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Ray Jay Davis
West Virginia University College of Law

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Mandamus to review administrative action in West Virginia

Ray Jay Davis

Limitation by law of governmental action and legal responsibility of officials are ramparts in defense of constitutional democracy. The American people expect all branches of government—executive and legislative, as well as judicial—to protect us against arbitrary official action. Lawyers, however, are primarily interested in judicial restraints and limitations upon officialdom. This article is an examination of the West Virginia law concerning one of the methods used by courts to control administrative officers—the writ of mandamus.

This common law writ is an order from a court, directed to an executive official or to an inferior tribunal, commanding or prohibiting an act, the completion or omission of which is required by law. In West Virginia, by virtue of constitutional and statutory provisions, the circuit courts are vested with power to issue man-
damus. By constitutional grant the Supreme Court of Appeals not only can review circuit court mandamus proceedings, but also has original jurisdiction to award the writ. 6

In the past few years mandamus has become ever more popular as a judicial device for securing individual rights through curbing unreasonable action by state and local bureaucracy. Indeed recently the supreme court has several times noted that:

"The tendency in this jurisdiction is to enlarge and advance the scope of the remedy of mandamus, rather than to restrict and limit it, in order to afford the relief to which a party is entitled when there is no other adequate and complete legal remedy." 6

The purpose of this article is to examine some of the methods whereby the West Virginia courts have broadened the scope of this writ, to explore some of the reasons for widening it, and to note the formulas by which issuance of mandamus is governed today.

Prior to the late nineteenth century administrative activity consisted primarily of summary action by health, licensing, and tax officials. Although under the Constitution of West Virginia judicial review from administrative determinations must be available, 7 until the modern age of social and economic legislation it was considered unnecessary to provide specifically for control by the courts of administrative action. Common law judicial writs, including mandamus, were employed to control these activities. 8 Equitable remedies were also available to prevent irreparable injuries by officials. 9 But these remedies have been fraught with technical limita-

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6 W. VA. CONST. art. VIII, § 3.
Exercise of the original jurisdiction of the supreme court when it is invoked is an "inescapable duty" imposed upon it. Midland Investment Corp. v. Ballard, 101 W. Va. 591, 594, 133 S.E. 316, 317 (1926). It cannot be evaded by rule of court. Cf. Ex parte Doyle, 62 W. Va. 280, 57 S.E. 824 (1907) (habeas corpus case in which the reasoning used would apply to mandamus).

This broad view of mandamus is in line with the views of Lord Mansfield expressed in Rex v. Barker, 3 Burr. 1265 (1762).


8 JAFFE, ADMINISTRATIVE LAW 492 (1953).

9 Officials themselves are often empowered to seek injunctive assistance as an aid in enforcement of the laws they administer. See, e.g., W. VA. CODE
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tions and uncertainties. Therefore, many statutes establishing administrative agencies now provide specific methods of judicial review. For example, statutory procedures have been set up for review of decisions of workmen's compensation and unemployment security officials and of the insurance commissioner. Where statutes so provide the older remedies are generally unavailable; the procedure set forth by the legislature must be followed. Instead of fashioning judicial remedies tailored to the subject matter the legislature has from time to time stipulated that mandamus shall be the statutory means of review. Findings of the racing commission are subject to review by mandamus, county courts may be mandamused to compel levy of taxes to satisfy unpaid judgments against the county, and the writ may be awarded to require election officials to perform certain duties. Also on at least one occasion the supreme court has interpreted a review statute as providing for mandamus. By statute, under certain cir-

c. 16, art. 14, § 14 (Michie 1955); id. c. 30, art. 4, § 18; id. c. 30, art. 5, § 23; id. c. 8, art. 16, § 1; id. c. 24, art. 2, § 2. In such enforcement proceedings the defendants will assert that the administrative action was illegal. Thus, the proceeding, in effect, will become a review of the administrative determination.

10 W. VA. CODE c. 23, art. 5, § 4 (Michie 1955).
11 Id. c. 21A, art. 7, § 22.
13 Howle v. Alabama State Milk Control Board, 265 Ala. 189, 90 So. 2d 752 (1958).


14 W. VA. CODE c. 19, art. 23, § 6 (Michie Supp. 1957). An earlier version of this statute was applied in Tweel v. West Virginia Racing Comm'n, 138 W. Va. 531, 76 S.E.2d 574 (1953).
15 W. VA. CODE c. 7, art. 5, § 9 (Michie 1955).

By virtue of this statute mandamus is the only available remedy here. Ratliff v. County Court, 33 W. Va. 94, 10 S.E. 2d 28 (1899); but see Taylor County Court v. Holt, 53 W. Va. 532, 44 S.E. 887 (1903).

16 W. VA. CODE c. 3, art. 5, § 41 (Michie 1955). This statute gives the writ of mandamus more scope than at common law, rendering it a process to control election officers in all actions, ministerial or judicial. State ex rel. Bumgardner v. Mills, 152 W. Va. 580, 588, 53 S.E.2d 416, 424 (1949); Sanders v. Board of Canvassers, 79 W. Va. 303, 90 S.E. 865 (1919). Mandamus will not issue here, however, unless the petitioner can show he has a clear legal right to the remedy sought. Adams v. Londeree, 139 W. Va. 748, 83 S.E.2d 127 (1954).

cumstances, mandamus is available to officials as a mode of enforcing the law. For example, the public service commission in proper cases can use it to compel obedience to lawful rate orders, and it will issue upon application by certain officials to require public utilities to exercise their license or franchise.

In spite of these modern modes of review, however, many administrative boards and officers are still not covered specifically by review statutes. In West Virginia this is especially true in the areas of licensing, government employment, and disbursement of revenues. There the common law remedies still predominate.

The most serviceable of the common law remedies are the writs of certiorari and mandamus. Certiorari "is more or less the progenitor of the modern statutory review." At its name implies, this writ commands an inferior tribunal to certify its record to the court for review. According to the formula generally used by the courts in determining whether certiorari will issue, that writ can be directed only to judicial or quasi-judicial bodies which make determinations on a record. Because of this limitation counsel seeking review of administrative determinations cannot often resort to certiorari. Thus, in many cases, lawyers must turn to mandamus.

Prior to the latter-day enlargement of mandamus in West Virginia the relator, or petitioner for the writ, faced two principal obstacles to success: (1) he had to show that there was no available adequate judicial remedy; and (2) the courts would issue the

\[\text{18 W. Va. Code c. 23, art. 2, § 2 (Michie 1955). This statute was applied recently in State ex rel. Public Service Comm'n v. Southern West Virginia Oil & Gas Corp., 91 S.E.2d 737 (W. Va. 1956).}\]

\[\text{19 W. Va. Code c. 8, art. 4, § 16 (Michie 1955). For an application of this statute, see State ex rel. City of Benwood v. Benwood & McMechen Water Co., 94 W. Va. 724, 120 S.E. 918 (1924).}\]

\[\text{20 Under proper conditions equitable remedies, such as declaratory judgment, W. Va. Code c. 55, art. 12, §§ 1-16 (Michie 1955), are also available.}\]

\[\text{21 JAFFE, ADMINISTRATIVE LAW 494.}\]

\[\text{22 Quensenberry v. State Road Comm'n, 103 W. Va. 714, 138 S.E. 362 (1927).}\]

\[\text{For other applications of the law of certiorari, see State ex rel. Board of Education v. Martin, 112 W. Va. 174, 163 S.E. 850 (1932); Reynolds Taxi Co. v. Hudson, 103 W. Va. 173, 136 S.E. 833 (1927).}\]

\[\text{Certiorari is sometimes available instead of mandamus. State ex rel. Baer v. Beckley, 133 W. Va. 459, 57 S.E.2d 263 (1949) (certiorari as method of review from agency acting in partly judicial capacity); State ex rel. Ellis v. State Road Comm'n, 100 W. Va. 531, 131 S.E. 7 (1925) (certiorari, not mandamus, available when agency acting in discretionary capacity deprives petitioner of property right.)}\]
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writ only when the action to be compelled was "ministerial" or involved no element of administrative "discretion." Another form of the second notion was that a court could command an officer only if he was under a "clear legal duty." Each of these hurdles will be discussed in turn to determine the extent to which they are still applicable.

I. INADEQUATE REMEDY

Mandamus is a sort of last ditch remedy. If no other adequate remedy is available, then, and only then, will it issue. The writ was developed to protect persons without other recourse against official unreasonableness. It will not lie if some other method is available. Therefore, litigants seeking mandamus must first exhaust all available administrative remedies and then make certain no judicial redress is provided.

The doctrine of exhaustion of administrative remedies has been woven into the fabric of West Virginia law both by statutory enactment and by case decisions. The courts will refuse to take jurisdiction over matters which have been delegated to agency officials until the administrative process is at an end. An interesting comparison can be seen in the case of Drew v. City of Mount Hope. Drew's application for transfer of certain licenses to another building into which he was moving was refused by city authorities. The court, on the one hand, granted mandamus to compel transfer of the restaurant, soft drink, and tobacco licenses. But, on the other hand, it refused the writ as to the beer license. The ordinance involved provided that after refusal of a beer license an applicant was entitled to appear before the city council and be advised of the reasons for the action. Drew had not taken this step before he went to court. He had not exhausted his administrative remedies.

