Michigan Law Review

Volume 45 | Issue 2

1946

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MICHIGAN LAW REVIEW

Vol. 45 DECEMBER, 1946 No. 2

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THE appearance of a substantial body of administrative law in the United States preceded its recognition as such by a good many years. In the intervening period, the courts made every effort to fit the new and unfamiliar jurisprudence into old and familiar forms, particularly those of the common law. This was a natural development, both because it accorded with common law traditions of adjustment, and because there was no legislative recognition of the view for action. The recognition that the problems of administrative law cannot invariably be solved within the framework of traditional legal concepts has paralleled the growing awareness of this new body of law. Many vestiges of the older approach remain, however. Particularly is this true in the form of judicial control over administrative action.

It is the purpose of this article to show how the courts have attempted to mold one of these forms to such new uses, to demonstrate the inadequacy of the formulas devised for its application and to suggest that no single solution, whether of legislative or judicial devising, can prove satisfactory for the multiplicity of administrative functions found in government today and now reviewable by the writ of mandamus.

Common law extraordinary legal remedies are available to would-be litigants to review administrative action in three general sets of circumstances: When the statute establishing the agency makes inadequate or no provision for court review of its decisions; when the statutes provide for review by one of these writs without defining its scope; or where the statute establishing the administrative body either itself or by reference to a general statute defines the scope of the writ in a manner held by the courts to be identical with the common law

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remedy.[1] In such cases, the courts claim to apply the common law, although, it will be seen, since the common law knew few of the modern functions of administrative bodies, it fulfills the standard only in the sense that the remedy is judge-made.

The most popular writ to review administrative functions and the one in which the role of courts as legislators is most easily demonstrated is mandamus. The common law scope of this writ,[2] according to the

[1] In a few states it has been held that a constitutional grant of authority to the courts to use these remedies removes them from legislative control and creates unalterable common law writs: Camron v. Kenfield, 57 Cal. 550 (1881); Sherlock v. Mayor of City of Jacksonville, 17 Fla. 93 (1879); Stein v. Morrison, 9 Idaho 426, 75 P. 246 (1904), reversing Williams v. Lewis, 6 Idaho 184 54 P. 619 (1898); Kendall v. Beiling, 295 Ky. 782, 175 S.W. (2d) 489 (1943); Specht v. Detroit, 20 Mich. 168 (1870); State ex rel. Scharnikow v. Hogan, 24 Mont. 379, 62 P. 493 (1900); O'Brien v. Bd. of Commrs., 41 Nev. 90, 167 P. 1007 (1917); Gibson v. Templeton, 62 Tex. 555 (1884). In a few cases it has been specifically held or strongly implied that the legislature can alter the scope of these remedies: Board of Commissioners v. Dunlap, 83 Colo. 360, 265 P. 94 (1928); Warren v. Ind. Telephone Co., 217 Ind. 93, 26 N.E. (2d) 399 (1940) (implying that alterations will be approved only so long as they serve to broaden judicial review); Butin v. Civil Service Commission, 179 Iowa 1048, 162 N.W. 565 (1917); State ex rel. Brewster v. Mohler, 98 Kan. 465, 158 P. 408 (1916), aff'd., Payne v. Kansas ex rel. Brewster, 248 U.S. 112, 39 S.Ct. 32 (1917); Mayor v. Morgan, (La. 1828) 7 Martin, N.S., 1; Dennett, Petitioner, 32 Me. 508 (1851); Barnes v. Lehi City, 74 Utah 321, 279 P. 878 (1929); Winsor v. Bridges, 24 Wash. 540, 64 P. 780 (1901); Boggess v. Buxton Clerk, 67 W.Va. 679, 69 S.E. 367 (1910). Courts, however, usually follow the line of least resistance, holding that the statutes adopt the common law remedies: St. Louis, I. M. & S. Ry. Co. v. Barnes, 35 Ark. 95 (1879); Rash v. Allen, 1 Boyce (24 Del.) 444, 76 A. 370 (1910); State ex rel. Wolfe v. Kirke, 12 Fla. 278 (1868); Commissioners v. Harper, 38 Ill. 103 (1865); Michigan City v. Roberts, 34 Ind. 471 (1870); State ex rel. Harkness v. Gleason, 187 Ind. 297, 119 N.E. 9 (1917); Dane v. Derby, 54 Me. 95 (1866); Clements v. Roberts, 144 Tenn. 129, 230 S.W. 30 (1920); City of Roanoke v. Elliott, 123 Va. 393, 96 S.E. 819 (1918); State ex rel. Anderton v. Kempf, 69 Wis. 470, 34 N.W. 226 (1887).

[2] In addition to the cases cited above holding that all these common law remedies are beyond legislative control, mandamus has been held to be a common law writ under either a special statute or a general code section in the following states: Ex parte Huckabee, 71 Ala. 427 (1882); St. Louis, I. M. & S. Ry. Co. v. Barnes, 35 Ark. 95 (1879); Bright v. Farmers' Highline Canal & Reservoir Co., 3 Colo. App. 170, 32 P. 433 (1893); State v. New Haven & Northampton Co., 41 Conn. 134 (1874); Union Church v. Sanders, 6 Del. 100 (1855); Rash v. Allen, 1 Boyce (24 Del.) 444, 76 A. 370 (1910); Brusnwick v. Dure, 59 Ga. 803 (1877); Commrs. v. Harper, 38 Ill. 103 (1865); Michigan City v. Roberts, 34 Ind. 471 (1870); State ex rel. Harkness v. Gleason, 187 Ind. 297, 119 N.E. 9 (1917); Ford v. Manchester, 136 Iowa 213, 113 N.W. 846 (1907); Dane v. Derby, 54 Me. 95 (1866); Weber v. Zimmerman, 23 Md. 45 (1865); Waldron v. Lee, 5 Pick. (22 Mass.) 323 (1827); State ex rel. Miller v. Lancaster Co., 13 Neb. 223, 13 N.W. 212 (1882); People ex rel. La Chicotte v. Best, 187 N.Y. 1, 79 N.E. 890 (1907); Britt v. Bd. of Canvassers, 172 N.C. 797, 90 S.E. 1005 (1916); Clements v. Roberts, 144 Tenn. 129, 230 S.W. 30 (1920); State

authorities, is well defined. The most frequently cited text is High's *Extraordinary Legal Remedies* which opens with the following definition:

> "The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law."[3]

The United States Supreme Court has characterized its own often cited decisions as follows:

> "Thus it has been ruled, that the only acts to which the power of the courts, by *mandamus*, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer; but that, wherever the right of judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise."[4]

From these as well as other authorities[5] it is clear then that mandamus is a remedy designed to compel the performance of duties which are legal in nature. Or, put in another way, the writ of mandamus will issue when the judiciary has the final word over officers and agencies subordinate to it in legal matters. And most statutes defining the scope of the writ specify that it will extend to "any inferior tribunal, board, person," etc.[6]

ex rel. Polson v. Hardcastle, 68 Wash. 548, 124 P. 110 (1912); State ex rel. Anderton v. Kempf, 69 Wis. 470, 34 N.W. 226 (1887). Of course, this remedy is frequently administered under equitable principles; cf. 20 IOWA L. REV. 667 (1935); Feldman, "Mandamus," 7 LAW. SOC. J. 233, 436 (1936).

[3] HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, § 1 (1884).

[4] United States ex rel. Goodrich v. Guthrie, 17 How. (58 U.S.) 284 at 304 (1854); Kendall v. United States ex rel. Stokes, 12 Pet. (37 U.S.) 524 (1838). See Decatur v. Paulding, 14 Pet. (39 U.S.) 497 at 518 (1840), where it was said, "Any sensible distinction applicable to all cases, it is impossible to lay down . . . such are the refinements and mere verbal distinctions, as to leave an almost unlimited discretion to the court."

[5] ". . . Courts, therefore, will not attempt by mandamus to compel the officer vested with such discretion to exercise it in any particular way, or to come to any particular decision, or to revise or alter his judgment when he has once exercised it." MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, § 945 at p. 632 (1890).

[6] In Kendall v. United States ex rel. Stokes, 12 Pet. (37 U.S.) 524 at 621 (1838), it was said of the common law English writ, "And the power to issue this

I

USE OF MANDAMUS AGAINST OFFICERS OF OTHER DEPARTMENTS: THE SEPARATION OF POWERS DOCTRINE

The fact that utilization of this writ is limited to the control of bodies inferior to the courts, when combined with the American theory of the separation of powers, creates a problem of special importance with respect to its availability as against officers of other departments. For the separation of power theory presupposes not only a separation of functions, legislative, executive, and judicial, but also supposedly establishes the independence and autonomy of each department.[7] The problem presented is more than that of judicial review, a facet of the definition of legal *versus* political questions. For the traditional concept of judicial review in the United States does not admit that the court can simply construe or declare acts of coordinate departments invalid. This power can be exercised only with respect to a case or controversy between parties where the effect on legislative power, for example, is a collateral result of the decision of the rights of the parties involved.[8] Even though the legislature is concerned, it is not a party before the court. However, in a case involving the writ of mandamus when sought against the governor, the coordinate department is both concerned in the disposition of the petition, and a party to the action, so that the control is not collateral but direct.

A. *In Jurisdictions Where the Governor Is Subject to Mandamus*

Some twenty states[9] hold that the writ of mandamus may issue to compel the governor to perform his legal duties. Their reasoning follows and usually cites that of Chief Justice John Marshall in *Marbury v. Madison*.[10] This line of argument holds that insofar as a constitution is a legal document, it is addressed exclusively to the judiciary, at least with respect to its final interpretation; and that the mandamus is a means to compel the performance of legal duties. In Ameri-

writ is given to the king's bench only, as having the general surviving [supervising] power over all inferior jurisdictions and officers, and is co-extensive with judicial sovereignty."

