable by the courts. In the Drummey case, supra (13 Cal. 2d 75, 82), the court said:

“. . . in the absence of a proper statutory method of review, mandate is the only possible remedy available to those aggrieved by administrative rulings of the nature here involved.”

50. Id. at 602, 241 P.2d at 289.
51. See text accompanying notes 27-30 supra.
52. 109 Cal. App. 2d at 603, 241 P.2d at 289 (citations omitted).
With that, the court ended the defense of its conclusion.

THE "OTHER ADEQUATE REMEDIES" DOCTRINE: A PREMATURE OBITUARY

Having in mind the rationale underlying the rule, we turn to its well-deserved critical examination. Mark Twain once complained to the Associated Press that its report of his death was an exaggeration. The report in Brock that the "other remedies" rule is dead in California cannot be so charitably dismissed, as the court, perhaps unlike the Associated Press, should easily have known better.

Brock cites only the 1943 decision in Sipper v. Urban for the proposition that the "other remedies" doctrine is dead in California. While we might therefore excuse the court for ignoring all of the pre-1943 authority for the rule, some of which it quoted, its ignorance of all the authority for the doctrine after the decision in Sipper and before the writing of its opinion, including six decisions of the supreme court (five of them no more than four years old) is hard to excuse.

53. Cablegram from London to the Associated Press, June 2, 1897.
54. 22 Cal. 2d 138, 137 P.2d 425 (1943).
55. Note 49, supra. See Andrews v. Police Court, 21 Cal. 2d 479, 480, 133 P.2d 398, 398-99 (1943); Irvine v. Gibson, 19 Cal. 2d 14, 15-16, 118 P.2d 812, 813 (1941); Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 329, 109 P.2d 935, 949 (1941); Crandall v. Amador County, 20 Cal. 72, 75 (1862), where the court stated:

The invariable test . . . by which the right of a party applying for a [writ of] mandamus is determined, is . . . whether there is any adequate remedy to which he can resort to enforce his right. If there is, he cannot have a [writ of] mandamus . . . . To prevent a failure of justice, and only for this, the Court will avail itself of this extraordinary power.

See also Goodwin v. Glazer, 10 Cal. 333, 334 (1858); Draper v. Noteware, 7 Cal. 276, 278 (1857); Coombs v. Smith, 17 Cal. App. 2d 454, 455, 62 P.2d 380, 381 (1936); Potomic Oil Co. v. Dye, 10 Cal. App. 534, 537, 102 P. 677, 678 (1909).
56. Phelan v. Superior Court, 35 Cal. 2d 363, 366, 217 P.2d 951, 953 (1950), where the court stated:

Although the statute [CAL. CIV. PROC. CODE § 1086 (West 1955)] does not expressly forbid the issuance of the writ [of mandate] if another adequate remedy exists, it has long been established as a general rule that the writ will not be issued if another such remedy is available to the petitioner. [Citations omitted.] The burden, of course, is on the petitioner to show that he did not have such a remedy.

What is inexcusable is that Sipper cannot, except by the wildest misreading, stand for the proposition for which it was cited. In that case, a writ of mandate was filed to review the quasi-judicial order of the Real Estate Commissioner suspending a broker's license. In a single paragraph, the court rejected the lone contention that the trial court could not refuse the writ without according the broker a hearing on his petition. The court ruled that, where no abuse of discretion is shown on the face of the petition, it is not error to deny the writ without a hearing.\(^7\) The opinion spans less than four pages; it brooks no misreading. It breathes not a hint of the momentous holding for which it is cited in *Brock*.

In a concurring opinion, Justice Traynor notes that the Real Estate Act provided for review of this quasi-judicial decision by way of certiorari, and states in passing that "[s]o long as this procedure is not held unconstitutional the present proceeding in mandamus should be dismissed under the Real Estate Act."\(^5\) Of course, ever since *Standard Oil*, review by certiorari of a quasi-judicial decision was unconstitutional. As Justice Schauer noted in his concurring opinion, mandamus has been "repeatedly affirmed as the only tenable and available proceeding for review of state board proceedings."\(^5\)

Clearly, then, had the court been of a mind to reach the constitutional issue, it would have declared the statute calling for certiorari unconstitutional. There was, however, no reason to reach that issue. The pleading was patently defective; whatever the remedy invoked, no cause of action was stated. The court ignored the suggestion of Justice Traynor in obvious deference to "the long-established rule that an appellate court will not enter upon the resolution of constitutional questions unless absolutely necessary to a disposition of the appeal."\(^6\)

57. 22 Cal. 2d at 141, 137 P.2d at 426-27.
58. *Id.* (Traynor, J., concurring).
59. *Id.* at 144-45, 137 P.2d at 427-28.