23 MERRILL, MANDAMUS § 10.

24 W. VA. CODE c. 21A, art. 7, § 19 (Michie 1955).


26 For recent federal cases involving West Virginia parties in which the exhaustion doctrine was discussed, see Morgantown Glassware Guild v. Humphrey, 326 F.2d 670 (D.C. Cir.), cert. denied, 352 U.S. 896 (1956); United States v. Jacovelty, 204 F.2d 154 (4th Cir. 1953); Gates v. Woods, 169 F.2d 440 (4th Cir. 1948); Sleeth v. Dairy Products Co., 228 F.2d 165, 168 (4th Cir. 1955), 58 W. VA. L. REV. 427 (1956) (dictum).

27 114 W. Va. 135, 171 S.E. 743 (1938).
The reasons for the exhaustion doctrine may be seen by examination of the *Croy* case. The relator had hired a plumber to connect his water line into a water company's main. The company, which had a rule requiring plumbers who did such work to be approved by it, refused to turn on the water because the petitioner's plumber was not so approved. The public service commission had been given jurisdiction to determine the reasonableness of such rules. But Croy attempted to short-circuit the administrative process by seeking mandamus from the supreme court to compel the water company to turn on the water. If the court had entertained his application, it would have upset efficient and orderly procedure under the statute giving the commission power over public utilities; use would not have been made of the specialized understanding of public utilities regulation that the members and staff of the commission are presumed to possess.

While it is quite clear that courts will close their doors until completion of administrative proceedings, they have dispensed with the exhaustion doctrine when no adequate administrative remedies are available. Where it is impossible or extremely difficult for litigants to obtain administrative final determinations, courts may not require "exhaustion of administrative litigants." For example, the Supreme Court of the United States, which has generally adopted a tough attitude concerning exhaustion, did not apply it in *Smith v. Illinois Bell Co.*, because for two years the administrative agency had remained "practically dormant."

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29 This phrase comes from the title of an article on an allied topic. Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 Geo. L.J. 465 (1953).


31 270 U.S. 587 (1928).
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and because property "may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them." Also the judges will not insist that litigants take steps not required by the administrative process or make useless demands upon officials.

Once the litigant has completed the administrative process, he is not yet in a position to seek mandamus. Under general law he also has to follow through any available judicial remedies. In most instances, when he does so, he either will have obtained his judicial relief or else his cause will have been rejected by the courts as one without merit. Therefore, generally, if some judicial remedy is provided, mandamus will be denied. This position is perfectly understandable in view of the reasons given for providing the courts with power to issue the writ. It was meant to take care of situations where a judicial remedy should be available, but is not otherwise provided.

Judicial remedies, like administrative ones, need not be exhausted if they are adequate. The difficulty is in determining

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32 Id. at 591.


35 For West Virginia cases denying mandamus because a judicial remedy is available, see, e.g., Doran v. Whyte, 75 W. Va. 368, 83 S.E. 1925 (1914); Miller v. County Court, 84 W. Va. 285, 12 S.E. 702 (1890).

Declaratory judgment lies "in cases of actual and existing controversies, such as might be the basis of litigation through the ordinary or extraordinary processes of law or equity, and not otherwise." Crank v. McLaughlin, 125 W. Va. 126, 23 S.E.2d 56 (1942) (syllabus). Although in 1948 it was held possible to try title to office by seeking a declaratory decree, Daugherty v. Town of Mahscott, 131 W. Va. 500, 48 S.E.2d 342 (1948), something for which mandamus ordinarily was used, the availability of declaratory judgment has not stopped the supreme court from determining title to office upon a petition for mandamus. Stowers v. Blackburn, 90 S.E.2d 277 (W. Va. 1955). Remedy by declaratory judgment apparently will not prevent a person from seeking mandamus, at least in cases in which, prior to adoption of declaratory judgment, mandamus would lie.

36 Moses, MANDAMUS 17-18 (1866).

whether or not a remedy is "adequate." Is a judicial remedy which is not so convenient as mandamus inadequate? In West Virginia it has been held that the remedy of appeal from removal from a government job is inadequate because it does not provide specifically for restoration to office or payment of salary.\(^3\) Probably, however, reinstatement and payment would have followed successful conclusion of an appeal. Mandamus was merely more convenient. Quo warranto has been held inadequate because it only determines the right to an office and does not compel appointment of someone entitled to the office.\(^3\) Although that would seem to be a matter which naturally would follow once title to the office had been determined, it is obvious that mandamus is a more effective remedy than quo warranto. Is a judicial remedy inadequate because it is too slow? There have been cases in this jurisdiction in which the speed of mandamus has led the court to grant it instead of requiring use of normal appellate procedures set forth by statute.\(^4\) It is submitted that, because of the highly remedial nature of mandamus (a direct command either to perform or not to perform an act), there are not too many instances when other means for judicial review of administrative action would be quite so handy. Therefore, by a loose definition of "adequate," the Supreme Court of Appeals has all but nullified the "no adequate judicial remedy" requirement and has greatly increased the number of cases in which mandamus will lie.

*State ex rel. Vance v. Arthur*\(^4\) sheds some light on the requirement of inadequacy under current West Virginia law. Vance was twice improperly convicted of operating a motor vehicle while under the influence of alcohol.\(^4\) The judgments were certified to the department of motor vehicles and the commissioner, as required by statute, then revoked Vance's driver's license for ten years. When the petitioner discovered the judgments were illegal, he made unsuccessful demands on the two judges to vacate the judgments and on the commissioner to reinstate his license. He could then

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\(^4\) 99 S.E.2d 418 (W. Va. 1957).
\(^4\) The convictions were improper because the proceedings were held without a warrant as required by statute. W. Va. Code c. 50, art. 18, § 2 (Michie 1955).
\(^4\) Id. c. 17B, art. 3, §5.
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have proceeded by taking appeals from the convictions and, upon successful conclusion of the appeals, by asking the commissioner to reinstate his license. Instead Vance successfully sought mandamus to compel the commissioner to reinstate the license. The court noted that:

"The existence of another remedy will not preclude resort to mandamus for specific relief unless such other remedy is specific and appropriate to the circumstances of the particular case and requires performance of the duty to be sought."\(^4\)

Mandamus was cheaper and faster than taking the appeals and asking for administrative reinstatement once the appeals succeeded. Besides, the commissioner might not have acted even should the convictions have been reversed.\(^5\)

There will be instances in which a person, at the onset of his dispute with an agency, might have an available judicial remedy but loses it later. Where the loss is without fault by the petitioner, he can claim mandamus as a method of review.\(^6\) But where the relator is at fault in losing his normal remedy, as, for example, when he permits the statute of limitations to run, he is not entitled to mandamus on the ground he has no other remedy.\(^7\) The writ is not for those who have slept on their rights.

II. MINISTERIAL-DISCRETIONARY ACT DICHOTOMY

Previously in mandamus proceedings in West Virginia there was a central question: Was the official action complained of "ministerial," or was it "discretionary"? It was asserted that:

"[M]andamus will not lie to control the exercise of the discretion of any court, board, or officer when the act com-

\(^{44}\) 98 S.E.2d at 425.

\(^{45}\) For other cases in which mandamus might still have been necessary after pursuing the other available remedies, see Eureka Pipe Line Co. v. Riggs, 75 W. Va. 353, 83 S.E. 1020 (1914); Thomas v. Town of Mason, 39 W. Va. 526, 20 S.E. 580 (1894).

\(^{46}\) E.g., cases in which applicants for permits lose the right to appeal because in applying they had to act as though the ordinance providing for the permits was valid and on appeal they could not assume a contrary position. Carter v. Bluefield, 132 W. Va. 881, 54 S.E.2d 747 (1949). But cf. Paint Creek Transit Co. v. City of Montgomery, 126 W. Va. 663, 29 S.E.2d 631 (1944).

plained of is either judicial or quasi judicial in its nature . . . . But . . . . that if the act to be performed is not one of legal discretion—that is judicial in nature—but is merely ministerial, mandamus will lie.48

The character of the act was controlling. If the courts found it was “ministerial,” “mandatory,” or “required,” they held for the relator.49 If, however, the respondent could convince them that the matter was “discretionary,” “political,” or “judicial” in character, he could, with certain exceptions, defeat the issuance of the writ.50

The difficulty with this rule is obvious. Just what type of actions can be classified “ministerial”? What activities are properly labelled “discretionary”? Not even the supreme court can always agree as to the proper classification of an act.51 The fact of the matter is that there is no clear-cut ministerial-discretionary act dichotomy. “Discretion is the power to make a choice among competing considerations. All powers to act admit on the one hand some elements of choice if only as to the manner of detail. On the other hand, nearly all powers to act, however numerous and broad the considerations relevant to choice, exclude and deny the legality of other elements as factors of choice.”52 This difficulty

48 Marcum v. Ballot Comm’rs, 42 W. Va. 263, 265, 26 S.E. 281 (1895). But in this particular case the distinction made no difference because by statute both ministerial and discretionary acts were subject to control by mandamus. The mandamus formula used by Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156-66 (1803), assumes the same distinction. See also Zion Evangelical Lutheran Church v. City of Detroit Lakes, 221 Minn. 55, 21 N.W.2d 203 (1945), discussed in Riesenfeld, Bauman, and Maxwell, Judicial Control of Administrative Action by Means of Extraordinary Remedies in Minnesota, 35 MINN. L. REV. 569, 593 (1949); 2 SPELLING, op. cit. supra note 2, § 1854; HIGH EXTRAORDINARY LEGAL REMEDIES § 34 (3d ed. 1898); MERRILL, MANDAMUS §§ 29, 33.