[7] "In theory, at least, these departments are not merely equal, but are also exclusive." Putnam v. Norblad, 134 Ore. 433 at 438, 293 P. 940 (1930).

[8] HARRIS, THE JUDICIAL POWER IN THE UNITED STATES, passim (1940).

[9] Alabama, Arizona, California, Colorado, Georgia, Idaho, Indiana, Kansas, Kentucky, Maryland, Montana, Nebraska, Nevada, North Carolina, Ohio, Oregon, South Carolina, Virginia, West Virginia, and Wyoming.

[10] 1 Cranch (5 U.S.) 137 (1803).

can government the law alone is sovereign; therefore it is not the officer but the function that determines the availability of the writ, and it is not the courts but the constitution or the statutes which does the controlling.[11] Thus the Kansas Supreme Court said regarding the separation of departments:

> "For the purpose of passing laws the legislature is supreme, and *the other departments must obey*. For the purpose of construing the laws, and of determining controversies, the courts are supreme, and *the other departments must obey*. And for the purpose of ultimately enforcing the laws the executive department is supreme, and *the other departments must obey*. But the executive department can enforce the statutory laws only as the legislature has enacted them, and where the courts have construed the laws (statutory or constitutional) in the determination of controversies, the executive department can enforce them only as construed. . . . It must be remembered, however, that all controversies must be determined somewhere, and that the courts are the only tribunals created by the constitution and laws for the special purpose of construing the constitution and the laws . . . ."[12]

And in Ohio it was said in a similar case:

> "The legislative, executive, and judicial departments of the state government are not so absolutely distinct that an arbitrary exercise of power, or what is the same thing, an arbitrary refusal to exercise power, could not be checked or opposed by either of the other departments. Such a theory is opposed to the principle of checks and balances upon which the federal and state constitutions have been framed. Indeed, it does not seem clear to us, if the judicial department may annul an act of the legislature by declaring it unconstitutional, why it may not constitutionally exercise its functions in requiring the executive department to perform a clear legal duty which it neglects or refuses to perform. Neither are we ready to acknowledge that any office or officer is so high that the law cannot reach him."[13]

[11] For this reason, it makes no difference apart from special constitutional provisions whether the petition is presented to the state supreme court or to an inferior court, since it is not the court but the law that compels action.

[12] Martin v. Ingham, 38 Kan. 641 at 656-659, 17 P. 162 (1888).

[13] State ex rel. Trauger v. Nash, 66 Ohio St. 612 at 617-618, 64 N.E. 558 (1902). In Traynor v. Beckham, 116 Ky. 13 at 23, 74 S.W. 1105, 76 S.W. 844 (1903), it was said, "Ministerial power is certainly inferior to judicial power. If one officer can be controlled in its exercise, why not another?" And in State ex rel. Wright v. Savage, 64 Neb. 684 at 696, 90 N.W. 898, 91 N.W. 557 (1902), "There seems to be no good reason for holding that one member of a co-ordinate branch of the government should be exempt from judicial control and the others subject to it."

While these states are in agreement that the governor is subject to judicial control with respect to some of his duties, the criteria that are applied in determining which duties are thus enforceable are hopelessly confused. Some decisions hold that if a power is conferred on the governor by the constitution, that is sufficient to grant an immunity from mandamus.[14] In other cases a power, whether of legislative or constitutional origin, is not subject to judicial control by mandamus if it is one belonging to him in his official capacity as governor; or contrariwise, if the power is one which could have been imposed on any other officer as well as the governor, it is subject to mandamus.[15] Still a third group of cases have held that the distinction to be applied is the commonly used separation between discretionary and ministerial functions.[16] While this is the most widely used standard, either alone

[14] In Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156 at 161, 28 P. 1125 (1892), the court said in compelling the governor to issue a land patent: "The authorities are uniform that the courts cannot by *mandamus* control the action of the governor in the exercise of any of his political or governmental powers, whether the same are conferred by the constitution or by legislative enactments . . .," and the court's decision to issue the writ was based on the fact that the power was conferred not in the executive article, which would have made the power executive, but in the education section of the constitution. In extending the writ, the court said in Georgia ex rel. Low v. Towns, 8 Ga. 360 at 367 (1850), ". . . The commissioning Clerks is no part of the duty enjoined by the Constitution on the executive department of the government. . . ." To the same effect see Ellingham v. Dye, 178 Ind. 336 at 401, 99 N.E. 1 (1912), writ of error denied, Marshall v. Dye, 231 U.S. 250, 34 S.Ct. 92 (1913); Miles v. Bradford, 22 Md. 170 (1864); State ex rel. Trauger v. Nash, 66 Ohio St. 612, 64 N.E. 588 (1902); Blalock v. Johnston, 180 S.C. 40 at 45-46, 185 S.E. 51 (1936); Allen v. Byrd, 151 Va. 21, 144 S.E. 469 (1928); State ex rel. Irvine v. Brooks, 14 Wyo. 393, 84 P. 488 (1905). *Contra*, Hovey v. State ex rel. Schuck, 127 Ind. 588 at 600, 27 N.E. 175 (1890).

[15] Tenn. and Coosa R.R. Co. v. Moore, 36 Ala. 371 (1860); Directors of Insane Asylum v. Wolfly, 3 Ariz. 132, 22 P. 383 (1889); Middleton v. Low, 30 Cal. 596 (1866); Hovey v. State ex rel. Schuck, 127 Ind. 588, 27 N.E. 175 (1890); Martin v. Ingham, 38 Kan. 641, 17 P. 162 (1888); Householder v. Morrill, 55 Kan. 317, 40 P. 664 (1895); State ex rel. White v. Dickerson, 33 Nev. 540, 113 P. 105 (1910); State ex rel. Whitman v. Chase, 5 Ohio St. 528 (1856); State ex rel. Trauger v. Nash, 66 Ohio St. 612, 64 N.E. 558 (1902); Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936); State ex rel. Irvine v. Brooks, 14 Wyo. 393, 84 P. 488 (1905).

[16] This standard is almost always combined with one or more of the others noted above. *Cf.* Tenn. and Coosa R.R. Co. v. Moore, 36 Ala. 371 (1860); State ex rel. Higdon v. Jelks, 138 Ala. 115, 35 S. 60 (1902); State ex rel. Turner v. Henderson, 199 Ala. 244 (1917); State ex rel. Daly v. Henderson, 199 Ala. 428, 74 S. 951 (1917); State ex rel. Martin v. Henderson, 199 Ala. 701, 74 S. 952 (1917); Directors of Insane Asylum v. Wolfly, 3 Ariz. 132, 22 P. 383 (1889); Winsor v. Hunt, 29 Ariz. 504, 243 P. 407 (1926); Ind. Comm. v. Price, 37 Ariz. 245, 292 P. 1099 (1930); Middleton v. Low, 30 Cal. 596 (1866); Harpending v. Haight, 39 Cal. 189 (1870); Twin Falls County v. Ross, 52 Idaho 328, 14 P. (2d)

or in combination with one of the others noted above, some courts either have rejected outright the validity of the distinction or have recognized the dichotomy but denied its legal consequences. In Ohio, a jurisdiction in which the latter type of treatment is employed, the court in discussing the nature of the governor's power to ascertain the number of votes cast for candidates in an election said:

> "We fully concede that the duties of the defendants, in the respect in question, were ministerial in their nature. But the performance of ministerial duties requires the exercise of intelligence, sense and judgment. Ministerial duties must be performed correctly; and the fact that a ministerial officer performed his duties according to his judgment is of no avail, if the duties are not correctly performed."[17]

More recently in the same state mandamus has been used to determine whether a governor removed an official on charges which were sufficient under a statute making his "judgment" final, and to determine whether there was any competent evidence to support those charges.[18] And the rule in that jurisdiction has been expressed as meaning that while the separation between discretionary and ministerial functions is a valid one for most purposes, mandamus will extend to all ministerial

622 (1932); Governor v. Nelson, 6 Ind. 496 (1855); Biddle v. Willard, 10 Ind. 62 (1857); Martin v. Ingham, 38 Kan. 641, 17 P. 162 (1888); Householder v. Morrill, 55 Kan. 317, 40 P. 664 (1895); Traynor v. Beckham, 116 Ky. 13, 74 S.W. 1105, 76 S.W. 844 (1903); McCreary v. Williams, 153 Ky. 49, 154 S.W. 417 (1913); Magruder v. Swann, 25 Md. 173 (1866); Warfield v. Vandiver, 101 Md. 78, 60 A. 538 (1905); Foote & Co. v. Harrington, 129 Md. 123, 98 A. 289 (1916); Brooke v. Widdicombe, 39 Md. 386 (1873); Chumasero v. Potts, 2 Mont. 242 (1875); Territory ex rel. Tanner v. Potts, 3 Mont. 364 (1879); State ex rel. Eaves v. Rickardo, 16 Mont. 145, 40 P. 210 (1895); State ex rel. State Pub. Co. v. Smith, 23 Mont. 44, 57 P. 449 (1899); State ex rel. Danaher v. Miller, 52 Mont. 562, 160 P. 513 (1916); State ex rel. White v. Dickerson, 33 Nev. 540, 113 P. 105 (1910); Cotten v. Ellis, 7 Jones (52 N.C.) 545 (1860); State ex rel. Whitman v. Chase, 5 Ohio St. 528 (1856); State ex rel. Hawke v. Davis, 102 Ohio St. 216, 131 N.E. 348 (1921); State ex rel. Vogt v. Donahey, 108 Ohio St. 440, 140 N.E. 609 (1923); State ex rel. Watkins v. Donahey, 110 Ohio St. 494, 144 N.E. 125 (1924); State ex rel. Armstrong v. Davey, 130 Ohio St. 160, 198 N.E. 180 (1935); State ex rel. Herbert v. Bricker, 139 Ohio St. 499, 41 N.E. (2d) 377 (1940); State ex rel. Rawlinson v. Ansel, 76 S.C. 395, 57 S.E. 185 (1906); Brown v. Ansel, 82 S.C. 141, 63 S.E. 449 (1908); Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936); Easler v. Maybank, 191 S.C. 511, 5 S.E. (2d) 288 (1939); Allen v. Byrd, 151 Va. 21, 144 S.E. 469 (1928); State ex rel. Irvine v. Brooks, 14 Wyo. 393, 84 P. 488 (1905).