It is elementary that a court will not decide a constitutional question unless absolutely necessary and . . . even though a constitutional ques-
But even this refutation concedes to Brock far more than it deserves. Justice Traynor was obviously not urging the abandonment of the "other remedies" doctrine; he was urging consideration of the applicability of Standard Oil to the statute calling for review by certiorari. Exactly what the court in Brock was thinking of when it cited Sipper must remain an impenetrable mystery of jurisprudence.

The firmest refutation of Brock, however, is not analytical, but historical. Numerous cases after Brock, paying not the slightest attention to Brock's funeral oration, continue to cite the "other remedies" doctrine as the settled law in California.61

Justice Holmes described the situation as "revolting" where a rule of law persists although "the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."62 The persistence of the rule in Brock is worse, for the sole ground upon which it was laid down never existed in the first place, but was bogus ab initio.

At present, then, the rule in Brock, that mandate is available to review quasi-legislative actions irrespective of the adequacy of other remedies, exists side by side with the doctrine applied in all other cases that mandate is not available in the

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face of other adequate remedies. In one recent case, both rules are stated on the same page,\textsuperscript{63} without any recognition of the inconsistency between them.

The tension between the rule established in \textit{Brock} and the doctrine \textit{Brock} pronounced dead is ineluctable, and as set forth below,\textsuperscript{64} there are some significant recent signs of departure from \textit{Brock}'s approach to the applicability of mandamus to quasi-legislative actions in the presence of other adequate remedies.

\textbf{The Case of the Phantom Statute}

As discussed above, the rule announced in \textit{Brock} that mandamus is routinely available to review quasi-legislative actions is entirely irreconcilable with the doctrine, quite alive and well, that mandamus may not be invoked in the face of other adequate remedies. Were this all that was wrong with the rule, those indifferent to jurisprudential symmetry might agree with the words of Justice Frankfurter (albeit uttered in a different context) that "the most constructive way of resolving conflicts is to avoid them."\textsuperscript{65} For almost three decades, the courts have avoided any hint of overt recognition that the rule in \textit{Brock} is baseless and inconsistent. While some may dismiss consistency as "the hobgoblin of little minds,"\textsuperscript{66} the inescapable fact that the rule is thoroughly refuted by the very statute it invokes must be allowed as a palpable, and by any fair reckoning, a terminal infirmity.

It is a peculiarity of the cases that when the proposition is recited that "[t]he courts may rely upon mandamus under Code of Civil Procedure section 1085 to review the validity of a quasi-legislative action,"\textsuperscript{67} the opinion virtually never quotes the referenced statute. Indeed, \textit{Brock} coyly nevet once mentions section 1085, but refers obliquely to mandate "indepene-
Such reticence inspires an investigator to review section 1085 and judicial construction of the statute.

Since its enactment in 1872, Code of Civil Procedure section 1085 has provided, in relevant part, that the writ of mandamus "may be issued . . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station . . . ." The reference to "an act which the law specially enjoins" has been taken as denoting an action specifically (as distinguished from generally) required by law.69

Thus, for example, in Black v. City of Santa Monica,70 plaintiffs sought a writ of mandamus against a municipality in connection with an alleged breach of contract. After ruling that mandamus would not lie because a suit for damages was an adequate remedy, the court held:

Furthermore, the law imposes upon municipal corporations and their officers no special duty to carry out the terms of contracts or to refrain from breaches of contractual relations. They are not singled out, as distinguished from other corporate entities or other individuals, as obligations . . . .71

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71. 13 Cal. App. 2d at 6, 56 P.2d at 257; see also Wenzler v. Municipal Court, 235 Cal. App. 2d 128, 132, 45 Cal. Rptr. 54, 57 (1965). In Ramsay v. Cullen, 56 Cal. App. 5, 6, 204 P.2d 251, 252 (1921), mandate was sought against an ordinance alleged to have resulted from fraud. The court refused to issue the writ, because [t]he law does not specially enjoin legislative bodies to repeal ordinances which have sprung from their counsels as the result of frauds, no matter how strongly it may be asserted that it is . . . their moral duty. Id., 204 P.2d at 252. See Perrin v. Honeycutt, 144 Cal. 87, 90, 77 P. 776, 777 (1904).
The court was not, of course, saying that municipalities have no duty to adhere to their contracts—that duty, however, is general and pervasive, rather that specific and concrete. Substantive review of a quasi-legislative action "is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support. . . ." and is thus "'based on no more than the will or desire of the decision-maker and is not supported by a fair or substantial reason. . . .'" A duty of government more general and pervasive than to refrain from arbitrary, capricious, and baseless actions could scarce be conceived.