49 For current cases so holding, see, e.g., State ex rel. Vance v. Arthur, 98 S.E.2d 418 (W. Va. 1957); Meisel v. O’Brien, 93 S.E.2d 481 (W. Va. 1956); State ex rel. Bullard v. County Court, 92 S.E.2d 452 (W. Va. 1956); State ex rel. County Court v. West Virginia State Bd. of Health, 137 W. Va. 284, 70 S.E.2d 903 (1952); State ex rel. Board of Aeronautics v. Sims, 129 W. Va. 694, 41 S.E.2d 506 (1947).


51 See, e.g., Board of Trustees of Policemen’s Pension or Relief Fund v. Huntington, 96 S.E.2d 225 (W. Va. 1956).

52 JAFFE, ADMINISTRATIVE LAW 499.
leads to a suspicion that at least sometimes the definition of an act describes a result, rather than explains how it was achieved.

Assuming administrative acts validly can be classified as either mandatory or discretionary, it does not follow that once an act is judicially characterized the grant or denial of mandamus is automatic. The bare formula fails to take account of the variable meaning of "discretion." It may include questions of law, questions of fact, so-called mixed questions of law and fact, and questions concerning policy. Courts of course do not regard those questions in the same way upon review. They are much more likely to substitute their own judgment for that of an administrative official on matters of law than on matters of fact or policy. Perhaps when "discretion" involves a matter of law mandamus might be more readily forthcoming than when it involves a matter of fact-finding. At any rate the supreme court in mandamus cases has kept quite strict control over administrative determinations of law.

There are of course many cases which fit the old ministerial-discretionary act formula. But there are those which do not seem to follow it. The West Virginia courts have issued the writ in review of discretionary acts, and in other cases have not awarded it even though the acts involved were mandatory or ministerial.

A. Writ Issued Even Though Act Discretionary

In June of 1954 the county court of McDowell County determined that, because of its poor financial position, it would be unable to pay the salary or expenses of a county probation officer for the ensuing fiscal year. Accordingly, it ordered the judge of the criminal court of the county not to continue the appointment of a probation officer for the next fiscal year. The judge, however, did not revoke his appointment and the probation officer continued to function in that capacity. He sought mandamus in the supreme court to require the county to pay his salary and expenses. Irrespective of the fact that there was no showing that the


54 See text at notes 149-52, infra.

55 See, e.g., cases cited in notes 49, 50, supra.
petitioner had been derelict in carrying out his duties, the court denied his application. It held that county courts are vested with wide discretion in administering the financial affairs of their counties, and that, when officials have discretionary duties, mandamus "is never employed to prescribe in what manner they shall act, or to correct errors they may have made." 56

Oft-times relators plead themselves out of court by claiming that official action is erroneous. In a well-known Illinois case, People ex rel. Sheppard v. Dental Examiners, 57 a dental licensing board was given the authority to admit to practice without an examination graduates of any "reputable dental college." Sheppard was refused a license without examination on the ground that his alma mater was not "reputable." His petition for mandamus was not granted. Determination as to the character of dental colleges had been delegated by the legislature to the administrative board. The court would not transfer to the judicial forum the very issue for which the agency had been created to resolve. Similarly, in West Virginia the courts have refused to substitute their judgment for that of a school board in hiring teachers, 58 they have not seen fit to dictate to the state road commission when and where it should reconstruct, repair, and maintain highways, 59 and they have not controlled the way in which the compensation commissioner exercises his discretion in waiting after an injury to determine when it has reached the stage at which a fair award could be made. 60

The legislature meant the manner of exercise of discretion on these matters to rest in the hands of administrative specialists. 61

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56 Meador v. County Court, 87 S.E.2d 725, 736 (W. Va. 1955).
For other cases in which courts have been reluctant to dictate the manner in which administrators exercise their discretionary powers, see Sleeth v. Dairy Products Co., 228 F.2d 165 (4th Cir. 1955); State ex rel. Conley v. Pennybacker, 131 W. Va. 442, 43 S.E.2d 9 (1948); Wiley v. County Court, 111 W. Va. 646, 163 S.E. 441 (1932); Miller v. County Court, 54 W. Va. 285, 12 S.E. 702 (1890).

See also High, op. cit supra note 48; MERRILL, MANDAMUS §§ 33, 37.


61 Two well-known cases in which appellate courts in other states refused to upset rather debatable determinations by agencies are: Scudder v. Board of Selectmen, 309 Mass. 373, 34 N.E.2d 708 (1941), discussed in JAFFE, ADMINISTRATIVE LAW 500, and in Brown, The Use of Extraordinary Legal and Equitable Remedies to Review Executive and Administrative Action in Massachusetts, 21 B.U.L. REV. 632 (1941); and Marburg v. Cole, 236 N.Y.
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A contrast to the cases on reluctance by the courts to use mandamus to control the way in which administrators use their discretionary power can be seen in a case involving tolls on bridges between Wheeling Island and the mainland. The city of Wheeling, after it obtained them, doubled the tolls between the island and Ohio and eliminated those on the bridges to West Virginia. The petitioners asked the public service commission to restore the West Virginia tolls and halve the Ohio ones. It refused to act because of a pending sale of the bridges from the city to the state road commission. A writ of mandamus was directed to the commission either to restore the tolls or to decline to do so. It is "not the right of such a body to suspend unduly, by awaiting the alternative occurrence of a future event, the exercise of its proper function." While the court did not suggest the course of conduct to be followed by the commission, it did order it to exercise its discretion. This position is in full accord with other cases in which administrative officials have been commanded by mandamus to exercise their discretionary powers.

Since it is possible to seek mandamus to compel an official to use his discretionary authority, could not the courts take the matter just one step further and assert that in some instances the purported exercise of discretion was no act at all? Is not abuse of discretion tantamount to nonexercise of it? In this regard it is worthwhile to compare another Illinois dental board case with the Sheppard case. Sheppard had pleaded that the board acted erroneously; the court refused to control the way in which the board used its discretion. In this other case Cooper, the relator, pleaded that the board acted fraudulently in classifying the school from which he graduated as not reputable. His argument was not that the board had acted in error, but that, because of animosity toward his alma mater, it had not really exercised any discretion at all. The appellate court agreed that abuse of discretion was equivalent to

202, 36 N.E.2d 113 (1941), discussed in FORKOSCH, ADMINISTRATIVE LAW § 323, and in Note, 18 ST. JOHN'S L. REV. 145 (1941).


63 Id. at 348, 24 S.E.2d at 288.

failure to exercise it, and it indicated that if Cooper could prove his allegations mandamus would be awarded.\textsuperscript{5}

The same approach is used by the West Virginia courts to broaden the availability of mandamus. A court will require an official to proceed

"... not only when the officer absolutely refuses to act at all, but also when he has acted, and it appears to the court that he has not acted in good faith, but has on the contrary, set up as an excuse and as a cover for his disobedience of the law, a mere pretense of action. This the law holds equivalent to no action, no performance of duty. ... [C]ourts will not allow remedies to be defeated by mere pretexts or evasions of duty."\textsuperscript{6}

Thus, mandamus will be issued by West Virginia judges when the discretion only purported has been exercised, that is, when the officials have acted in an "arbitrary," "capricious," or "abusive" fashion.\textsuperscript{6}

Emotionally charged words used by pleaders in seeking writs of mandamus governing official discretionary action cover two separate types of alleged administrative errors. Some of them relate to unreasonable determinations by agencies; others deal with determinations which appear wholly reasonable, but which are beyond the power of the agencies to make—ultra vires actions.

An application for mandamus to require a town council to issue a pool hall license furnishes an example of the first type of case.\textsuperscript{68} The town of Clendenin denied a pool hall license ostensibly for three reasons. It was unable to prove two of them, and the third reason was based on fear of what might have happened had

\textsuperscript{65} Dental Examiners v. People \textit{ex rel.} Cooper, 123 Ill. 227, 13 N.E. 201 (1887).

\textsuperscript{66} Dillon v. Bare, 60 W. Va. 483, 486, 56 S.E. 390, 391 (1906).

\textsuperscript{67} For examples of use of such terms to describe the way in which discretion has been used, see Thacker v. Crow, 90 S.E.2d 199, 203 (W. Va. 1955) ("arbitrary and capricious"); State \textit{ex rel.} Ward v. Raleigh County Court, 138 W. Va. 551, 555, 76 S.E.2d 579, 582 (1953) ("arbitrary, capricious, or based on a misapprehension of law"); Beverly Grill v. Crow, 133 W. Va. 214, 219, 57 S.E.2d 244, 247 (1949) ("arbitrary and capricious"); State \textit{ex rel.} Garbutt v. Charnock, 105 W. Va. 8, 14, 141 S.E. 403, 405 (1928) ("unsoundly and capriciously exercised"); State \textit{ex rel.} Hoffman v. Town of Clendenin, 92 W. Va. 618, 621, 115 S.E. 583, 584 (1923) (discretion "must be governed by rule, it must not be arbitrary, vague, and fanciful, but legal and regular"); State \textit{ex rel.} Noyes v. Lane, 89 W. Va. 744, 748, 110 S.E. 180, 181 (1921) ("arbitrary, capricious or fraudulent," "results from a misapprehension of law").