[17] State ex rel. v. Foster, 38 Ohio St. 599 at 603 (1883).

[18] State ex rel. Vogt v. Donahey, 108 Ohio St. 440, 140 N.E. 609 (1923); State ex rel. Watkins v. Donahey, 110 Ohio St. 494, 144 N.E. 125 (1924).

functions and any discretionary function where the discretion of the governor has been abused.[19]

The West Virginia court has also rejected the ministerial-discretionary distinction with respect to the governor upon occasion, remarking that, "It is hardly possible to conceive of a public office, the duties of which do not require of the officer filling it the exercise of discretion."[20]

Even where the ministerial-discretionary power division is accepted as the determinant of when mandamus will issue, there are occasions when the words of the statutes under which the power is exercised are interpreted almost out of existence to make application of this formula jibe with the results desired by the courts. The South Carolina Supreme Court has held, for example, that a statute empowering the governor to call a special election whenever certain facts "be made to appear to the satisfaction of the Governor," established a ministerial rather than a discretionary duty since "insofar as this case is concerned, the words 'to the satisfaction of the Governor' may be treated as not being in the statute."[21]

There is also a small group of cases where the reasoning of the court is concerned solely with the merits of the controversy and does not discuss either the nature of the functions or the immunity of the governor.[22]

In states where the governor is subject to control by mandamus it would seem that the same line of reasoning would subject the legisla-

[19] In State ex rel. Armstrong v. Davey, 130 Ohio St. 160 at 163, 198 N.E. 180 (1935), it was said, "No executive act dependent upon the judgment or discretion of the Governor is subject to judicial control, and mandamus will not lie unless there has been a clear abuse of discretion."

[20] Goff v. Wilson, 32 W.Va. 393 at 401, 9 S.E. 26 (1889). In State ex rel. Wheeler & Co. v. Board of Public Works, 80 W.Va. 638, 93 S.E. 759 (1917), the function of approving relator's bond on a public contract was termed "ministerial," yet the writ was extended since the Governor and the board had abused their discretion.

[21] Easler v. Maybank, 191 S.C. 511 at 515, 5 S.E.(2d) 288 (1939). In Gray v. State ex rel. Coghlen, 72 Ind. 567 at 576 (1880), it was said, ". . . Where the words of a statute are permissive merely, in cases where public interests and rights are concerned, and where the public or third persons have a claim *de jure* that the power should be exercised, they will be construed as obligatory."

[22] State ex rel. Higdon v. Jelks, 138 Ala. 115, 35 S. 60 (1902); Sellers v. Frohmiller, 42 Ariz. 239, 24 P. (2d) 666 (1933); Governor v. Nelson, 6 Ind. 496 (1855); Biddle v. Willard, 10 Ind. 62 (1857); Baker v. Kirk, 33 Ind. 517 (1870); State ex rel. Eaves v. Rickards, 16 Mont. 145, 40 P. 210 (1895); State ex rel. Tzschuck v. Weston, 4 Neb. 234 (1876); State ex rel. Cromelien v. Boyd, 36 Neb. 181, 54 N.W. 252 (1893); State ex rel. Wall v. Blasdel, 4 Nev. 241 (1868); State ex rel. Laughton v. Adams, 19 Nev. 370, 12 P. 488 (1886).

tive department to judicial control, at least with respect to so-called ministerial duties, such as reapportionment. Such, however, is not the case. Only in rare instances have courts been requested to or have they taken jurisdiction of petitions for mandamus against legislative officers, and then only when it seems likely that the officer will obey if the decision is adverse.[23] This, perhaps, gives the clue to the willingness of the judiciary to act on cases involving the governor. For while the question of control by mandamus is almost always discussed and decided in these states apart from the problem of enforcement, the courts are fond of pointing out that there is considerable reason for assuming that the governor will obey without question, even though it is admitted that he could not be judicially coerced.

B. *In Jurisdictions Where the Governor Is Immune from Mandamus*

In the eighteen states which hold that the governor is immune to actions for mandamus,[24] the reasoning is far more uniform. Here

[23] State ex rel. Benton v. Elder, 31 Neb. 169, 47 N.W. 710 (1890), mandamus refused on its merits to compel the speaker to publish election returns pending judicial determination of a contest. In Goff v. Wilson, 32 W.Va. 393, 9 S.E. 26 (1889), mandamus was refused to determine title to the office of governor pending a legislative investigation of election returns, since the writ if issued would serve to control collaterally legislative discretion; the court also proved the existence of discretion by pointing out that certiorari was being used in a lower court to review some of the returns. Thus the function was both legislative and judicial and therefore not controllable by mandamus. *Cf.* State ex rel. Tzschuck v. Weston, 4 Neb. 234 (1876).

[24] Arkansas, Florida, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Wisconsin. Maryland was at one time in this group; Miles v. Bradford, 22 Md. 170 (1864), reversed in Magruder v. Swann, 25 Md. 173 (1866). This list is perhaps not entirely accurate. The governor's acquiescence was held to give jurisdiction in People ex rel. Stickney v. Palmer, 64 Ill. 41 (1872), although cases before and after hold that he is constitutionally immune. In Louisiana, while many earlier decisions hold that the governor is immune to suits for mandamus, the writ was denied in State ex rel. Young v. Hall, 135 La. 420, 65 S. 596 (1914), and State ex rel. Williams v. Long, 172 La. 1028, 136 S. 41 (1931), solely because the functions there involved were discretionary. In Rhode Island, the only decision holds that his immunity extends to include "at least" his official duties, Mauran v. Smith, 8 R. I. 192 (1865). In Wisconsin, the point has never been definitely decided; the only statement is one in the syllabus of State ex rel. Byrne v. Harvey, 11 Wis. 32 (1860), which says that his immunity extends to all his duties. But in State ex rel. Kay v. LaFollette, 222 Wis. 245, 267 N.W. 907 (1936), the writ was refused because the function there involved was termed "discretionary." In South Dakota, the question was specifically reserved and the writ denied on its merits in Woods v. Sheldon, 9 S.D. 392, 69 N.W. 602 (1896), but the concurring opinion of Justice Fuller was placed upon the ground that the writ will not issue to the governor. In Texas, the governor is made immune to mandamus from the supreme court by an amendment to Art. 5, sec. 3 of the Constitution of 1876, approved September 22, 1891.

the courts usually begin with a discussion of the separation of powers theory as establishing independence and equality among the three departments.

> "Neither of the three great departments into which our government is, by the constitution, divided, is subordinate to, or may exercise any control over, another, except as is provided in the constitution. This normal condition is that of equality, each acting within its own sphere, independent of either of the others. . . ."[25]

Therefore a petition for mandamus against the chief executive is a call upon the judiciary "to exercise, or what amounts to the same thing, to *control* the exercise of powers belonging exclusively to the *executive* department of the government."[26] The separation theory assumes, according to these courts, "that the persons employed in each department, will be wise enough, and honest enough, to discharge the duties entrusted to them, without the aid or interference of the others."[27] The alternative "interference of either branch with the other would imply dependence and inferiority, when by our peculiar frame of government there exists equality and independence."[28]

The remainder of the reasoning in these cases is usually devoted to refuting the arguments of those courts holding the opposite point of view. For example, with respect to the claim that control is being exercised not by the courts but by the law, it is pointed out that this common law writ issues only against bodies inferior to the courts and therefore cannot issue to the governor any more than it could issue to the King or his subordinates in England.[29] Blackstone is quoted to the effect that "all jurisdiction implies superiority of power. . . ."[30]

[25] People ex rel. Billings v. Bissell, 19 Ill. 229 at 231 (1857). See also, State ex rel. Flemming v. Crawford, 28 Fla. 441 at 473, 10 S. 118 (1891); People ex rel. Harless v. Yates, 40 Ill. 126 (1863); People ex rel. Bacon v. Cullom, 100 Ill. 472 (1881); People ex rel. Bruce v. Dunne, 258 Ill. 441, 101 N.E. 560 (1913); State ex rel. Oliver v. Warmoth, 22 La. Ann. 1 (1870); State ex rel. Williams v. Long, 172 La. 1028, 136 S. 41 (1931); Dennett, Petitioner, 32 Me. 508 (1851); Rice. v. Governor, 207 Mass. 577, 93 N.E. 821 (1911); People ex rel. Sutherland v. Governor, 29 Mich. 320 (1874); Rice v. Austin, 19 Minn. 103 (1872), reversing Minn. and Pac. R. R. Co. v. Sibley, 2 Minn. 13 (1858), and Chamberlain v. Sibley, 4 Minn. 309 (1860); Mauran v. Smith, 8 R.I. 192 (1865).

[26] State ex rel. Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1893). There are dicta to the contrary in Pacific R.R. v. Governor, 23 Mo. 353 (1856).

[27] Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317 at 336 (1859).

[28] State ex rel. Bartley v. Fletcher, 39 Mo. 388 at 394 (1867).

[29] Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317 (1859), citing TAPPING, MANDAMUS 162, 163 (1853).