The statutory limitation on the availability of mandamus to "an act which the law specially enjoins" means that the writ is not available save in "a case where the act was definite, certain and fixed, and where its character and scope, and the result to flow from it, were as well known before the doing of the act as afterwards." This is obviously not the case with respect to quasi-legislative actions, as within the realm of non-arbitrary decisions a variety of valid results are possible.

The conclusion would, then, seem inexorable that the limitation on the availability of mandamus to the enforcement of actions "which the law specially enjoins" precludes use of the writ to review quasi-legislative administrative actions.

save consideration of whether procedural prerequisites were performed and then subject to the condition that no other remedy is adequate to address that issue in a given case.

Before we precipitously conclude that the statute means what it says, we must pause to consider the judicial exegesis. The "plain meaning rule" notwithstanding, the sentiment is not wholly dead that "[t]he words [a judge] must construe are empty vessels into which he can pour nearly anything he will."

In the case of section 1085 of the Code of Civil Procedure, the course of judicial construction resembles a game of "telephone," with each interpretative step being based on its predecessor, without further reference to the statute, until the final result bears scarcely a familial likeness to the original legislative message.

The first step on this journey away from the statute was the equation of the reference to duties "which the law specially enjoins" with "ministerial duties," a not unlikely holding: "The statute [section 1085] tersely declares that the writ is available 'to compel the performance of an act which the law specially enjoins . . . .' Thus it is limited to the enforcement of purely ministerial duties . . . ."

The next step, of

77. CAL. GOV'T CODE §§ 11420-11427 (Deering 1973); see cases cited at note 72 supra.
78. See text accompanying notes 55-56 supra.

'The meaning of a statute must, in the first instance, be sought in the language in which the [statute] is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.'

Id. (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). See also Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313, 318, 347 P.2d 909, 912, 1 Cal. Rptr. 494, 497 (1959); People v. Sands, 102 Cal. 12, 16, 36 P. 404, 405 (1894); In re W.R.W., 17 Cal. App. 3d 1029, 1033, 95 Cal. Rptr. 354, 357 (1971); People v. Chambers, 7 Cal. 3d 666, 674, 498 P.2d 1024, 1029, 102 Cal. Rptr. 776, 781 (1972).


While in Flora Crane Serv., Inc. v. Ross, 61 Cal. 2d 199, 203, 390 P.2d 193, 196, 37 Cal. Rptr. 425, 428 (1964), the requirement of the statute was said to be "a clear
course, was to interpret the term "ministerial," which was in turn invoked to interpret the statutory language. The courts decided that this term is to be understood as the opposite of "discretionary," thus invoking still another term.

To this point, no administrative actions properly described as quasi-legislative could be reviewed under the mandamus statute, for the essence of quasi-legislative actions is the exercise of discretion. The next step, however, requires that the reader's eyes be affixed firmly on the shells:

and present ministerial duty," other cases have equivocated and phrased the requirement as being a "clear, present and usually [sic] ministerial duty." Loder v. Municipal Court, 17 Cal. 3d 859, 863, 553 P.2d 624, 627, 132 Cal. Rptr. 464, 467 (1976), cert. denied, 429 U.S. 1109 (1977); People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 491, 487 P.2d 1193, 1199, 96 Cal. Rptr. 553, 559 (1971); Larson v. City of Redondo Beach, 27 Cal. App. 3d 332, 336, 103 Cal. Rptr. 592, 594 (1972); Franklin v. Municipal Court, 26 Cal. App. 3d 884, 898, 103 Cal. Rptr. 354, 363 (1972). These cases do not cite Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2d 803, 813, 25 Cal. Rptr. 798, 805 (1962), which appears to be the first case to use this language. None of these cases spell out the reason for the cautionary insertion nor how it was derived from the statute.


Discretion may be defined, when applied to public functionaries, as the power conferred on them by law to act officially according to the dictates of their own judgment. A ministerial act, on the other hand, is one that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed, when a given state of facts exists. [Citation omitted.] Stated otherwise, it is an act with respect to the performance of which a public officer can exercise no discretion—an act or duty prescribed by some existing law that makes it incumbent on him to perform precisely as laid down by the law. [Citations omitted].