\textsuperscript{68} State \textit{ex rel.} Hoffman v. Town of Clendenin, 92 W. Va. 618, 115 S.E. 583 (1923).
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the license been granted. The court granted mandamus because running a pool hall is a legitimate business which cannot be assumed to be likely to become a nuisance. It is unreasonable to deny such a license because of such fears. Another illustration of unreasonable official action can be seen in a case in which Beckley officials refused to grant a church a building permit.69 One of the reasons given for the refusal, that construction of the church would create a traffic congestion, was spurious. It was not reasonable to assume that traffic generated by a congregation of only twenty-five or thirty members would do that.70

In many mandamus cases it is none too easy to convince a court that administrative action was arbitrary. Cooper, the applicant for the dental license, won his case as a matter of law in a determination based on a demurrer by the respondents.71 He did not have to prove his allegations. West Virginia relators faced with the problem of proving unreasonableness have not always succeeded. In another pool hall case a former licensee was unable to convince the court that a county court had denied renewal of his license because a corporation had pressured the officials.72 The state auditor, acting as an ex officio insurance commissioner, was not mandamused to require him to renew an insurance agent’s license; the court was convinced that the auditor had not abused his discretion.73 In Myers v. State Compensation Comm’r74 the court held that the evidence was insufficient to show the petitioner had a new condition which would entitle him to have his case reopened. Therefore, the decision not to open the case again was reasonable.75

69 State ex rel. Howell v. Meador, 109 W. Va. 368, 154 S.E. 876 (1930). Although the court spoke neither of discretion nor of arbitrary exercise of it, this case falls into that pattern. It is instructive to see what the courts do as well as what they say.

70 See also State ex rel. Garbutt v. Charnock, 105 W. Va. 8, 141 S.E. 403 (1928).

71 Dental Examiners v. People ex rel. Cooper, 128 Ill. 227, 12 N.E. 201 (1887).

72 State ex rel. Hamrick v. Pocahontas County Court, 92 W. Va. 222, 114 S.E. 519 (1922).


74 113 W. Va. 316, 167 S.E. 740 (1933).

75 For other cases in which relators were unable to prove abuse of discretion, see Sleeth v. Dairy Products Co., 228 F.2d 165 (4th Cir. 1955); Walden v. State Compensation Comm’r, 113 W. Va. 307, 167 S.E. 743 (1933); State ex rel. Dillon v. Neal, 104 W. Va. 259, 189 S.E. 757 (1937).

Words such as "arbitrary" and "capricious" reflect flavor of ill motives on the part of officials. Do relators have to prove that there was a bad motive for administrative action? In *Dillon v. Bare* the state auditor asserted that assessors had acted fraudulently and dishonestly in making assessments which were far below true value. His only proof, however, was a showing that their valuations were below his and that they refused to follow his suggestions. That did not convince the court that the respondents had acted in bad faith, and it refused to grant the writ. Action for evil motives should be subject to control by mandamus on the ground that it is unreasonable. But failure to prove evil motives should not in and of itself defeat mandamus. Nor should an affirmative showing that officials were making a good faith attempt to comply with the law bar issuance of the writ. Even with the best of intentions administrators can on some occasions act unreasonably.

The second subheading of the "arbitrary use of discretion" cases concerns actions which, though reasonable, are ultra vires. The case of *Thacker v. Crow* is illustrative. There the beer commissioner refused to transfer a license to a place located within three hundred feet of the entrance to a school playground. It was reasonable to deny a license to a person who would use it to serve beer close by an area in which young children congregate. But the statute gave the commissioner no such power. He was required to deny licenses to sell beer within three hundred feet of the "front door" of a "school," but "school" cannot be read to include a playground, especially in light of the reference to "front door." The action was held to be "arbitrary and capricious" because it was beyond the commissioner's power under the statute. Similarly, a city council was mandamused to issue a building permit because it acted on a reasonable, but ultra vires, "long determined policy."

An election board of canvassers might be acting as reasonable men would act in altering returns on the theory that fraud had been practiced, but one such board was ordered by the supreme

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76 60 W. Va. 483, 58 S.E. 390 (1906).
77 In *State ex rel. West Virginia State Lodge v. Charleston*, 133 W. Va. 420, 56 S.E.2d 763 (1949), mandamus was denied because, among other things, the city was making a good faith effort to conform with the law. It is submitted that a good faith effort may not always be enough.
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court to reconvene and count the excluded ballots; it had no power to hear and consider evidence of fraud in an election.81 Inasmuch as the courts are the final arbiters of statutory interpretations, the power to prevent officials from self-enlargement of their authority is a broad one.82

Assuming that a board has acted beyond its powers, what should a judge do when he is presented with a petition asking for mandamus? Should he enter an order compelling a licensing body to grant a permit? In a leading case the United States Supreme Court refused to take such drastic action.83 The Court found that the F.C.C. had denied a broadcast license on an improper ground. But, instead of instructing the lower court to mandamus the commission to issue the license, the Supreme Court gave it directions to dissolve the writ. The whole basis for allowing mandamus in the ultra vires area is the assumption that the agency has not really acted but has only purported to do so. Just as in cases where there has been a failure to act, here the order should be one to take action, proper action on the basis of the correct interpretation of the agency's powers. Thus, an assessor should be ordered to make a proper assessment, but should not be coerced to assess at any given value determined by a court.84 Canvassers should be ordered to count ballots, but should not be compelled to certify that a certain candidate has won an election.85 Mandamus will lie to compel

82 For other ultra vires cases from West Virginia, see State ex rel. Ward v. Raleigh County Court, 138 W. Va. 551, 76 S.E.2d 579 (1953) (county court no power to fix maximum limit for expense accounts of sheriff and deputies); Beverly Grill v. Crow, 183 W. Va. 214, 57 S.E.2d 244 (1949) (commissioner no power to refuse beer license because people in neighborhood object); State ex rel. Bunch v. Fortney, 93 W. Va. 292, 116 S.E. 753 (1923) (certificate of public convenience and necessity cannot be refused because nasty letter from petitioner's attorney convinces commission that issuance would result in continual friction); State ex rel. Noyes v. Lane, 89 W. Va. 744, 110 S.E. 180 (1921) (city clerk gave invalid reasons for rejecting petitions for recall election).
84 Dillon v. Bare, 60 W. Va. 483, 485, 56 S.E. 390, 391 (1906) (dictum).
a county court to audit and approve proper expense accounts, but the courts will not direct it as to the dollars and cents which should be approved.\textsuperscript{86}

There are cases in which it is clear that the only ground which is or which might be asserted for a certain exercise of discretion is ultra vires.\textsuperscript{87} Perhaps in such instances it is not going too far for a court to order by mandamus a permit to issue, a person to be restored to a job, or some other specific action. But where an administrator on remand might be able to supply a proper reason for his action, the courts should remand the matter to the agency. Nevertheless, West Virginia courts have at times directed administrative bodies and officials to perform certain specific acts; they have come very close to dictating the manner in which administrators should exercise their discretion.\textsuperscript{88} This goes beyond the theory on which courts intervene by mandamus in matters of administrative discretion. It also tends to transfer to the judicial forum questions which were intended by the legislature to be settled by administrative agencies.

B. Writ Denied Even Though Act Ministerial

Perhaps the all time champion litigant (at least as to number of appearances) before the Supreme Court of Appeals of West Virginia is the state's long-time auditor, Edgar B. Sims. Although he has appeared as a relator seeking mandamus,\textsuperscript{89} Mr. Sims has been much more in evidence as a defendant in mandamus proceedings. As a respondent he has won cases\textsuperscript{90} even though most of his duties are ministerial in nature and, under the usual mandamus formula, 

\textsuperscript{86} State ex rel. Ward v. Raleigh County Court, 138 W. Va. 551, 76 S.E.2d 579 (1953).


\textsuperscript{88} See, e.g., State ex rel. Bunch v. Fortney, 93 W. Va. 292, 116 S.E. 753 (1923).

\textsuperscript{89} See, e.g., Sims v. Fisher, 125 W. Va. 512, 25 S.E.2d 216 (1943). This case and later ones in which the supreme court attempted to circumvent it without giving the appearance of doing so are discussed in Colson, Service of Process in a Delinquent Lands Proceeding—A Suit That Is Not a Suit, 54 W. VA. L. Rev. 55 (1951); Bailey, Process in Forfeited and Delinquent Lands Suits—A Moot Question?, 54 W. VA. L. Rev. 47 (1951); Bailey, The West Virginia Law of Forfeited and Delinquent Lands, 50 W. VA. L.Q. 158 (1947).

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the writ would issue as a matter of course. Sims has scored his victories because he has been able to convince the judges that the statutes directing his action were unconstitutional. In West Virginia a ministerial officer may withhold action under a statute which does not conform to the constitution.91

Development of the defense of unconstitutionality in West Virginia stems primarily from three cases. In State ex rel. Miller v. Buchanan92 the governor decided that a tax exemption, held unconstitutional by the courts under the Constitution of 1863, would also be invalid under the present constitution. Acting under his instructions, the auditor directed assessors to assess property covered by the exemption. Buchanan refused to do so, claiming that the statute was constitutional and, hence, the instructions were illegal. The court refused to accept that defense, saying that "it is not the right of a subordinate executive or ministerial officer to arrest the execution of the law as construed by the Governor . . ."93 Neither would it appear to be the right of such an official to disobey the mandates of the legislature, claiming their invalidity. When that issue first was presented to the supreme court it dodged it. In Payne v. Staunton94 the question was raised

91 For examples of cases in which mandamus was denied because the enactments requiring action were unconstitutional, see State ex rel. Dewey Portland Cement Co. v. O’Brien, 96 S.E.2d 171 (W. Va. 1956), 59 W. VA. L. Rev. 375 (1957); State ex rel. Richardson v. County Court, 133 W. Va. 585, 73 S.E.2d 569 (1953), 56 W. VA. L. Rev. 119 (1954); State ex rel. Adkins v. Sims, 130 W. Va. 646, 44 S.E.2d 81 (1947), 52 W. VA. L.Q. 57 (1949); Woodall v. Darst, 71 W. Va. 350, 77 S.E. 264, 80 S.E. 367 (1912).