[30] BLACKST. COMM., Sharswood ed., 242 (1860), quoted in Mauran v. Smith,

As a rule, all functions of the governor are termed "executive," "political," or "governmental" in these cases, whether based on constitution or statute, because constitutionally he is prohibited by the separation theory from exercising judicial and legislative power, so whatever he can be empowered to do by statute at least must be appropriate to his department since there are only the three kinds of power. Consequently any distinction between ministerial and discretionary power is meaningless, for at best it is a division that cuts across the constitutional separation of powers.[31] Some courts hold that all powers of the governor are discretionary because they are executive and because it is the governor who acts.[32] And some find that the distinction has no mean-

8 R.I. 192 at 217 (1865). The same position is taken in State ex rel. Bisbee v. Drew, 17 Fla. 67 (1879); State ex rel. Axleroad v. Cone, 137 Fla. 496, 188 S. 93 (1939); People ex rel. Dewey v. Board of State Auditors, 32 Mich. 191 (1875); Woods v. Sheldon, 9 S.D. 392, 69 N.W. 602 (1896).

[31] For example, in People ex rel. Sutherland v. Governor, 29 Mich. 320 at 323 (1874), it was said, "There is no very clear and palpable line of distinction between those duties of the governor which are political, and those which are to be considered ministerial merely; and if we should undertake to draw one . . . the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction." Similarly, in State ex rel. Oliver v. Warmoth, 22 La. Ann. 1 at 3 (1870), it was said of this distinction, "We think this doctrine objectionable in this, that it accords to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive officer as being merely ministerial or otherwise. This would infringe the right of the executive to use discretion in determining the same question." Affirmed in State ex rel. Miss. Valley Nav. Co. v. Warmoth, 24 La. Ann. 351 (1872). To the same effect, see, State ex rel. Axleroad v. Cone, 137 Fla. 496, 188 S. 93 (1939); Rice v. Governor, 207 Mass. 577, 93 A. 821 (1911); People ex rel. Dewey v. Board of State Auditors, 32 Mich. 191 (1875) [but compare People ex rel. Ayers v. Board of State Auditors, 42 Mich. 422, 4 N.W. 274 (1880)]; Rice v. Austin, 19 Minn. 103 (1872); Western R. R. Co. v. De Graff, 27 Minn. 1, 6 N.W. 341 (1880); People ex rel. Broderick v. Morton, 156 N.Y. 136, 50 N.E. 791 (1898); State ex rel. Latture v. Board of Inspectors, 114 Tenn. 516, 86 S.W. 319 (1904); Clements v. Roberts, 144 Tenn. 129, 230 S.W. 30 (1920); State ex rel. Byrne v. Harvey, 11 Wis. 32 (1860).

[32] In Hawkins v. Governor, 1 Ark. 570 at 586-587 (1839), the court, speaking of the constitutional position of the governor, said, "That instrument assigns to his office no ministerial acts to be performed, nor can the law enjoin upon him any such duty." In State ex rel. Birkeland v. Christianson, 179 Minn. 337 at 346, 229 N.W. 313 (1930), it was said, "We do not believe that it is customary for the legislature to issue mandatory commands to the governor." And in Bates v. Taylor, 87 Tenn. 319, 11 S.W. 266 (1888), it was held that the governor always has discretion to interpret the statute, at least for himself. To the same effect see Vicksburg & M. R. R. Co. v. Lowry, 61 Miss. 102 (1883); State v. Dinkins, 77 Miss. 874, 27 S. 832 (1900); Jonesboro, F. B. & B. G. Turnpike Co. v. Brown, 8 Baxt. (67 Tenn.) 490 (1875). In Bledsoe v. International Railroad Co., 40 Tex. 537 at 557 (1874), the

ing in this context; that either discretionary or ministerial authority may be executive, and it is executive power that is immune from judicial control under the separation theory.[33] Whether the power involved constitutes a part of the governor's official duty, or whether it might have been delegated to any other officer of the government is a distinction rejected for similar reasons.[34]

These courts take a point of view at complete variance with the traditional judicial attitude toward the relations of the judiciary to a statute or constitution. They maintain that statutes and constitutions are not always addressed exclusively to them, but in a wide variety of aspects, as political documents, are addressed in all their executive provisions exclusively to the governor; that the only provisions for enforcement in these respects lie in impeachment procedure and in the hands of the voter.[35]

court said, "The word 'ministerial' has reference generally to an act done under authority of a superior; and in this sense it could never apply to the chief executive with respect to anything required by the legislative authority."

[33] For example, in State ex rel. Bisbee v. Drew, 17 Fla. 67 at 72 (1879), it was said of the governor's functions, "Many of the acts are perhaps properly designated as ministerial, yet they are none the less executive, emanating from the executive power, enjoined by law." To the same effect see, State ex rel. Thompson v. Whitcomb, 28 Minn. 50, 8 N.W. 902 (1881); State ex rel. Tuttle v. Braden, 40 Minn. 174, 41 N.W. 817 (1889); State ex rel. Bartley v. Fletcher, 39 Mo. 388 (1867); State ex rel. Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1893); State ex rel. Gledhill v. Governor, 25 N.J.L. 331 (1856); Jonesboro, F. B. & B. G. Turnpike Co. v. Brown, 8 Baxt. (67 Tenn.) 490 (1875); Bates v. Taylor, 87 Tenn. 319, 11 S.W. 266 (1888); Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317 (1859).

[34] "That is to say, unless the incumbent of the gubernatorial office is bound to act under these laws *as governor*, he is not bound to act at all, not having assumed or undertaken to perform any duties except as governor." Rice v. Austin, 19 Minn. 103 at 104 (1872). To the same effect, People ex rel. Bruce v. Dunne, 258 Ill. 441, 101 N.E. 560 (1913); Dennett, Petitioner, 32 Me. 508 (1851); State ex rel. Robb v. Stone, 120 Mo. 428, 25 S.W. 376 (1893); Woods v. Sheldon, 9 S.D. 392, 69 N.W. 602 (1896); Jonesboro, F. B. & B. G. Turnpike Co. v. Brown, 8 Baxt. (67 Tenn.) 490 (1875); Bates v. Taylor, 87 Tenn. 319, 11 S.W. 266 (1888); People ex rel. Latture v. Board of Inspectors, 114 Tenn. 516, 86 S.W. 319 (1904); Clements v. Roberts, 144 Tenn. 128, 230 S.W. 30 (1920); Bledsoe v. International Railroad Co., 40 Tex. 537 (1874).

[35] Thus, in People ex rel. Bruce v. Dunne, 258 Ill. 441 at 448, 101 N.E. 560 (1913), it was said, "Of course, it would be expected that the court enforcing the provision of the constitution by which the powers of government are partitioned among the several departments, for its own protection from interference would accord the same degree of independence to the other departments." And see State ex rel. Oliver v. Warmoth, 22 La. Ann. 1 (1870), quoted supra, note 31. Compare State ex rel. Atty. Gen. v. Doherty, 25 La. Ann. 119 (1873). In Dennett, Petitioner, 32 Me. 508 at 510 (1851), it was said of the executive branch, "That department is responsible for the correct performance of its duties in the manner prescribed by the constitu-

Finally, it is pointed out that the analogy drawn between judicial review of legislation and judicial control of the governor is a false one. The power of judicial review as applied to legislative acts means only that the judiciary will disregard statutes in violation of the constitution. So, in strict analogy, the judiciary may disregard executive acts in violation of the constitution. But this does not justify a power in the courts to prevent either department from acting in a manner contrary to the constitution in the first instance, or to compel either the executive or the legislature to perform any functions in a particular way.[86] In the case of the legislature, this power is denied because legislative functions are political and because court decisions of this kind would be unenforceable;[87] the same logic would apply to the governor's powers.[88]

tion, but is not responsible to the judicial department." To the same effect, Rice v. Governor, 207 Mass. 577, 93 N.E. 821 (1911); People ex rel. Sutherland v. Governor, 29 Mich. 320 (1874); People ex rel. Dewey v. Board of State Auditors, 32 Mich. 191 (1875); Western R. R. Co. v. De Graff, 27 Minn. 1, 6 N.W. 341 (1880); State ex rel. Bartley v. Fletcher, 39 Mo. 388 (1867); In the matter of Inquiries, 58 Mo. 369 (1874); People ex rel. Broderick v. Morton, 156 N.Y. 136, 50 N.E. 791 (1898); Bates v. Taylor, 87 Tenn. 319, 11 S.W. 266 (1888).

[86] In People ex rel. Billings v. Bissell, 19 Ill. 229 at 232 (1857), it was said, "We may not enjoin the others [departments] from doing an unconstitutional act, but by refusing to give effect to such act, or relieving against it, when properly and judicially applied to for that purpose, we may restrain them." This decision was cited approvingly in People v. Hatch, 33 Ill. 9 (1863), where the distinction was very carefully laid out. In People ex rel. Brundage v. Peters, 305 Ill. 223, 137 N.E. 118 (1922), mandamus was used to compel a sheriff to carry out a judgment for civil contempt although the governor had issued a pardon, since it was held that the governor had no pardoning power in the case. This has been cited as analogous to judicial control of legislation. The same distinction is made in People ex rel. Bacon v. Cullom, 100 Ill. 472 (1881); People ex rel. Bruce v. Dunne, 285 Ill. 441, 101 N.E. 560 (1913); State ex rel. Berkeland v. Christianson, 179 Minn. 337, 229 N.W. 313 (1930); City of Oklahoma City v. Haskell, 27 Okla. 495, 112 P. 992 (1910); Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317 (1859). Compare Lee v. Dowda, 155 Fla. 68, 19 S. (2d) 570 (1944); and State ex rel. Kinsella v. Fla. State Racing Comm., 155 Fla. 387, 20 S. (2d) 258 (1944).

[87] *Cf.*, Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926); Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1929); Jones v. Freeman, 193 Okla. 554, 146 P. (2d) 564 (1943); State ex rel. Flanagan v. S. D. Rural Credits Bd., 45 S.D. 619, 189 N.W. 704 (1922).