A nice illustration of the operation of this distinction is to be found in cases holding that mandamus will issue to enforce the ministerial duty of an officer to exercise his discretion, e.g., Payne v. Superior Court, 17 Cal. 3d 908, 925-26, 553 P.2d 565, 577-78, 132 Cal. Rptr. 405, 417-18 (1976); Shepard v. Superior Court, 17 Cal. 3d 107, 118, 550 P.2d 161, 166, 130 Cal. Rptr. 257, 262 (1976); Anderson v. Phillips, 13 Cal. 3d 733, 736, 532 P.2d 1247, 1249, 119 Cal. Rptr. 879, 881 (1974); Ballard v. Anderson, 4 Cal. 3d 873, 885, 484 P.2d 1345, 1353, 95 Cal. Rptr. 1, 9 (1971); Knoff v. City & County of San Francisco, 1 Cal. App. 3d 184, 197, 81 Cal. Rptr. 683, 691 (1960).

83. City Council v. Superior Court, 179 Cal. App. 2d 389, 393-94, 3 Cal. Rptr. 796, 799 (1960); see cases cited at note 2 supra.
the exercise of discretion by one in whom the law reposes such discretion . . . , but the rule is qualified in that, 'An abuse of discretion, however, is not the exercise of discretion, and it is settled that the writ will issue to correct such abuse if the facts otherwise justify its issuance.'

Although the chain of logic reconciling this rule with the rule that mandamus lies only to compel ministerial acts is nowhere fleshed out, it apparently runs rather like the following. Actions may be classed as either ministerial or discretionary. Therefore, any action not discretionary must be ministerial. As no official has been granted the discretion to abuse his discretion, it follows that the abuse of discretion is not a discretionary act. Therefore, it is a ministerial act and mandate will issue to correct the abuse.

If this logic is troublesome in the abstract, its early application was not, for the "abuse of discretion" reasoning was considered a restatement of the following rule:

Our view of the law then was, and yet is, that if an official duty is to be performed on the happening of an event, the officer cannot arbitrarily and capriciously refuse to perform it after the event has happened, on the plea that he is not satisfied that it has happened. If the fact exists, and is established by sufficient proofs, it is his legal duty to be satisfied, and to act accordingly.

In Phyle v. Duffy, for example, the court considered a statute which "provides that where there is good reason to believe a condemned prisoner is insane the warden must institute a proceeding directed to . . . the issue of his sanity." The court invoked the rule that

[m]andate is the proper remedy to compel a public officer to perform an official duty, and it may be had not only upon a failure to exercise a duty but also where the officer's refusal to do so constitutes an abuse of discretion.

Several cases have applied the same principle where an applicant satisfied the criteria for a license or certificate, and yet it

86. 34 Cal. 2d 144, 208 P.2d 668 (1949).
87. Id. at 153, 208 P.2d at 673 (emphasis in original).
88. Id.
was arbitrarily denied.\footnote{E.g., Keller v. Hewett, 109 Cal. 146, 148, 41 P. 871, 872 (1895); Henry v. Barton, 107 Cal. 535, 536, 40 P. 798 (1895); Thomas v. Armstrong, 7 Cal. 287, 288 (1857).}

Another variation on this theme is found in \textit{Raisch v. Board of Education}\footnote{81 Cal. 542, 22 P. 890 (1889).} where a school district contracted for some rubber hose and then refused to pay. The court noted that a statute established a duty to pay the bill, except that the board might “reject any such demand for good cause, of which said board shall be the sole judge.”\footnote{Id. at 545, 22 P. at 890.} The board’s argument that it had adjudged not to pay and that its decision was conclusive, was brushed aside:

But although the board is to be the ‘sole judge’ of what is good cause, still the rejection cannot be arbitrary or capricious. There must be at least the semblance of a cause. The board, after obtaining materials which it has ordered and needs for school purposes, cannot say: “True, the materials are of the kind and quality ordered, but we have concluded not to pay for them, and therefore reject the demand.” . . . If there was no semblance of cause, then it is clear that it was the duty of the board to draw the drafts, and the writ will be granted to compel the performance of this duty.\footnote{Id. at 546-47, 22 P. at 891.}