For other material on the defense of unconstitutionality, see GELLIHORN AND BLYE, ADMINISTRATIVE LAW 303; DAVIS, ADMINISTRATIVE LAW § 223; Rashbaum, Right of Mandamused Official to Raise Issue of Constitutionality, 19 St. Louis L. Rev. 340 (1934); Note, 54 HARV. L. Rev. 117 (1940); Note, 33 COlUM. L. Rev. 1096 (1933); Note, 42 HARV. L. Rev. 1071 (1929).

92 24 W. Va. 362 (1884).

93 Id. at 362.

as to whether a clerk of court could refuse to do a ministerial act on the ground that the statute requiring it did not conform to the constitution. The court noted that "confusion and disorder might ensue from the exercise of such power," but it stated that, if it were necessary to decide the question, it would not compel the clerk to execute a void act. However, the realtors had failed to prove a part of their case so the court was able to determine the controversy on a basis other than the right of an official to defend asserting statutory invalidity. But in Woodall v. Darst it was held specifically that the auditor could raise the question of constitutionality. Since that time there has been no question but that important ministerial officials could justify on that ground failure to execute a statute. Also lesser ministerial officers have been permitted to do so.

Behind cases permitting ministerial officers to assert the defense of unconstitutionality lies the notion that an unconstitutional law is not really a law at all, being null and void, and that a court should not compel an officer to do something which is required of him only by a void and invalid enactment. The difficulty with this proposition is that all legislative enactments are the law until a court decides otherwise. Perhaps there is a feeling by the judges that, if in a case they decide a statute requiring action is invalid and then proceed to order an official to take action under it, they are put in an awkward position. That embarrassment can be avoided simply by refusing to rule on constitutionality of statutes when their invalidity is asserted by an officer in a mandamus proceeding. If they refuse to decide that question, the statute presumptively is constitutional and no inconsistency would be shown by an order to act under it.

In most states an officer with ministerial duties, at least in the general run of cases, may not plead unconstitutionality when he

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95 Id. at 206, 46 S.E. at 929.
96 Id. at 203, 46 S.E. at 930.
97 Id at 209, 46 S.E. at 930.
98 71 W. Va. 350, 77 S.E. 264, 80 S.E. 367 (1912).
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is a respondent in a mandamus proceeding. Sound policy supports that position. Even in Payne v. Staunton it was recognized that it may be unwise to allow subordinate officials to supersede legislative will just because in their view the lawmakers exceeded their authority. "The business of government cannot be held in abeyance because a nonjudicial functionary doubts the validity of mandates given him by the duly established law-making body."

In states which do not permit this defense is not an official put in a dilemma? If he does not act, he will be subject to a mandamus suit against which he cannot defend. If he acts and the statute is later held unconstitutional, he may be subject to liability for acting beyond the scope of his constitutional powers. This is especially true of situations in which action consists in paying out government funds or in forcing someone to pay taxes. Because of this difficulty in most jurisdictions a court will consider a plea of invalidity as justification for an official's refusal to act, in the event his acting under the statute might subject him to some personal liability, if the law were later held unconstitutional. There is, however, no need for such doctrine in West Virginia. Officials here are not put into the dilemma, but are free to act. By statute they are protected from all liability, both civil and criminal, if they take action under a statute or an order from the governor and later the statute or order is held unconstitutional.

There might, however, arise situations when prompt determination of a constitutional question is desirable, and when it does not appear that someone other than the officer entrusted with carrying out the statute will raise the issue. Suppose, for example, there is some question as to the validity of a statute providing for

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103 55 W. Va. at 206, 46 S.E. at 929.

104 GELLOHORN AND BYSE, ADMINISTRATIVE LAW 399.


106 W. VA. CODE c. 61, art. 5, § 18 (Michie 1955).

The protection of this statute is limited to officials; it does not immunize others from liability for actions taken under a statute later held unconstitutional. Morton v. Cabot, 134 W. Va. 55, 63 S.E.2d 861 (1949).
the issuance of bonds by a state agency.\textsuperscript{107} Until they are sold it might be difficult to find proper parties to contest the validity of the bonds. Even declaratory judgment procedures have their limitations.\textsuperscript{108} But sale of the bonds will be slow when the investing public is aware of the constitutional doubts concerning them. The easiest way to handle the problem would be to have the secretary of state refuse to seal them.\textsuperscript{109} Then the agency for which the bonds were being issued could bring mandamus against the secretary of state to command him to do his duty. If he could raise the constitutionality of the statute as a defense, the test case would answer the problem bothering the prospective investors. Recently this type of proceeding neatly took care of the problem the university board of governors had in marketing bonds issued to raise money for construction at West Virginia University.\textsuperscript{110}

If officers are permitted indiscriminately to question constitutionality, even in cases where there is no real need for fast judicial determination as to the legality of a statute, a confused situation results. Nonlegal officers will be in a position to arrest the execution of legislative commands. If, on the other hand, officers cannot raise the issue, many chances for final judicial determinations on vital issues will be passed by. West Virginia believes the first evil is preferable. But in some other jurisdictions a third approach has been adopted. An officer may justify refusal to act when he has been advised by the state attorney general that the enactment is invalid.\textsuperscript{111} This is the best solution to the problems here. The attorney general is a legal officer whose duty it is to advise officials of the state as to matters of law.\textsuperscript{112} It is better to have him, instead of someone unlearned in law, make determinations as to whether or not the legislature has exceeded its authority.

\textsuperscript{107} Such doubt would be created by W. VA. Const. art. X, § 4.
\textsuperscript{108} In declaratory judgment proceedings, just as in any other type of litigation, the parties must have a real, live controversy to give them the right to appear in court seeking relief. See, generally Developments in the Law: Declaratory Judgments—1941-1949, 62 Harv. L. Rev. 787, 805-17 (1949); Borchard, Declaratory Judgments 293-314 (2d ed. 1941).
\textsuperscript{109} The secretary of state is keeper of the great seal of the state. W. VA. Const. art. 2, § 7; W. VA. Code c. 5, art. 2, § 1 (Michie 1955).
\textsuperscript{110} State ex rel. Board of Governors v. O'Brien, 94 S.E.2d 446 (W. Va. 1956).
\textsuperscript{112} W. VA. Code c. 5, art. 3, § 1 (Michie 1955).
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cases, where a real doubt exists as to the constitutionality, he could
direct the official not to act. Then a mandamus proceeding would
follow in which the issue of constitutionality would be considered
and the law, consequently, would be tested.

III. CLEAR DUTY TO ACT RULE

Not everyone who feels an administrative agency has wronged
him, and in so doing has acted contrary to law, is permitted by the
courts to present the substance of his claim before them. Judicial
review, whether by means of mandamus or by some other method,
is reserved for persons who can demonstrate sufficient “interest.”
Litigants must have more than a burning curiosity; they must have
what is described as “standing to sue.”¹¹³ Many persons may feel
some impact from an administrative decision, but, according to the
law, only “persons aggrieved” by the action may go to court.¹¹⁴
Who is “aggrieved”? The law of standing to sue is not very definite
about that. Obviously the person with the most at stake is the party
to an administrative proceeding against whom a decision has been
rendered. The pool hall operator who cannot get a license,¹¹⁵ the

¹¹³ Standing is required both of plaintiffs, Tileston v. Ullman, 318 U.S.
44 (1943); Frothingham v. Mellon, 262 U.S. 447 (1923); and of defendants,
Yazoo & M.V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Heskev

The course pursued by the courts in matters of standing is, however, not
always easy to follow. Compare Adler v. Board of Education, 342 U.S. 485
(1952), with Doremus v. Board of Education, 342 U.S. 429 (1952); com-
mented upon in Davis, Standing, Ripeness and Civil Liberties: A Critique of
Workers v. Mitchell, 330 U.S. 75 (1947), with Termiello v. Chicago, 337
U.S. 1 (1949); commented upon in 37 A.B.A.L.J. 833 (1951).

For general information concerning standing, see HART AND WECHSLER,
THE FEDERAL COURTS AND THE FEDERAL SYSTEM 160-75 (1953); DAVIS,
ADMINISTRATIVE LAW §§ 199-209 (1951).

¹¹⁴ In West Virginia the requirement of standing to sue rests both on
case law and specific statutory provisions. For cases dealing with standing
of plaintiffs, see State ex rel. West Virginia State Lodge v. Charleston, 133
W. Va. 420, 59 S.E.2d 763 (1949); Crank v. McLaughlin, 125 W. Va. 126, 23
Concerning the standing of defendants compare State ex rel. Thompson v. Fry,
137 W. Va. 321, 71 S.E.2d 449 (1952), with State ex rel. Huntington v.
Heffley, 127 W. Va. 254, 32 S.E.2d 456 (1944). For statutes in which stand-
ing is required as a prerequisite to judicial review of administrative action,
see W. VA. CODE c. 7, art. 5, § 9 (Michie 1955); id. c. 21A, art. 7, §§ 17, 22;

For a discussion of the impact of statutory provisions on the law of
standing to sue, see DAVIS, ADMINISTRATIVE LAW § 202.