[88] In Mauran v. Smith, 8 R.I. 192 at 217 (1865), Blackstone is quoted to the effect that "all jurisdiction implies superiority of power; authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it." [Quoted from 1 Bl. Comm., Shars. ed. 242 (1960).] It has been held, however, that this immunity may be waived by the governor, People ex rel. Stickney v. Palmer, 64 Ill. 41 (1872); State ex rel. Stewart v. Marks, 6 Lea (74 Tenn.) 12 (1880). *Contra*, Rice v. Austin, 19 Minn. 103 (1872); St. Paul & Chicago Ry. Co. v. Brown, 24 Minn. 517 (1877); Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317 (1859).

It would seem that in those states where the governor is held to be immune to suits for mandamus, the logic used to justify his immunity would apply with equal force to other executive officers and agencies.[39] This is generally true, however, only when they are closely associated with the governor in the performance of a given function and then only in certain cases.[40] In Illinois, for example, when the governor is the member of a board or commission, the board is immune because of that fact.[41] Nor will mandamus issue against a group of independent executive officers, including the governor, who must act jointly, although all except the governor are severally capable of being subjected to this remedy.[42] This immunity extends even to include ministerial functions when the approval of the governor will subsequently be required.[43]

Irrespective of the immunity of the governor himself in most cases, other executive officers are subject to mandamus, even when they are

[39] *Cf.*, Harpending v. Haight, 39 Cal. 189 (1870), where this reasoning was used to deny the governor's immunity.

[40] An exception was State ex rel. County Treasurer v. Dike, 20 Minn. 363 (1874), where the treasurer and secretary of state were held immune because they were executive officers. But this reasoning was rejected in Cooke v. Iverson, 108 Minn. 388, 122 N.W. 251 (1909); Hayne v. Metropolitan Trust Co., 67 Minn. 245, 69 N.W. 916 (1897); and reversed in Higgins v. Berg, 74 Minn. 11, 76 N.W. 788 (1898); and State ex rel. Day v. Hanson, 93 Minn. 178, 100 N.W. 1224, 102 N.W. 209 (1904). Compare St. Paul and Chicago Ry. Co. v. Brown, 24 Minn. 517 (1877); State ex rel. Thompson v. Whitcomb, 28 Minn. 50, 8 N.W. 902 (1881); and State ex rel. Tuttle v. Braden, 40 Minn. 174, 41 N.W. 817 (1889). Other exceptions are Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317 (1859); Chalk v. Darden, 47 Tex. 438 (1877); Galveston B. & G. N.-G. Ry. Co. v. Gross, 47 Tex. 428 (1877). In State ex rel. Hope & Co. v. Board of Liquidation, 42 La Ann. 647 at 658 (1890), it was said, "... when such duties and powers devolve upon the executive branch or department of the State government, as a whole, as in this case, the members of the board thus constituted are likewise exempt from judicial control; and, notwithstanding that some of the officers, *respectively*, are subject to judicial control, and can be coerced by *mandamus* to act, and to perform 'their ordinary official duties.'"

[41] People ex rel. Bruce v. Dunne, 258 Ill. 441, 101 N.E. 560 (1913). To the same effect see, People ex rel. Broderick v. Morton, 156 N.Y. 136, 50 N.E. 791 (1898); McFall v. State Board, 101 Tex. 572, 110 S.W. 739 (1908).

[42] People v. Hatch, 33 Ill. 9 (1863); People ex rel. Harless v. Yates, 40 Ill. 126 (1863). See also Bledsoe v. International Railroad Co., 40 Tex. 537 (1874). *Contra*, State ex rel. Robt. Mitchell Furniture Co. v. Toole, 26 Mont. 22, 66 P. 496 (1901).

[43] MacGregor v. Miller, 324 Ill. 113, 154 N.E. 707 (1926); People ex rel. McDowell v. Dept. of Public Works, 326 Ill. 589, 158 N.E. 396 (1927); Parish v. Miller, 336 Ill. 630, 168 N.E. 671 (1929). But compare People ex rel. Euziere v. Rice, 356 Ill. 373, 190 N.E. 681 (1934). To the same effect, People ex rel. Ambler v. Auditor General, 38 Mich. 746 (1878); Vicksburg & M. R. R. Co. v. Lowry, 61 Miss. 102 (1883).

members of a board or commission which includes the governor.[44] Sometimes this is held to be so because the common law remedy applies to inferior officers and bodies, and the officer or body is inferior to the governor, who is constitutionally the "chief" executive officer of the state.[45] This result reflects the conflict of the obvious implication of the common law that the defendant must be inferior to the courts, and the implication of the separation theory that executive functions and officers can never be inferior to the judiciary. With equal frequency the justification for the lack of immunity is based on the type of function involved. When it is found that an executive power is involved, the immunity applies; but when it is a ministerial power, which "is certainly inferior to judicial power,"[46] the writ will issue.[47] The implications of the separation theory can thus be ignored in the same fashion as in the case of all non-constitutional executive officers of the state.

C. *Availability of Mandamus To Control Courts and Local Government Under the Separation Theory*

The writ of mandamus may be issued against courts to compel the performance of what are considered ministerial, or, what is said to amount to the same thing, non-judicial functions. Such activities as transferring a case to a court of concurrent jurisdiction, entertaining jurisdiction of a case, and admitting an attorney to practice, are fre-

[44] The writ will issue to all members except the governor in such a case. State ex rel. McEnery v. Nicholls, 42 La. Ann. 209 (1890); Trotter v. Gates & Co., 162 Miss. 569, 139 S. 843 (1932); State ex rel. Dunlop v. Cruce, 31 Okla. 486, 122 P. 237 (1912); Brunson v. Commrs. of Land Office, 145 Okla. 219, 292 P. 562 (1930); State ex rel. Stewart v. Marks, 6 Lea (74 Tenn.) 12 (1880); State ex rel. Latture v. Board of Inspectors, 114 Tenn. 516, 86 S.W. 319 (1904).

[45] Danley v. Whitely, 14 Ark. 687 (1854); People ex rel. Lanphier v. Hatch, 19 Ill. 283 (1857); Bradley v. State Canvassers, 154 Mich. 274, 117 N.W. 649 (1908); State v. McPhail, 182 Miss. 360, 180 S. 387 (1938); Comm. ex rel. Butler v. Hartranft, 77 Pa. St. 154 (1874). Compare, Rich v. Board of Canvassers, 100 Mich. 453, 59 N.W. 181 (1894); Oren v. Secretary of State, 171 Mich. 590, 137 N.W. 227 (1912). *Contra*, People ex rel. Dewey v. Bd. of State Auditors, 32 Mich. 191 (1875), overruled in People ex rel. Ayers v. State Auditors, 42 Mich. 422, 4 N.W. 274 (1880).

[46] Traynor v. Beckham, 116 Ky. 13 at 23, 74 S.W. 1105, 76 S.W. 844 (1903).

[47] State ex rel. Flemming v. Crawford, 28 Fla. 441, 10 S. 118 (1891); People ex rel. Ayres v. State Auditors, 42 Mich. 422, 4 N.W. 274 (1880); Michigan State Dental Society v. Secretary of State, 294 Mich. 503, 293 N.W. 865 (1940); Hayne v. Metro. Trust Co., 67 Minn. 245, 69 N.W. 916 (1897); Higgins v. Berg, 74 Minn. 11, 76 N.W. 788 (1898); Cooke v. Iverson, 108 Minn. 388, 122 N.W. 251 (1909); Wood v. State ex rel. Gillespie, 169 Miss. 790, 142 S. 747 (1932). *Cf.*, State ex rel. Jeffrey v. Burdick, 3 Wyo. 588, 28 P. 146 (1891).

quently so classified.[48] But here the position of the higher appellate state courts, as possessors of general superintending jurisdiction over inferior courts by virtue of a constitutional grant, serves to blur the problem under consideration.

The separation of powers theory is seldom discussed or even referred to in suits for mandamus except in the cases noted above. Occasionally when the issue is raised in a case involving officials of a local government, the courts have a substantial body of jurisprudence at hand holding that the theory was never intended to apply to local government.[49]

In the past the extraordinary remedy of mandamus has been used as a method of reviewing action of the executive branch of state government with varying effectiveness. However, the most consistent doctrine which emerges from this body of precedent and which exists today as the chief criterion of whether mandamus should or should not issue

[48] For example, Ex parte Hickey, 52 Ala. 228 (1875); Thompson v. Holt, 52 Ala. 491 (1875); Ex parte Campbell, 130 Ala. 171, 30 S. 385 (1900); Gunn's Admr. v. County of Pulaski, 3 Ark. 427 (1841); People ex rel. Field v. Turner, 1 Cal. 190 (1850); Katenkamp v. Superior Ct., 16 Cal. (2d) 696, 108 P. (2d) 1 (1940); Harriman v. Waldo Co., 53 Me. 83 (1865); Commonwealth v. Justices, 2 Pick. (19 Mass.) 414 (1824).