These cases and others\footnote{E.g., Dufton v. Daniels, 190 Cal. 576, 213 P. 949 (1923), a case wherein the code section makes it the plain duty of the board of control to audit and allow the necessary travelling expenses of the petitioner . . . unless in fact the fugitive so returned by him was not placed on trial. \textit{Id}. at 580, 213 P. at 950. The State’s claim that the fugitive was not “placed on trial” was rejected because “the facts are all admitted and are susceptible to but one construction.” \textit{Id}. at 580-81, 213 P. at 950. \textit{See also} Tulare Water Co. v. State Water Comm’n, 187 Cal. 533, 536, 202 P. 874, 876 (1921) (holding that “[t]he commission surely does not possess and could not be invested with the power to arbitrarily deny an application made in conformity to the law for the appropriation of water that was subject to appropriation.”); City of San Marcos v. California Highway Comm’n, 60 Cal. App. 3d 383, 417-18, 131 Cal. Rptr. 804, 826-27 (1976); Ellis v. City Council, 222 Cal. App. 2d 490, 497, 35 Cal. Rptr. 317, 321 (1963); Hand v. El Dorado Irrigation Dist., 97 Cal. App. 740, 276 P. 137 (1929).} display two salient features: First, it cannot escape notice that in each case the “discretion” reposed in the administrative agency was solely quasi-judicial, as it called for the mere determination of an issue of fact upon which the application of a settled rule depends,
rather than the formulation of a policy to be applied in future cases. More to the point for present purposes is that there was, in each case, an undeniable ministerial duty. The sole issue was whether the agency would be allowed to interpose a bogus excuse to avoid its performance. The presence of a ministerial duty kept each case tethered to the statute authorizing mandamus.

The final step in this judicial evolution has been, of course, to unhitch the "abuse of discretion" test from the requirement of a ministerial duty, and apply it to agencies acting in a quasi-legislative capacity, not bothering to note that the remedy may no longer be authorized in this new context. The fallacy of this last step is immediately revealed when we compare the result of this construction with the original statutory language. As was pointed out, the general and pervasive obligation of government to act reasonably is not "an act which the law specially enjoins," nor is it so "definite, certain and fixed . . . [in] its character and scope . . . [that] the result to flow from it [is] as well known before the doing of the act as afterwards."

In short, the statute is simply not applicable to quasi-legislative actions, nor can it be made applicable by ignoring its text or fabricating a chain of dubious interpretive glosses, no matter how lengthy or tortuous.

94. See note 2 supra.
95. As the rule was expressed in Inglin v. Hoppin, 156 Cal. 483, 105 P. 582 (1909), stated:
Where discretion other than legislative is vested in such a subordinate officer or tribunal, the exercise of that discretion will be subjected to correction if abused. Where the act is in its nature ministerial and depends upon the existence or non-existence of facts, if the jurisdiction to determine the fact be vested, in the first instance, in such inferior tribunal, its determination made upon conflicting evidence will not be reviewed. Yet, if the case presented be one where the decision has been in such flat opposition to the plain and uncontradicted facts as to force the conclusion that the decision was in bad faith, a review by the courts will always be open . . . .
Id. at 487, 105 P. at 583-84 (emphasis added).
96. See note 72 supra.
97. See text accompanying note 74 supra.
98. Jacobs v. Board of Supervisors, 100 Cal. at 129, 34 P. at 632.
99. The inapplicability of the statute to quasi-legislative actions would obtain, of course, irrespective of the unavailability or inadequacy of alternative remedies, such as injunctive or declaratory relief. As applied to that limited class of cases, an argument can be fashioned that the statute unconstitutionally limits the jurisdiction of the courts.
CRACKS IN THE WALL

As of this writing, no case has undertaken a critical examination of the rule laid down in Brock, or of the analysis proffered to justify that rule. Some recent cases, however, have disposed of petitions for mandamus with reasoning wholly irreconcilable with that case.

In Malibu West Swimming Club v. Flournoy,100 for example, an order of the State Controller dubbed as quasi-legislative was attacked by way of mandamus. The court first noted the rule of Brock that "[a] party may seek review of a quasi-legislative action through a 'traditional' mandamus proceeding under Code of Civil Procedure section 1085."101 Departing abruptly from the approach of Brock, the court then announced:

Availability of review by traditional mandamus does not equate with entitlement to it. The writ will not be granted where the petitioner has an adequate remedy in the ordinary course of law . . . . The adequacy of other

Authority to grant relief "in the nature of mandamus" is founded in the constitution (Cal. Const. art. VI, § 10) and "the cases [have] held that such jurisdiction could not be enlarged, and occasionally added by way of dictum that it could not be curtailed [citation omitted]." Modern Barber College v. California Employment Stability Comm’n, 31 Cal. 2d 720, 731, 192 P.2d 916, 922 (1948). See Saxton v. Board of Educ., 206 Cal. 758, 768, 276 P. 998, 1002 (1929); Mojave River Irrigation Dist. v. Superior Court, 202 Cal. 717, 724, 262 P. 724, 727 (1927); Miller & Lux v. Board of Supervisors, 189 Cal. 254, 259-60, 208 P. 304, 307 (1922).