618, 115 S.E. 583 (1923); State ex rel. Kelley v. Grafton, 87 W. Va. 191,
104 S.E. 487 (1920).
government employee whose job has been taken from him, the property owner who has been refused a building permit, the creditor of the state who cannot get a warrant signed, and the injured person whose claim to workmen's compensation has been denied have all had their day in court. In such cases there is little question; the courts will entertain the petitions for relief if the parties use the correct procedure to raise their complaints.

It is equally as easy to predict that the bon vivant whose favorite spot has lost its license to sell beer cannot get judicial relief. But what about the businessman who discovers that the licensing authority has permitted someone to compete with him? Can he go to court? He is being hurt by the official action. Nevertheless, in some jurisdictions competitors have been prohibited from complaining to the courts about administrative largess to their business rivals. In Crank v. McLaughlin the petitioners were producers and sellers of milk in Charleston. They sought a decree declaring that the action of the commissioner of agriculture in abrogating certain Charleston ordinances dealing with the sale of milk in the city was illegal. The effect of the commissioner's action was to permit competitors formerly frozen out of the city market by the ordinance to share in it. This, however, did not prejudice the dairies enough to permit them to raise the question of the validity of the administrative action. The court pointed out that the city could have questioned in the courts the abrogation of its ordinance and that consumers or consumer groups might have complained that their health was being affected by opening their

121 125 W. Va. 126, 23 S.E.2d 56 (1942).
sources of supply to new dairies.\textsuperscript{122} They were affected sufficiently to possess standing.

Another type of litigant is the one who sues in a representative capacity. Parents have standing to dispute actions by school authorities which injure their offspring.\textsuperscript{123} By virtue of statute voters are entitled to mandamus county courts to divide counties into precincts as required by law.\textsuperscript{124} And, in some instances, West Virginia taxpayers, unlike those of the United States,\textsuperscript{125} have been allowed to protect inhabitants of the state against the enforcement of any illegal exactions by officials.\textsuperscript{126} Usually a person suing as a taxpayers' representative also asserts that he has standing as a representative of his fellow citizens and residents.\textsuperscript{127} There are instances of statutes authorizing citizens to seek judicial review,\textsuperscript{128} and there is case law allowing citizens to sue.\textsuperscript{129} But even these representatives must be a part of a group of citizenry that has been prejudiced. Thus, in a case involving conduct of Charleston authorities, which allegedly violated police civil service law requirements, a citizen and policeman from Huntington was not permitted to sue, but a citizen and policeman from Charleston was allowed to raise the issue of the propriety of the city's actions.\textsuperscript{130}

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\bibitem{122} Id. at 132, 23 S.E.2d at 59-60.
\bibitem{123} See, e.g., State ex rel. Nangle v. Board of Education, 81 W. Va. 353, 94 S.E. 500 (1917).
\bibitem{124} W. VA. CODE c. 3, art. 1, § 10 (Michie 1955). But in Payne v. Staunton, 55 W. Va. 202, 46 S.E. 627 (1904), voters who were seeking mandamus to require the clerk of court to permit them to inspect poll books were denied the writ on the ground that they had no standing. They had no pecuniary interest to entitle them to standing as individuals. Nor did they have standing as representatives of the voters, since they were seeking to inspect the books merely to get evidence on which criminal actions against persons who allegedly stuffed the ballot boxes could be based. Id at 209, 46 S.E. at 930.
\bibitem{125} Frothingham v. Mellon, 262 U.S. 447 (1928); Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928).
\bibitem{128} Appeal from an action of the liquor commissioner in granting or revoking or refusing to grant or revoke a license may be sought by a "resident of the community in his own behalf or in behalf of the community" as well as by interested parties. W. VA. CODE c. 60, art. 4, § 21 (Michie 1955).\textsuperscript{28}
\bibitem{129} See cases cited in note 127, supra. See also Note, 43 COLUM. L. REV. 124 (1930).
\bibitem{130} State ex rel. West Virginia State Lodge v. Charleston, 133 W. Va. 420, 56 S.E.2d 763 (1949).
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Closely allied to the requirement of standing to sue is the notion in mandamus cases that petitioners must show a "clear legal right" to the relief they are seeking. Recently the supreme court maintained that:

"To warrant this Court in granting this writ, facts must be presented showing that the relator has a clear legal right to the performance of the thing demanded. . . ." 

This goes beyond the interest necessary for standing to sue. A successful mandamus relator must show not only that an interest of his has been prejudiced, but also that the interest amounts to a "right," and that that right is "clear."

The correlative of a "clear legal right" by the person seeking review is a "clear legal duty" on the part of the governmental official to perform the act. The Supreme Court of Appeals has noted that, unless "a corresponding duty rests upon the respondent to perform the particular acts sought to be required of him by the relators," it will not issue a mandate to the officer to act. Neither can an official upon whom no duty rests intervene as a defendant in a mandamus proceeding.

What sort of "right" or "duty" is "clear"? If this rule means that mandamus will not issue until the court decides there is a legal duty to act, a perfectly obvious proposition, then nothing is added by describing the duty as "clear.

If, on the other hand, it means that when an applicable rule is disputable or that the administrator's view is "reasonable," and the court will refrain from making its independent determination of the matter, then it is


See also 2 SPELLING, op. cit. supra note 2, § 1369; HIGH, op. cit. supra note 48, § 9; MERRILL, MANDAMUS § 56.


133 See also State ex rel. Revercomb v. O'Brien, 91 S.E.2d 865, 872 (W. Va. 1956).

134 See also State ex rel. Public Service Comm'n v. Southern West Virginia Oil & Gas Corp., 91 S.E.2d 737 (W. Va. 1956); State ex rel. Murasky v. State Compensation Comm'r, 109 W. Va. 218, 153 S.E. 509 (1930); State ex rel. Miller v. Buchanan, 24 W. Va. 362 (1884); HIGH, op. cit. supra note 48, § 9; MERRILL, MANDAMUS § 57.

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quite another thing. It is indeed an alternative manner of expressing the ministerial-discretionary act rule. Probably the latter is intended.

Two further questions might be raised. Why, before declaring the law, must a judge decide the preliminary question as to whether the "right" of "duty" he is about to enforce is "clear" or "plain"? What reasons can be given for failure on the part of the courts to grant mandamus when there is a showing that the right is indeed clear and that the duty is quite plain?

A. Why Require "Plain Duty"?

Mandamus originated as an executive tool. It was a mandate directly from the king, without the intervention of the courts, to a subject commanding him to perform a particular act. This aspect of the king's prerogative was later assumed by the court of king's bench through the convenient fiction that the king sat in that court. Of course in America mandamus does not issue as a prerogative writ, but is authorized by constitutional and legislative enactments. Nevertheless, the writ is an extraordinary remedy in the sense that it is used only in extraordinary cases and when normal procedures are ineffectual. This historical background—a background which does not square very well with the separation of powers theory—in part explains why before issuing mandamus the West Virginia courts seek to find the "right" of the petitioner and the "duty" of the respondent "clear."

Although the Constitution of the United States has no separation of powers provisions, it has been asserted that the branches of the national government are coordinate and cannot command each other. A leading judicial proponent of this theory was Chief Justice Taney. In Kendall v. United States, although the

135 JAFFE, ADMINISTRATIVE LAW 501.
136 For West Virginia cases recounting the origin of mandamus, see Bailey v. Coleman, 123 W. Va. 510, 514, 16 S.E.2d 918, 920 (1941); Fisher v. Charleston, 17 W. Va. 595, 603 (1881).
137 For treatise material on the history of the writ, see 2 BAILLIE, HABEAS CORPUS AND SPECIAL REMEDIES §§ 197, 198 (1913); 2 SPELLING, op. cit. supra note 2, §§1212, 1365; HIGH, op. cit. supra note 46 §§ 3-8; MERRILL, MANDAMUS §§ 1-9; MOSES, MANDAMUS 16-18.
138 The chief architect of judicial supremacy in the United States was John Marshall. It is instructive to compare his views in the mandamus part of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803), with Taney's. 139 37 U.S. (12 Pet.) 524 (1838).
Taney court ordered the postmaster general to perform a ministerial act, it spoke at length about the separation of powers. Taney himself felt that the District of Columbia courts could not issue mandamus because they were without the royal prerogative.\(^{140}\) Subsequently, in *Decatur v. Paulding*,\(^ {141}\) writing for the court, Taney noted that the secretary of the navy was competent to refuse a pension to a navy widow because his power included "judgment and discretion" in expounding the laws. He argued that the secretary's construction of the law would not bind judges in a case in which they had jurisdiction, and neither should that official be bound by the Court's view in a matter within his jurisdiction.\(^ {142}\)

The West Virginia Constitution prohibits any government department from exercising power belonging to either of the others.\(^ {143}\) The supreme court traditionally has been very emphatic in its statements that the "departments of government must be kept separate and distinct, and each in its legitimate sphere must be protected."\(^ {144}\) Especially in two types of cases has this feeling been manifested: first, cases in which the court has felt that nonjudicial functions were being given to the judiciary;\(^ {145}\) and, second, cases in which the court has noted that appeal of judicial questions

\(^{140}\) *Id.* at 626.
\(^{141}\) 39 U.S. (14 Pet.) 497 (1840).
\(^{142}\) For a discussion of Taney's constitutional views, see Frankfurter, *The Commerce Clause* 46-73 (1937).
\(^{143}\) *W. Va. Const.* art. 5, § 1.
\(^{144}\) *State ex rel.* Miller v. Buchanan, 24 W. Va. 362, 379 (1884). See also Slack v. Jacob, 8 W. Va. 613, 661 (1875).