[49] State ex rel. Wilkinson v. Lane, 181 Ala. 646, 62 S. 31 (1913); State ex rel. Gunter v. Thompson, 193 Ala. 561, 69 S. 461 (1915); Standard Oil Co. of Calif. v. State Bd. of Equal., 6 Cal. (2d) 557, 59 P. (2d) 119 (1936); People v. Perkins, 56 Colo. 17, 137 P. 55 (1913); Munn v. Finger, 66 Fla. 572, 64 S. 271 (1914); Kaufman v. Tallahassee, 84 Fla. 634, 94 S. 697 (1922); Florida Motor Lines, Inc. v. R. R. Comm., 100 Fla. 538, 129 S. 876 (1930); State ex rel. Williams v. Whitman, 116 Fla. 196, 150 S. 136, 156 S. 705 (1934); Kessler v. Fritchman, 21 Idaho 30, 119 P. 692 (1911); People ex rel. City of Springfield v. Edmands, 252 Ill. 108, 96 N.E. 914 (1911); Baltimore & O. R. Co. v. Whiting, 161 Ind. 228, 68 N.E. 266 (1903); Livengood v. Covington, 194 Ind. 633, 144 N.E. 416 (1924); Sarlls v. State ex rel. Trimble, 201 Ind. 88, 166 N.E. 270 (1929); Eckerson v. Des Moines, 137 Iowa 452, 115 N.W. 177 (1908); Cole v. Dorr, 80 Kan. 251, 101 P. 1016 (1909); State ex rel. Brewster v. Bentley, 100 Kan. 399, 164 P. 290 (1917); Bryan v. Voss, 143 Ky. 422, 136 S.W. 884 (1911); State ex rel. Simpson v. Mankato, 117 Minn. 458, 136 N.W. 264 (1912); Mayor v. State, 102 Miss. 663, 59 S. 873 (1912); Barnes v. Kirksville, 266 Mo. 270, 180 S.W. 545 (1915); State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N.W. 224 (1912); Cleveland v. City of Watertown, 222 N.Y. 159, 118 N.E. 500 (1917); State v. Dudley, 182 N.C. 822, 109 S.E. 63 (1921); Brown v. Galveston, 97 Tex. 1, 75 S.W. 488 (1903); Larsen v. Salt Lake City, 44 Utah 437, 141 P. 98 (1914); Walker v. Spokane, 62 Wash. 312, 113 P. 775 (1911); State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 P. 651 (1911); Booton v. Pinson, 77 W.Va. 412, 89 S.E. 985 (1915); State ex rel. Bloomer v. Canavan, 155 Wis. 398, 145 N.W. 44 (1914); Wisconsin Gas and Elec. Co. v. Fort Atkinson, 193 Wis. 232, 213 N.W. 873 (1927); State v. Sheldon, 29 Wyo. 233, 213 P. 92 (1923). *Contra*, Stiles v. Council, 233 Mass. 174, 123 N.E. 615 (1919), and cases cited.

appears to be the common law distinction between discretionary and ministerial functions. It is to this standard that attention is now directed.

II

THE CHARACTER OF THE DUTY AS GOVERNING THE AVAILABILITY OF THE WRIT OF MANDAMUS: THE DISCRETIONARY MINISTERIAL DISTINCTION

The rules governing the availability of the writ of mandamus are usually concerned not with the officer involved but with the nature of the function which is to be controlled by the writ. The standard rule given is that mandamus will issue to control ministerial but not discretionary power. However, although this rule is frequently stated, the legal definitions of the terms involved do nothing to clarify understanding.[50] Such, for example, is the definition given by High:

> "Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties necessarily calling for the exercise of judgment and discretion, on the part of the officer or body at whose hands their performance is required, mandamus will not lie."[51]

Corpus Juris is equally tautological:

> ". . . the distinction . . . is generally said to be that, where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial."[52]

And *Bouvier's Law Dictionary* defines a "ministerial duty" as

> "One in respect to which nothing is left to discretion. A simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law, the performance of which may, in proper cases, be required. . . ."[53]

These definitions, as well as those found in the judicial decisions, only serve to tell us that these terms are opposites. But they do not

[50] For a non-legal definition, see FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 71 et seq. (1928).

[51] HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, § 24 (1884).

[52] 38 C.J., § 72, p. 598.

[53] BOUVIER'S LAW DICTIONARY, 3d rev. (1914).

define their substantive content. At most, we learn only that if a duty is ministerial it is one in which no discretion is involved, or, conversely, discretionary duties are non-ministerial duties.[54] The decided cases give no better clue to the substance of the distinction.[55]

A. *Construction by Administrative Body or Officer of Statute Under Which It Operates*

At the outset, in dealing with any specific situation where the distinction is to be applied, the question may be raised as to whether the administrative official or body acting has a power to construe or interpret the statutes under which it operates, and, if so, whether the function is consequently a discretionary one. As a general rule, administrative bodies are recognized as having the power to determine so-called jurisdictional questions as a necessary preliminary to action. But the cases are numerous where such a power is denied; the courts sometimes going out of their way to deny it. For example, when the California State Controller refused to audit a warrant, believing that under the law he had the power to examine its legality, the court specifically ruled that he had no such power. But since the issuance of mandamus is a discretionary power, and since the court believed that the warrant was invalid, mandamus was denied "in the exercise of a sound judicial discretion."[56]

[54] But in Patterson v. Adcock, 157 Ark. 186 at 191, 248 S.W. 904 (1923), it was said, "Certiorari will not lie to correct a purely ministerial act, even though the performance of the act involves discretion." And State ex rel. v. Foster, 38 Ohio St. 599 (1883), quoted supra, p. 8. For an excellent criticism of the inadequacy of the distinction between ministerial and discretionary administrative functions, see Patterson, "Ministerial and Discretionary Official Acts," 20 MICH. L. REV. 848 (1922).

[55] It is not unknown for a court to define "ministerial" and "discretion" backhandedly by determining whether mandamus could or has issued. *Cf.* Grider v. Tally, 77 Ala. 422 (1885); Dunbar v. Frazer, 78 Ala. 538 (1886); Ramagnano v. Crook, 85 Ala. 226, 3 S. 845 (1887); Merlette v. State, 100 Ala. 42, 14 S. 562 (1893); Rains v. Simpson, 50 Tex. 495 (1878). And compare Morton, Bliss & Co. v. Comptroller, 4 S.C. 430 (1873), discussed in Patterson, "Ministerial and Discretionary Official Acts," 20 MICH. L. REV. 848 at 864 (1922).

[56] Cal. Hwy. Comm. v. Riley, 192 Cal. 97, 218 P. 579 (1923). To the same effect see Middleton v. Law, 30 Cal. 596 (1866); Georgia ex rel. Low v. Towns, 8 Ga. 360 (1850); State ex rel. Martin v. Porter, 89 Ind. 260 (1883); State ex rel. Mut. Prot. League v. Bigler, 169 Ind. 223, 82 N.E. 464 (1907); City of Auburn v. State ex rel. First Nat. Bank, 170 Ind. 511, 83 N.E. 997, 84 N.E. 990 (1908); Vincent v. Ellis, 116 Iowa 609, 88 N.W. 636 (1902); Flowers v. Ind. School Dist., 235 Iowa 332, 16 N.W. (2d) 570 (1944); State ex rel. Ross v. Robinson, 1 Kan. 188 (1862); State ex rel. Mitchell v. Stevens, 23 Kan. 456 (1880); Kansas City, K. V. & W. R. Ry. Co. v. Public Utilities Comm., 101 Kan. 557, 167 P. 1138 (1917); State ex rel. Weber v. Yaunkin, 108 Kan. 634, 196 P. 620 (1921); German

It is rare but not unknown for a judge to maintain that "the courts are the only tribunals created by the constitution and the laws for the special purpose of construing the constitution and the laws. . . ."[57] However, even where the courts recognize the necessity of permitting the administrative body to interpret the statutes in the first instance, the statutes are rarely held to be finally so construed even if such is evidently the legislative will.[58] For this is almost invariably treated as a true judicial function which cannot be delegated without running afoul of the separation theory or the requirements of due process of law. A recent Illinois decision is typical of the conservatism with which the courts regard legislative efforts to make administrative statutory interpretations final.[59] The statute involved provided, "The determination of the corporate authorities that the . . . public interest to be subserved is such as to warrant the vacation of any street . . . is conclusive, and the passage of such an ordinance is sufficient evidence of that determination. . . ." In reply to the charge that this statute violated due process, the court said:

> "The statute limits the authority of the courts but it does not assume to deny them the right to examine the record to see if any public use or interest is subserved in vacating a street or alley. Properly construed, the statute merely declares the long estab-

Security Bank v. Coulter, 112 Ky. 577, 66 S.W. 425 (1902); Magruder v. Swann, 25 Md. 173 (1866); Waldron v. Lee, 5 Pick. (22 Mass.) 323 (1827); Luce v. Bd. of Exam., 153 Mass. 108, 26 N.E. 419 (1891); State ex rel. Willard v. Stearns, 11 Neb. 104, 7 N.W. 743 (1881); Long v. State ex rel. Hoxie, 17 Neb. 60, 22 N.W. 120 (1884); State ex rel. Whitman v. Chase, 5 Ohio St. 528 (1856); Dalton v. State, 43 Ohio St. 652, 3 N.E. 685 (1885); Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936); State ex rel. Irvine v. Brooks, 14 Wyo. 393, 84 P. 488 (1905).

[57] Martin v. Ingham, 38 Kan. 641 at 658-659, 17 P. 162 (1888).

[58] The exceptions for the most part are cases decided before the Civil War. *Cf.*, State v. Wilmington, 3 Del. 294 (1840); Harrison v. Baltimore, (Md. 1843) 1 Gill. 264; Roberts v. Boston, 5 Cush. (59 Mass.) 198 (1845); Wheeler v. Patterson, 1 N.H. 88 (1817); Van Wormer v. Albany, (N.Y. S.Ct. 1836) 15 Wend. 262; Kennedy v. Bd. of Health, 2 Pa. St. 366 (1845). Or where the constitution makes the administrative determination final, Freeman v. Selectman, 34 Conn. 406 (1867); Miles v. Bradford, 22 Md. 170 (1864). *Cf.* also State ex rel. Heimov v. Thomson, 131 Conn. 8, 37 A. (2d) 689 (1944); and Board of Trustees v. McCrory, 132 Ky. 89, 116 S.W. 326 (1909). But see DICKENSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 42 (1927).