If mandamus is "the remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided," Bodinson Mfg. Co. v. California Employment Comm’n, 17 Cal. 2d 321, 329, 109 P.2d 935, 940 (1941), no statute can forbid the issuance of the writ in such a circumstance. Such a holding would be entirely compatible with the thesis of this article, that mandamus is, and of right ought to be, an extraordinary remedy.

It might be noted in this connection that in 1966 the constitution was amended to alter the grant of jurisdiction from the "power to issue writs of mandamus" (former Cal. Const. art. VI, §§ 4, 4b, 5) to the present language granting "jurisdiction in proceedings for extraordinary relief in the nature of mandamus (Cal. Const. art. VI, §§ 4, 4b, 5)." The issue of whether a similar change in the statute granting jurisdiction to federal courts to issue the writ was intended to broaden its availability was raised, but not decided, in Burnett v. Tolson, 474 F.2d 877, 880 (4th Cir. 1973). For present purposes, it should be stressed that the amended language reaffirms that mandamus is a species of "extraordinary relief." The courts possess no more authority to expand their constitutionally granted jurisdiction than the legislature has to contract it.

100. 60 Cal. App. 3d 161, 131 Cal. Rptr. 279 (1976).
101. Id. at 164, 131 Cal. Rptr. at 281.
102. Id.
remedies requires an inquiry into the circumstances of the particular case... 103

After examining the circumstances then at bar, the court concluded that the petitioners had an adequate remedy in paying the additional tax occasioned by the order and suing to recover it. 104

This, of course, was utterly opposed to Brock and the cases that follow its doctrine, 105 none of which undertake "an inquiry into the circumstances of the particular case" to determine the adequacy of alternative relief, let alone placing the burden on the petitioner to demonstrate the inadequacy of such remedies. 106 According to Brock, the "other remedies" rule is dead, and mandamus is available irrespective of what other relief might have been sought. 107 While previous cases had come to a similar result, also relying on the "other remedies" doctrine, 108 those cases involved almost exclusively review of assessment adjudications, expressly categorized as quasi-judicial, and attempts at review pursuant to the administrative mandamus statute. Here, the court directly invades the territory staked out by Brock.

Interestingly, it has been held that declaratory relief is available to review the validity of state tax regulations without the necessity of paying the tax and suing for a refund. 109 Placed alongside Malibu West Swimming Club (which has been cited with approval by one court 110 and followed by still another111) a palpable conflict in the cases is established.

While Malibu West Swimming Club is irreconcilable with Brock because it ignores Brock's premature requiem for the "other remedies" doctrine, two other cases are irreconcilable with Brock because they display uncharacteristic conscious-

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103. Id. (citation omitted).
104. Id. at 164-65, 131 Cal. Rptr. at 281-82.
105. See note 1 supra.
106. See note 56 supra.
107. See text accompanying note 52 supra.
ness of the governing statute.

The first of these cases, *State of California v. Superior Court (Veta)*,\(^{112}\) was an action by a disappointed applicant to the California Coastal Zone Conservation Commission for a permit to develop coastal property.\(^{113}\) The petitioners sought review of the Commission's decision, *inter alia*, by way of mandamus. The California Supreme Court made fast work of the petition:

Veta seeks to invoke the "traditional mandamus" provisions of section 1085 of the Code of Civil Procedure . . . . That section may be employed to compel performance of a duty which is purely ministerial in character; it cannot be applied to control discretion as to a matter lawfully entrusted to the Commission . . . .

Even the most cursory examination of the Act reveals that determination of whether an applicant qualifies for a permit is entrusted to the Commission's discretion. Thus, a permit may not issue unless the Commission finds, for example, that the development will not have any substantial adverse environmental or ecological effect . . . or irreversibly commit coastal zone resources, and that the proposed development will enhance the environment of the coastal zone . . . . The application of these factors requires the Commission to undertake a delicate balancing of the effect of each proposed development upon the environment of the coast as a predicate to the issuance of a permit. This process is manifestly inconsistent with an assertion that the Commission's functions in this regard are purely ministerial in character. Thus, the trial court should have sustained the general demurrer insofar as the petition seeks to compel the Commission to issue the permit.\(^{114}\)

This straightforward adherence to the terms of the statute is at marked variance with the authorities discussed above,\(^{115}\) which obscurely proclaim that an "abuse" of discretion is not the "exercise" of discretion and therefore, somehow, falls within the terms of the statute designed to enforce ministerial duties. As was noted, if the statutory language is