In *Hodges v. Public Service Comm'n*, 110 W. Va. 649, 159 S.E. 834 (1931), a statute giving a circuit court power to try de novo appeals from the public service commission under the "Water Power Act," *W. Va. Acts* 1929, c. 58, was held unconstitutional as an attempt to grant legislative powers to the judiciary. The case was the subject of a hot round of discussion. Davis, *Judicial Review of Administrative Action in West Virginia—A Study of Separation of Powers*, 44 W. Va. L.Q. 270, 352 (1938); Donley, *The Hodges Case and Beyond—A Reply to Professor Davis*, 45 W. Va. L.Q. 291 (1939). In fulfillment of Professor Donley's prophecy that "practically nobody—least of all the supreme court—will be influenced by what either of us has written," *Id.* at 315, the court has noted these "valuable discussions" but has stuck to its
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determined by administrative agencies must be available lest they exercise functions belonging to the courts. Reliance on the first type of cases would lead to judicial caution in issuing mandamus, but the existence of the second type indicates that the judges have not let separation of powers theories stop them from issuing mandamus to administrative officials. Still it is an interesting paradox to see a court which has “definitely ‘settled on a policy of strong adherence to the several constitutional provisions relating to the separation of powers’” commanding the other branches of the state government with such frequency.

A second reason for the “clear duty” rule lies in the idea that an administrator ought to be left fairly free to determine his own scope of action. Perhaps the furthest federal judges have gone along this line was in the Rives case. A congressional enactment provided that the secretary of interior should grant relief to World War I manganese speculators for their expenditures “for or upon property.” The secretary limited payments to expenses incurred for construction, equipment, and machinery; Rives insisted the statute also covered money spent for real estate and mining rights. The Supreme Court refused to upset the secretary’s interpretation of the act, leaving it within his power to determine the area of his discretion.

There are some echoes of the Rives doctrine in West Virginia law—especially when the court agrees with the administrative

\[\text{gums. State ex rel. Richardson v. County Court, 138 W. Va. 885, 897, 78 S.E.2d 569, 577 (1953).}

In Walter Butler Bldg. Co. v. Soto, 97 S.E.2d 275 (W. Va. 1957), the supreme court avoided holding unconstitutional a statute which provided for circuit court power to determine “anew all questions submitted to it on appeal” by so interpreting it as to permit the lower court to consider only judicial questions.

\[146 \text{See, e.g., Wilson v. Hix, 136 W. Va. 59, 65 S.E.2d 717 (1951); De Constantin v. Public Service Comm'n, 75 W. Va. 32, 88 S.E. 88 (1914).}

In reviewing findings of fact by administrative agencies courts may not disturb them when they are supported by substantial evidence for doing so would violate the separation of powers article of the constitution. Chesapeake & O.R.R. v. Public Service Comm'n, 139 W. Va. 161, 170-71, 81 S.E.2d 700, 708 (1953), 57 W. Va. L. Rev. 117 (1955) (dictum). But that rule “has no application in a case where the finding has no material relation to the issue of fact determinative of the question involved.”

\[147 \text{Ibid.}

\[148 \text{State ex rel. Richardson v. County Court, 138 W. Va. 885, 897, 78 S.E.2d 569, 577 (1953), quoting from Sims v. Fisher, 125 W. Va. 512, 524, 25 S.E.2d 216, 222 (1943).}

\[149 \text{Work v. United States ex rel. Rives, 287 U.S. 175 (1925). For a discussion of this case, see Cousens, Legal Doubt or Determination as a Ground for Refusing Mandamus, 24 Geo. L.J. 269 (1936).} \]
determination. But this proposition cannot be carried too far. Courts will not refrain from granting mandamus in all cases where there is some difficulty in interpretation of a statute. They might feel the administrator's interpretation is wrong. Thus, in the Schroath case, the motor vehicles commissioner was mandamused to compel issuance of class "A" registration for automobiles which had been leased by the relator to a bank. Although he thought the statute entitled him to demand the more expensive class "U" registration (common carrier), the court maintained that in order to hold the statute constitutional it would have to be construed otherwise. The administrator was, as a consequence, not permitted to draw his own area of authority in requiring class "U" permits. There are also other cases showing the same approach by our courts. Discretion as to matters of law is something over which the judiciary retains the last word.

Perhaps one reason why there are Rives cases on the books is the nature of the subject matter with which they deal. Rives sought a gratuity; he had no "right" to government reimbursement when the end of hostilities undercut the metals market and left him holding the bag. It is noteworthy that many mandamus relators seek government issuance of so-called "privileges." Although the privilege-right distinction is an unfortunate hangover from a more conceptualistic age, it certainly has influenced the law of man-

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In Sleeth v. Dairy Products Co., 228 F.2d 165, 167 (4th Cir. 1955), the court said:

"It is manifest that the duty imposed upon the county Health Officer by the statutory regulations involves the construction and application thereof, and the exercise of judgment and discretion in their enforcement. His duties are not so plainly marked as to amount to a positive command, and hence the well established rule applies that the courts will not issue a mandamus unless the attempted preformance of the duty amounts to an abuse of discretion."


The supreme court has in mandamus cases also reviewed and upset administrative findings of the former court of claims, an administrative agency, which had been accepted by the legislature. See, e.g., State ex rel. Adkins v. Sims, 130 W. Va. 646, 43 S.E.2d 81 (1947); State ex rel. Cashman v. Sims, 130 W. Va. 430, 43 S.E.2d 805 (1947). This practice is discussed in Note, 52 W. Va. L. Rev. 57 (1949).
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damus. This is especially true in relation to the more shady occupations. Thus, racing horses has been said not to be a matter of right, but a matter of privilege.153 If it is a bare privilege, it is easy to see why courts would insist on a “clear” showing of duty before ordering the license to issue. The privilege doctrine is by no means limited to marginally acceptable occupations, but pervades the whole field of licensing,154 as well as other areas of administrative law.165 While most cases in West Virginia using such language are older,156 their spirit has not yet disappeared.157 Continued judicial reorientation would be helpful here.

B. Equitable Discretion

Although mandamus originated as a judicial writ in a common law court and often is referred to as a remedy at law,168 it has equitable overtones.159 They probably result from the fact that it is

154 See, e.g., Nulter v. State Road Comm’r, 119 W. Va. 312, 193 S.E. 549, 194 S.E. 270 (1937); Quesenberry v. State Road Comm’n, 103 W. Va. 714, 138 S.E. 362 (1927); State ex rel. Ellis v. State Road Comm’n, 100 W. Va. 531, 131 S.E. 7 (1925).

For information concerning professional licensing in West Virginia, see DeLancy, THE LICENSING OF PROFESSIONALS IN WEST VIRGINIA (1938). See also Gellhorn, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105-51 (1956); Gellhorn and Byse, ADMINISTRATIVE LAW 768-79.

155 Besides in licensing, the privilege doctrine arises in connection with government employment, use of the mails, applications for a passport, pensions, and many other areas of the law.

156 See, e.g., Quesenberry v. State Road Comm’n, 103 W. Va. 714, 138 S.E. 362 (1927); State ex rel. Ellis v. State Road Comm’n, 100 W. Va. 531, 131 S.E. 7 (1925).


159 One example of an equitable flavor to mandamus is its use of the defense of laches. See, e.g., Board of Trustees of Policemen’s Pension or Relief Fund v. Huntington, 96 S.E.2d 225, 243-44 (W. Va. 1956); Hertzog v. Fox, 93 S.E.2d 529 (W. Va. 1946); State ex rel Daugherty v. County Court, 127 W. Va. 35, 31 S.E.2d 321 (1944); Cunningham v. Huntington, 97 W. Va. 672, 678, 125 S.E. 810, 812-13 (1924); State ex rel. Rhodes v. Board of Education, 95 W. Va. 57, 120 S.E. 183 (1923).

For a general discussion concerning laches, see Plattenburg, The Defense of Laches and a Correlative, 59 W. Va. L. Rev. 266 (1957).
an extraordinary remedy. They also account for the fact that sometimes, even when the relator can demonstrate a clear right and duty, the courts refuse to award mandamus.

The chief contribution of equity to the law of mandamus is the doctrine of "equitable discretion." Its best known expression was in *United States ex rel. Greathouse v. Dern.* There Justice Stone announced that:

"[M]andamus . . . may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right." If issuance of the writ will "work a public injury or embarrassment," it is within the discretion of a judge to deny it. Injection of this doctrine into the field of mandamus creates uncertainty and poses a difficulty for the judges when they are faced with situations in which hardship will result no matter what they decide. Nevertheless, the rule of the *Greathouse* case is the law of West Virginia.

When is the cure of mandamus worse than the disease of no adequate judicial remedy? The most frequent instances arise when grant of mandamus would not really help the petitioner. For example, in moot cases, even though the relator has a right to mandamus, issuance of the writ would be of no avail. Short of a moot case, there are other situations in which the writ would be idle. Thus, mandamus will not be awarded to require a city to institute condemnation proceedings when such proceedings, if

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160 *Cf.* MERRILL, MANDAMUS § 62.