[59] People ex rel. Foote v. Kelly, 385 Ill. 543, 53 N.E. (2d) 429 (1944). To the same effect, see State ex rel. Bode v. Sherman, 90 Ind. 123 (1883); State ex rel. Arnold v. Thomas, 152 Iowa 500, 132 N.W. 842 (1911); State ex rel. Watkins v. Donahey, 110 Ohio St. 494, 144 N.E. 125 (1924); Garrety v. Cottman, 138 Kan. 789, 28 P. (2d) 756 (1934); Denton v. West, 156 Kan. 186, 131 P. (2d) 886 (1942).

lished rule that the courts will not inquire . . . into the motives of the council in vacating a street or alley, nor into the expediency of such action."[60]

It is even more clear that when the statute makes no mention of administrative finality, "the function and prerogative of deciding finally the law and the facts of an actual controversy bearing upon vested legal right . . . in a proceeding initiated under statute before an administrative tribunal is, in its last analysis, a pure judicial power the exercise of which is subject to review in courts of competent jurisdiction."[61]

Since it is the *final* construction of a statute which is a judicial function (and therefore discretionary) its preliminary administrative interpretation is not necessarily a discretionary power.[62] Thus in those cases

[60] 385 Ill. 543 at 548, 53 N.E. (2d) 429 (1944). Compare Arnold v. State ex rel. Mallison, 147 Fla. 324, 2 S. (2d) 874 (1941).

[61] State ex rel. Williams v. Bd. of Dental Examiners, 116 Fla. 196 at 201, 150 S. 136, 156 S. 705 (1931). To the same effect, also involving mandamus, see Bodinson Mfg. Co. v. Employment Comm., 17 Cal. (2d) 321, 109 P. (2d) 935 (1941); Laisne v. Bd. of Optom., 19 Cal. (2d) 831, 123 P. (2d) 457 (1942); State ex rel. Heimov v. Thomson, 131 Conn. 8, 37 A. (2d) 689 (1944); State ex rel. Norris v. Chancey, 129 Fla. 194, 176 S. 78 (1937); Spencer & Gardner v. People, 68 Ill. 510 (1873); People ex rel. McDonnell v. Thompson, 316 Ill. 11, 146 N.E. 473 (1925); Governor v. Kirk, 33 Ind. 517 (1870); Hildreth v. Crawford, 65 Iowa 339, 21 N.W. 667 (1884); Kinzer v. School District, 129 Iowa 441, 105 N.W. 686 (1906); State ex rel. Kohler's Snowite Laundry & Cleaners v. State Bd. of Comm. and Industry, 205 La. 622, 17 S. (2d) 899 (1944); Inhabitants v. Farrar, 11 Allen (93 Mass.) 398 (1865); Reetz v. Mich., 218 Mich. 363, 188 N.W. 507 (1922); St. Louis v. Schnuckelberg, 7 Mo. App. 538 (1879); Bd. of Health v. Lederer, 52 N.J. Eq. 675, 29 A. 444 (1894); State ex rel. Moffett v. Conernor, 7 Ohio St. 372 (1857); State ex rel. Herbert v. Bricker, 139 Ohio St. 499, 41 N.E. (2d) 377 (1942); Gough v. Dorsey, 27 Wis. 119 (1870).

[62] This rule applies even to courts. Thus, if a court refuses to entertain jurisdiction under a misinterpretation of its powers, mandamus will usually issue. Hilmer v. Sup. Ct., 220 Cal. 71, 29 P. (2d) 175 (1934); Katenkamp v. Superior Ct., 16 Cal. (2d) 696, 108 P. (2d) 1 (1940); State ex rel. Melbourne Bank v. Wright, 107 Fla. 178, 145 S. 598 (1932); State ex rel. Fielder v. Kirkwood, 345 Mo. 1089, 138 S.W. (2d) 1009 (1940). But compare Gunn's Admr. v. County of Pulaski, 3 Ark. 427 (1841); State Bar of Calif. v. Sup. Ct., 207 Cal. 323, 278 P. 432 (1929). The same rule applies when courts perform administrative functions. State ex rel. Turner v. Bradley, 134 Ala. 549, 33 S. 339 (1901); Smith v. Tenn. Coal, Iron & R. Co., 192 Ala. 129, 68 S. 865 (1915); State ex rel. Birmingham v. Jefferson County Bd. of Revenue, 201 Ala. 568, 78 S. 964 (1918); County Ct. v. Robinson, 27 Ark. 116 (1871); Chinn. v. Sup. Ct., 156 Cal. 478, 105 P. 580 (1909); Wheat v. Barrett, 210 Cal. 193, 290 P. 1033 (1930); Bila v. Young, 20 Cal. (2d) 865, 129 P. (2d) 364 (1942); Gem Irr. Dist. v. Gallet, 43 Idaho 519, 253 P. 128 (1927); Diefendorf v. Gallet, 51 Idaho 619, 10 P. (2d) 307 (1932); State ex rel. Griffith v. Bd. of Commrs., 113 Kan. 203, 213 P. 1062 (1923); State Bd. of Pharm. v. White, 84 Ky. 626, 2 S.W. 225 (1886); State ex rel. Marshall v. Bugg, 224 Mo. 537, 123

where the administrative agency has interpreted a statute or constitutional provision in a manner not acceptable to the courts, it is not uncommon to find the writ of mandamus being used to compel action contrary to a statute which the court finds to be unconstitutional, or in accordance with a statute which the administrative officer believes to be invalid,[63] even though it is frequently insisted that the constitutionality of a statute may not be collaterally attacked as in a suit for mandamus.[64]

An illustration of one possible result is found in a recent Florida decision. Petition for mandamus was filed to compel the State Dental

S.W. 827 (1909); State ex rel. McCamey v. Ct. of Common Pleas, 141 Ohio St. 610, 49 N.E. (2d) 761 (1943). But compare Ramagnano v. Crook, 85 Ala. 226, 3 S. 845 (1887).

[63] Tenn. and Coosa R.R. Co. v. Moore, 36 Ala. 371 (1860); State ex rel. Mobile v. Commrs., 180 Ala. 489, 61 S. 368 (1913); Smith v. Tenn. Coal, Iron & R. Co., 192 Ala. 129, 68 S. 865 (1915); Sellers v. Frohmiller, 42 Ariz. 239, 24 P. (2d) 666 (1933); Johnson v. Fennell, 5 Cal. 711 (1868); Ross v. Whitman, 6 Cal. 361 (1856); Spring Valley Water Works v. Ashbury, 52 Cal. 126 (1877); Gillum v. Johnson, 7 Cal. (2d) 744, 62 P. (2d) 1037, 63 P. (2d) 810 (1936); Caroll v. Racing Bd., 16 Cal. (2d) 164, 105 P. (2d) 110 (1940); Consol. Printing and Pub. Co. v. Allen, 18 Cal. (2d) 63, 112 P. (2d) 884 (1941); Hedgcock v. People ex rel. Arden Realty and Inv. Co., 98 Colo. 522, 57 P. (2d) 891 (1936); State Water Cons. Bd. v. Enking, 56 Idaho 722, 58 P. (2d) 799 (1936); State ex rel. Hansen v. Parsons, 57 Idaho 775, 69 P. (2d) 788 (1937); Suppiger v. Enking, 60 Idaho 292, 91 P. (2d) 362 (1939); People ex rel. Cannon v. Chicago, 351 Ill. 396, 184 N.E. 610 (1933); Forbes v. Hubbard, 348 Ill. 166, 180 N.E. 767 (1932); Tews v. Woolhiser, 352 Ill. 212, 185 N.E. 827 (1933); People ex rel. Lind v. City of Rockford, 354 Ill. 377, 188 N.E. 446 (1933); Parker v. State ex rel. Powell, 133 Ind. 178, 32 N.E. 836, 33 N.E. 119 (1892); Town of Dublin v. State ex rel. Kirkpatrick, 198 Ind. 164, 152 N.E. 812 (1926); Sarlls v. State ex rel. Trumble, 201 Ind. 88, 166 N.E. 270 (1928); Benjamin v. Dist. Twp., 50 Iowa 648 (1879); State ex rel. Atty. Gen. v. St. John, 21 Kan. 591 (1879); Greene v. Taylor and Sons, 184 Ky. 739, 212 S.W. 925 (1919); Warfield v. Vandiver, 101 Md. 78, 60 A. 538 (1905); Bd. of Regents v. Auditor Gen., 167 Mich. 444, 132 N.W. 1037 (1911); Civil Service Comm. v. Auditor, 302 Mich. 673, 5 N.W. (2d) 536 (1942); State ex rel. Townsend v. Park Commrs., 100 Minn. 150, 110 N.W. 1121 (1907); State ex rel. Boorman v. State Bd. of Land Commrs., 109 Mont. 127, 94 P. (2d) 281 (1939); State ex rel. Tzschuck v. Weston, 4 Neb. 234 (1876); Gantenbein v. West, 74 Ore. 334, 144 P. 1171 (1915).

[64] Compare State ex rel. Hunter v. Winterrowd, 174 Ind. 592, 91 N.E. 956, 92 N.E. 650 (1910); State ex rel. Robb v. Holmes, 196 Ind. 157, 147 N.E. 622 (1925); State ex rel. Clifton v. Schortemeier, 197 Ind. 669, 151 N.E. 613 (1926); State ex rel. Guthrie v. Board, 4 Kan. 262 (1868); State ex rel. Crandall v. McIntosh, 205 Mo. 589, 103 S.W. 1078 (1907); People ex rel. Ayres v. Bd. of State Auditors, 42 Mich. 422, 4 N.W. 274 (1880); State ex rel. Buckley v. Thompson, 323 Mo. 248, 19 S.W. (2d) 714 (1929); State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S.W. 1 (1910); State ex rel. Volker v. Kirbey, 345 Mo. 801, 136 S.W. (2d) 319 (1939). Rashbaum, "Right of Mandamused Official to Raise Issue of Constitutionality," 19 ST. LOUIS L. REV. 340 (1934).