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113. Id. at 242-43, 524 P.2d at 1284, 115 Cal. Rptr. at 500.
114. Id. at 247-48, 524 P.2d at 1287-88, 115 Cal. Rptr. at 503-04 (citations omitted).
115. See text accompanying notes 84-98 *supra*. 
followed, virtually no determination made in a quasi-legislative capacity would be reviewable by mandamus, as the essence of a quasi-legislative action is the exercise of discretion.\footnote{116}

It is significant that the petition in \textit{State of California v. Superior Court (Veta)} could have been dispatched with as great alacrity on an alternate ground that is not dissonant with prior authority. The Attorney General had conceded that review might be had by “administrative mandamus” pursuant to Code of Civil Procedure section 1094.5.\footnote{117} The court could have invoked the rule that where review under that section is available, a petitioner may not seek review by way of “traditional mandamus” under Code of Civil Procedure section 1085.\footnote{118}

The sustaining of a demurrer was likewise the subject of review in \textit{Hilton v. Board of Supervisors}.\footnote{119} The petition alleged that the Board should not have rezoned certain property because, \textit{inter alia}, “the evidence presented to the board overwhelmingly favored a denial of the rezoning amendment, the ignoring of which evidence amounted to a prejudicial abuse of discretion on the part of respondent body.”\footnote{120} The court affirmed the sustaining of the demurrer, stating:

\begin{quote}
There is no allegation by petitioners, nor could there be, that it was the ministerial duty of respondents to rescind the ordinance here involved, since numerous cases uniformly hold that the enactment of a zoning ordinance is purely a legislative act and a governmental function . . . . Too, since the passage of a zoning ordinance is a legislative act, it necessarily follows that the vacating of such an enactment (the relief here sought) is likewise legislative in character . . . . “[T]he complaint simply asks the court to issue the writ to compel . . . the defendant . . . to perform a legislative act . . . . It is elementary that the courts have no such power.”\footnote{121}
\end{quote}

\begin{footnotes}
\item 116. See text accompanying note 83 \textit{supra}.
\item 117. 12 Cal. 3d at 245, 524 P.2d at 1286, 115 Cal. Rptr. at 502.
\item 119. 7 Cal. App. 3d 708, 86 Cal. Rptr. 754 (1970).
\item 120. \textit{Id.} at 713, 86 Cal. Rptr. at 757.
\item 121. \textit{Id.} (citation omitted).
\end{footnotes}
The aforementioned cases are, of course, woefully outnumbered by those mechanically citing and following the rule of Brock. The former can be dismissed as sporadic examples of that fundamentalist fidelity to legislative direction that unexpectedly grips a court and is promptly forgotten. And it may be that these flirtations with logic and tradition and statutory limitations are weaker than the tendency of the courts toward an incestuous relationship with their own past thoughts. A conflict in the cases exists, however, that invites the supreme court to critically reexamine this issue.\textsuperscript{122}

A Practical Postscript

At present, one seeking judicial review of a quasi-legislative action has the untrammelled option of: 1) seeking a declaratory judgment of his rights, 2) applying for a writ of mandate, 3) requesting an injunction against enforcement of the regulation, or 4) any combination of the above.\textsuperscript{123} The forms and combinations of remedies chosen may have significant, and sometimes unintended, procedural consequences.

For example, while precedence is accorded to trials in actions requesting an injunction\textsuperscript{124} or declaratory relief,\textsuperscript{125} at least both sides know that the trial cannot be held until the statutory thirty days allowed for an answer have elapsed\textsuperscript{126} and the case is at issue. In more crowded courts, even cases granted precedence may be considerably delayed.

By contrast, an action in mandamus may proceed on a blindingly fast track. Originally, the only issues to be determined in a mandate action were whether a specific, ministerial action was required by law, and whether it had been performed. The trial on these issues occurs, absent some other order of the court, on the date set for return on the alternative writ,\textsuperscript{127} which may be only a few days after the action was

\begin{itemize}
  \item 122. \textit{Cal. R. Ct. 29(a)}.
  \item 123. \textit{Leahey v. Department of Water \\ & Power, 76 Cal. App. 2d 281, 285, 173 P.2d 69, 71-72 (1946); see note 22 supra.}
  \item 125. \textit{Id.} § 1062(a). The action for declaratory relief may be slowed if other relief is also requested, in which case the matter "shall take precedence only upon noticed motion and a showing that the action requires a speedy trial." \textit{Id.}
  \item 126. \textit{Id.} § 412.20.
  \item 127. The date for the return and hearing is specified in the alternative writ . . . .
\end{itemize}

On the hearing date, all parties must be ready to proceed, with all
As Bernard Witkin rightly complained, such a procedure was never designed to operate in the context of modern administrative law:

The traditional and conventional writ of mandamus was never devised for [administrative review], nor would the restoration of certiorari to pre-Standard Oil days be any better. Modern administrative law has become... complex and distinctive and important. I think it would be a big step to divorce administrative review from the writ procedure and handle it separately.