For cases referring to mandamus as an extraordinary remedy, see Gardner v. Bailey, 128 W. Va. 381, 336, 36 S.E.2d 215, 218 (1945); Bailey v. Coleman, 123 W. Va. 510, 515, 16 S.E.2d 918, 920 (1941).

161 289 U.S. 352 (1933).

162 Id. at 359.

163 Id. at 360.

164 For cases expressing the view that issuance of mandamus is discretionary with a judge, see *State ex rel. Pardue v. County Court,* 105 W. Va. 235, 239, 141 S.E. 574, 575-76 (1928); *State ex rel. Miller v. Buchanan,* 24 W. Va. 382, 384 (1884) (dictum).

In *State ex rel. Trust Co. v. Melton,* 62 W. Va. 253, 264, 57 S.E. 729, 733 (1907), the court stated that:

"There may be discretion in the courts to refuse the writ of mandamus, under peculiar circumstances, rendering ineffectual beyond the vindication of a dry or fruitless legal right, or where the conduct of the applicant, in the nature of a waiver or estoppel, makes it inequitable or unjust, on his part to exact strict and full compliance with the law . . . ."

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ststituted, would not result in any recovery for the petitioner.\textsuperscript{166} Also, in its discretion the court refused to mandamus the road commission to turn over to a receiver monies which it owed a contractor against whom a general creditors' proceeding had been instituted.\textsuperscript{167} The commissioner had agreed to turn over the fund to proper parties after a court order of distribution was made. The funds were safe in administrative hands; there was nothing to be gained from turning them over to the receiver. Mandamus is not available to protect a mere abstract right. Under such circumstances the judges will exercise their discretion to refuse the writ.\textsuperscript{168}

There might be times when mandamus would be very beneficial to the party seeking it, but would cause a public injury outweighing the private good. In the \textit{Greathouse} case the relators proved their right to a permit for construction of a wharf, but the court in its discretion refused the writ noting that its grant would be prejudicial to the public interest because it would have been necessary to condemn any wharf constructed; the government was planning a parkway in the area.\textsuperscript{169} A New York court denied mandamus for a policeman who, during the Second World War, had been refused the right to retire on a pension. It noted the drastic wartime depletion of the police ranks and determined that mandamus to cut the force further would work a public mischief.\textsuperscript{170} This principle has been accepted by the Supreme Court of Appeals which has declared:

"The writ will not issue if the court can see that it will operate to the detriment rather than the benefit of the general public, or cause great disorder and confusion in the fiscal affairs and duties of the officers of a public corporation."\textsuperscript{171}

\begin{footnotes}
\item[166] State \textit{ex rel.} Wells v. City of Dunbar, 95 S.E.2d 457 (W. Va. 1957).
\item[167] State \textit{ex rel.} First Huntington Nat'l Bank v. State Road Comm'n, 112 W. Va. 841, 164 S.E. 289 (1932).
\item[168] For other cases concerning abstract rights, see State \textit{ex rel.} Pardue v. County Court, 105 W. Va. 235, 141 S.E. 874 (1928); Hall v. Staunton, 55 W. Va. 684, 47 S.E. 265 (1904).
\item[169] United States \textit{ex rel.} Greathouse v. Dern, 289 U.S. 352 (1933).
\item[171] State \textit{ex rel.} Pardue v. County Court, 105 W. Va. 235, 875, 141 S.E. 874, 875-76 (1928).
\end{footnotes}

But see State \textit{ex rel.} Trust Co. v. Melton, 62 W. Va. 253, 264, 57 S.E. 729, 733 (1907), in which the writ was awarded in spite of a recognition that in proper cases equitable discretion would be exercised to deny mandamus. The court noted that in that particular case "any embarrassment or hardship
Consequently, mandamus was refused when it was sought to require construction of a courthouse. There was a dispute going on as to moving the county seat. Had the courthouse been built and the county seat moved, an unnecessary drain would have been made on the county funds.

Executive officials have a broad range of authority in relation to the policies of government operation. As a matter of discretion courts will not use mandamus to run the government. For example, in Hall v. Staunton the courts refused to award the writ because it appeared that the relator sought it in order to ferret out a crime. That is up to public officials. In government operations the balance of interests favors withholding a court mandate. In the first place, persons other than the relator and the respondent might be involved. Thus, the alleged wrongdoer against whom the relator wants the officials to take action would not be in court in a mandamus proceeding. Yet the merits of what he has done would almost inevitably be discussed in a mandamus proceeding. Also here is a place where political remedies can be effective. If an official is incompetent, the solution is to fire him and hire a skilled replacement. Another compelling reason for judicial care exists because of the way in which mandamus is enforced. Disobedience of a writ is contempt. Would not a court appear ridiculous if it jailed the city fathers?

It smacks of a judicial power play when cities and counties are ordered by mandamus to lay certain taxes. Here is an area in which the judges might well exercise a great deal of caution. Nevertheless, the supreme court has commanded a city council to reconvene and make certain tax levies so funds would be on hand to keep up pension funds. The legislature has sought to regulate that may ensue must be laid at the feat of... some persons or body other than the applicant..."

Of course mandamus will not be issued to command performance of an illegal act. State ex rel. Pardue v. County Court, 105 W. Va. 285, 141 S.E. 874 (1928).

172 State ex rel. Matheny v. County Court, 47, W. Va. 672, 35 S.E. 959 (1900).


174 W. VA. CODE c. 55, art. 1, § 11 (Michie 1955); Eureka Pipe Line Co. v. Riggs, 75 W. Va. 353, 88 S.E. 1020 (1914).

175 Board of Trustees of Policemen’s Pension or Relief Fund v. Huntington, 96 S.E.2d 225 (W. Va. 1956).
the power of the judiciary in regard to one aspect of mandamus to require levying a tax. It has provided that:

"Whenever a writ of mandamus, issued to enforce the laying of a levy to satisfy a judgment against a political subdivision of the State would produce a disturbance in the administration of the financial affairs of the political subdivision not necessary to the protection and enforcement of the right of the creditor, the court may order that the levy be distributed equally over a period of years not to exceed ten . . . ."\textsuperscript{176}

Further legislation in this direction would be desirable.

Because of its nature the judicial process does not lend itself well to handling certain situations. In such cases judges often exercise their discretion not to command. Courts, especially courts of law, give specific dollars and cents, or guilty or not guilty judgments. As a consequence, mandamus is not often granted when it would take a long period of time and a lot of acts to comply with the mandate. Courts will stay clear of supervision. Then too the judicial system is designed to answer questions either yes or no. Some mandamus petitions ask more than that of a judge. In one California case a disappointed civil service examinee sought to have his comparative ranking altered.\textsuperscript{177} The question was not whether he was or was not eligible,\textsuperscript{178} a question judges will handle, but he was more or less eligible than a lot of other people. Where a comparison is sought, rather than a single dispositive determination, the courts in their equitable discretion will not grant the remedy.

**CONCLUSION**

Examination of recent reports of the Supreme Court of Appeals of West Virginia reveals a comparative abundance of mandamus cases. Three factors contribute to this: (1) original, as well as appellate, jurisdiction in the supreme court;\textsuperscript{179} (2) dearth of specific statutory methods of review of administrative actions; and (3) ease in obtaining mandamus because of the liberality with which the courts in West Virginia issue it.


\textsuperscript{178} The simple yes or no sort of question is involved in most occupational licensing.

\textsuperscript{179} In Arkansas, where there is very limited original jurisdiction in the state supreme court to issue mandamus, there has been only a handful of cases in recent years.
Extension of specific statutory review provisions to all administrative agencies and to all executive actions not only would eliminate the need for mandamus, but also would facilitate judicial review of agency action.\textsuperscript{180} Perhaps, it is over ambitious to attempt this, but at least when any new administrative statute is passed it should provide specific review procedures tailored to the problems involved. Another, but less likely, method to eliminate the complexities of mandamus and of the other extraordinary remedies would be passage of a law designed to afford a single method of review for all administrative determinations.\textsuperscript{181}

However, until legislative changes are made, the best method of improving judicial review by mandamus is through recognition by the courts that the old formulas are in fact no longer used, even though in some instances lip service might still be paid to them. In particular, it would be healthy for the courts to take four actions. (1) Expressly junk the ministerial-discretionary act distinction. Mandamus is now being issued to compel both ministerial and discretionary officers, who act beyond authority or unreasonably, to keep within the bounds of propriety. Frank recognition of this would clear away nineteenth century debris still cluttering the cases. (2) Limit determination of constitutionality of a statute to instances in which administrative refusal to act is based on advice of the attorney general that the law providing for action is unconstitutional. This will cut the number of cases brought to the supreme court in which lay officials refuse to act because of their own peculiar notions as to constitutional law. (3) Cease using the "trite"\textsuperscript{182} "clear right" and "plain duty" talk. It adds nothing to what the courts have in fact done. (4) Recognize that equitable discretion will permit judges to deny the writ when on the balance its issuance is contrary to the common good.

\textsuperscript{180} The proposed new rules of civil procedure do not apply to the extraordinary remedies. Rule 81 (a) (4). The comment notes that this is "for the time being."

\textsuperscript{181} New York adopted a single remedy in place of certiorari, mandamus, and prohibition. This unfortunately, did not work out too well. The technical distinctions still remain. Davis, Administrative Law § 223.

\textsuperscript{182} The description "trite" is that of the court. Morton v. Sims, 114 W. Va. 434, 498, 172 S.E. 531, 533 (1933).