For example, a petitioner may challenge by way of mandamus a health standard for some toxic substance set by a regulatory agency after consideration of a voluminous mass of scientific data. Especially in such a case, a court "must engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'" The reviewing court must consider the most complex evidentiary matters.

Even in such a case, it is not atypical for a petitioner claiming grievous financial harm from the operation of the regulation to demand the immediate trial the statute potentially affords him. On the other side, the administrative agency may seek advantage from the facts that although the burden is on the petitioner to obtain and file the administrative record, the materials constituting the full record are most often in the hands of the agency alone, thus allowing it...
to control the speed of the assembly, duplication, and release of the record. The agency may also insist on a trial on the date of return on the alternative writ, catching the petitioner unprepared.

It may be rightly objected that an astute, sensitive, and informed trial court would not allow such abuses, and that the flexibility of mandamus procedure allows a prompt hearing consistent with adequate preparation of court and counsel with the appellate courts standing ready to correct particularly egregious errors. Even eschewing a challenge of this idealized view of the judiciary, whether or not a trial court is accorded such wonderful flexibility should not depend upon into which door of the writ house the petitioner has wandered. Any need for immediate relief can be adequately afforded by means of a restraining order or injunction. Moreover, procedural predictability, while the most humble of desiderata, is not the least important.

The second procedural consequence of the remedy pursued is that while a judgment in a declaratory relief action declares that "plaintiff is entitled" to certain relief and that "it is the duty of defendants" to do certain things ... in a mandamus proceeding defendants would have been commanded to perform the duties which the court determined should be performed.

It has been suggested, for that reason, "that mandamus against a public officer is a more adequate remedy than declaratory relief." While it is doubtless not unknown for an administrative agency to ignore a judicial declaration, this should not be presumed to be the natural and reflexive response:

A declaratory judgment is an adjudication, not an abstraction ... Public officials must respect the court's declaration and follow its interpretation of the law ...

132. No statute or rule of court regulates the speed with which an administrative record must be prepared in a mandamus action challenging a quasi-legislative act. Cf. Cal. Gov't Code § 11523 (West Supp. 1980) (which provides that an agency must provide the record within 30 days of a request therefor when an administrative adjudication is challenged under the Administrative Procedure Act).


For purposes of judicial finality there is no more reason for assuming that a commission will disregard the direction of a reviewing court than that a lower court will do so.\(^{135}\)

Should the plaintiff fear that this presumption might not be translated into reality in his particular case, he is free to seek an injunction against enforcement of the rule or regulation ancillary to the declaratory relief.\(^{138}\) Should peculiar circumstances arise where even this relief would be inadequate to vindicate a plaintiff's rights, the writ of mandamus would still stand ready to fulfill its ancient offices.

**CONCLUSION**

Since its invention, the writ of mandamus has been considered a "'drastic and extraordinary' . . . remedy . . . reserved for really extraordinary causes."\(^{137}\) The Constitution of California accordingly specifies that mandamus is to be "extraordinary relief."\(^{138}\) The exigencies that led the supreme court to turn to mandamus as the routine method of review of quasi-judicial acts were never applicable to review of quasi-legislative actions. Its availability in cases where it is not needed serves mainly to inject an additional element of unpredictability into review proceedings. The statute that governs issuance of the writ cannot be tortured to countenance the present practice, and so has been largely ignored.

The reasoning expounded in the dicta in *Brock*, having survived collapse from its own internal inadequacies only through a protracted absence of critical review ought, one might optimistically think, succumb to the overwhelming force of the governing law. Whether it does will provide a fair

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\(^{135}\) Louis Eckert Brewing Co. v. Unemployment Reserves Comm'n, 47 Cal. App. 2d 844, 846, 119 P.2d 227, 228 (1941) (citations omitted). See Pacific Motor Transport Co. v. State Bd. of Equalization, 28 Cal. App. 3d 230, 236, 104 Cal. Rptr. 558, 562 (1972) ("It will be presumed that the governmental agency will respect a judicial declaration concerning a regulation's validity.")


\(^{138}\) CAL. CONST. art. VI, § 10.
test of Coke's saying: "The reason of the law is the life of the law." By that reckoning, the law as laid down in Brock is already dead.