Board to restore petitioner's license to practice. The license had been revoked for conduct which was specifically made a ground for revocation by the statute. Petitioner's acts occurred, however, shortly after a state court had held certain provisions of the law unconstitutional in another case. Even though this latter decision was reversed and the statute found valid before the petition for mandamus was filed, the writ issued to compel restoration of the license on the theory that an incorrect judicial interpretation outweighed a correct administrative interpretation.[65]

B. *Forms of Jurisdictional Questions*

Jurisdictional questions such as the meaning of the words of statutes can take three forms when determined in suits for mandamus. When the agency or officer refuses to act believing that it lacks jurisdiction, mandamus may issue to force action, although if discretionary, it is not supposed to control the shape or direction of the administrative act. Secondly, mandamus may be used where the function is ministerial to compel the administrative body to do a specified act or to revoke an act done beyond its authority. Finally, the same remedy may be used to annul discretionary action based upon what the courts consider inadequate or improper reasons.

1. *Mandamus to compel administrative act, whether discretionary or ministerial.* The first form is typified by a licensing agency, for example, refusing to act on a petition for a license believing that it lacks the power to grant the license. Mandamus may issue to compel the agency to entertain the petition, without deciding whether or not the license should be granted on its merits, even if the function of granting licenses is discretionary.[66]

2. *Mandamus to compel a specific act or to revoke an act done beyond authority when the act is ministerial.* This type of case shades by

[65] State ex rel. Williams v. Board of Dental Examiners, 116 Fla. 196, 150 S. 136, 156 S. 705 (1934).

[66] People ex rel. San Francisco Gas Co. v. Bd. of Supervisors, 11 Cal. 42 (1848); Globe Cotton Oil Mills v. Zellerback, 200 Cal. 276, 252 P. 1038 (1927); People ex rel. Hershey v. McNichols, 91 Colo. 141, 13 P. (2d) 266 (1932); State ex rel. Garrison v. Commrs. of Putnam Co., 23 Fla. 632, 3 S. 164 (1887); People ex rel. v. Cook Co. Bd. of Review, 326 Ill. 124, 157 N.E. 186 (1927); People v. Cook Co. Bd. of Review, 351 Ill. 301, 184 N.E. 325 (1933); State ex rel. Ind. Traction Co. v. Lewis, 187 Ind. 564, 120 N.E. 129 (1918); Railroad Comm. v. Northern Ky. Tel. Co., 236 Ky. 747, 33 S.W. (2d) 676 (1930); Nagel v. Barrett, 353 Mo. 1049, 186 S.W. (2d) 589 (1945); Chumasero v. Potts, 2 Mont. 242 (1875); People ex rel. Noyes v. Sohmer, 81 Misc. 522, 143 N.Y.S. 475 (1913).

almost imperceptible degrees into the second form. For whenever a court so wishes it can multiply the number of jurisdictional questions of this kind to the point at which all discretion ceases. Most statutes contain provisions that require administrative action to be "fair and equitable" or "in the public interest" or the like. If such standards are lacking or are found inadequate, the statutes may be declared unconstitutional as being in violation of the theory of the separation of powers. Provisions of this kind can be interpreted finally only in the courts, as has been seen. In the process of interpretation they frequently become multiplied so that specific meanings are read into general standards with a consequent diminution of administrative discretion. Even when the statutes omit limits of this kind, they can be and are implied, where the court is in sympathy with the legislative objective, as the alternative to declaring the statute unconstitutional under the separation theory. The one alternative is illustrated by a Michigan statute which conferred licensing authority on a township board in the words, "the township board may in its discretion, for just cause, refuse to grant the license provided for in this act." After a full review of the facts in an action for mandamus, the court issued the writ to compel the board to grant relator a license, first, because the court disagreed with the board's findings and conclusions, and second, because the act was invalid as attempting to confer an arbitrary power.[67]

3. *Mandamus to annul discretionary act when based upon inadequate or improper reasons.* The other alternative is illustrated by a Kentucky statute which provided that, "every sheriff may, by and with the approval of the county court, appoint his own deputies." This was said to imply that the court had the power to disapprove such appointments only "if the appointee be immoral, dishonest, incompetent or otherwise disqualified to perform the duties of the office . . . ."[68] Accordingly, mandamus issued to compel approval of the sheriff's nominee in question when the county court's sole objection was that it believed that the sheriff was paying off a pre-election promise in making the appointment. A previous case was cited as authority for this

[67] Blumlo v. Hampton Twp. Bd., 309 Mich. 452, 15 N.W. (2d) 705 (1940). *Cf.* Bd. of Water Engineers v. McKnight, 111 Tex. 82, 229 S.W. 301 (1921); Fugate v. Weston, 156 Va. 107, 157 S.E. 736 (1931).

[68] Fox v. Petty, 235 Ky. 240 at 246, 30 S.W. (2d) 1945 (1930). *Cf.* Wood v. Strother, 76 Cal. 545, 18 P. 766 (1888); Advisory Bd. v. State ex rel. Whaley, 164 Ind. 295, 73 N.E. 700 (1904); Elliott v. Sec. of State, 295 Mich. 245, 294 N.W. 171 (1940); State ex rel. Laurisch v. Pohl, 214 Minn. 221, 8 N.W. (2d) 227 (1943); Cliffs Chem. Co. v. Wis. Tax Comm., 193 Wis. 295, 214 N.W. 447 (1927).

decision. In it, the nominee had been indicted for a felony five years previously, his teacher's certificate had been revoked for immoral conduct, and he had abandoned two wives; but these facts did not justify disapproval of the nominee by the lower court when the weight of the evidence showed he had been leading an upright and moral life for the time immediately preceding his nomination.[69]

It is small wonder that under such conditions of elasticity of judicial treatment no rules can be discovered for the treatment of specific functions as discretionary or ministerial. State courts can use mandamus to review the revocation or refusal to grant a license or permit because the function constitutes a ministerial duty when the plaintiff has brought himself under the terms of the statute.[70] In another case, mandamus may be denied because the power to determine whether the plaintiff falls within the statutory conditions entitling him to his license is discretionary.[71] And merely because a hearing is provided

[69] Dassey v. Sanders, 17 Ky. L. Rep. 972, 33 S.W. 193 (1895). But see Day v. Justices, 3 B. Mon. (42 Ky.) 198 (1842), where mandamus was refused because this was a discretionary function; and the earlier case of Taylor v. Comm., 3 J. J. Marsh (26 Ky.) 401 (1830), where mandamus was said to be the *only* remedy for this function.

[70] State ex rel. Williams v. Bd. of Dental Examiners, 116 Fla. 196, 150 S. 136, 156 S. 705 (1934); City of East St. Louis v. Wider, 46 Ill. 351 (1868); People ex rel. v. Busse, 248 Ill. 11, 93 N.E. 327 (1910); People ex rel. Gosling v. Potts, 264 Ill. 522, 106 N.E. 524 (1914); People ex rel. Younger v. Chicago, 280 Ill. 576, 117 N.E. 779 (1918); Grace Missionary Church v. City of Zion, 300 Ill. 513, 133 N.E. 268 (1921); Mills v. White, 304 Ill. 256, 136 N.E. 741 (1922); Klever Shampay Karpet Kleaners v. Chicago, 323 Ill. 268, 154 N.E. 131 (1926); Ruban v. Chicago, 330 Ill. 97, 161 N.E. 133 (1928); United Artists Corp. v. Thompson, 339 Ill. 595, 171 N.E. 742 (1930); People ex rel. Jacobi v. Nelson, 346 Ill. 247, 178 N.E. 485 (1931); City of Montpelier v. Mills, 171 Ind. 175, 85 N.E. 6 (1908); Kansas Home Ins. Co. v. Wilder, 43 Kan. 731, 23 P. 1061 (1890); State Bd. of Pharm. v. White, 84 Ky. 626, 2 S.W. 225 (1886); Harper v. Bd. of App., 271 Mass. 482, 171 N.E. 430 (1930); Tranfaglia v. Bldg. Comm., 306 Mass. 495, 28 N.E. (2d) 537 (1940); Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N.W. 474 (1888); St. Louis v. Weitzel, 130 Mo. 600, 31 S.W. 1045 (1895); State ex rel. Jones v. Cook, 174 Mo. 100, 73 S.W. 489 (1902); Sampson Dist. Co. v. Cherry, 346 Mo. 885, 143 S.W. (2d) 307 (1940); Poole v. State Bd. of Cosmetic Art Examiners, 221 N.C. 199, 19 S.E. (2d) 625 (1942); Davis v. Patterson, 12 Pa. Super. 479 (1900); Coyne v. Prichard, 272 Pa. St. 424, 116 A. 315 (1922); Wright v. France, 279 Pa. St. 22, 123 A. 586 (1924). Compare Whitten v. Cal. State Bd. of Optometry, 8 Cal. (2d) 444, 65 P. (2d) 1296 (1937).

[71] Batters v. Dunning, 49 Conn. 479 (1882); Am. Casualty Ins. and Sec. Co. v. Fyler, 60 Conn. 448, 22 A. 494 (1891); People ex rel. Sheppard v. Ill. State Bd. of Dental Examiners, 110 Ill. 180 (1884); People ex rel. Trader's Ins. Co. v. Van Cleave, 183 Ill. 330, 55 N.E. 698 (1899); Coughlin v. Park Dist., 364 Ill. 90, 4 N.E. (2d) 1 (1936); State ex rel. Reynolds v. Bd. of Commrs., 45 Ind. 501 (1874); Hirsch v. Muscatine, 233 Iowa 590, 10 N.E. (2d) 71 (1943); Devin v. Belt, 70

does not mean that the administrative body is performing a discretionary function.[72] Similarly, the construction and maintenance of roads, streets, bridges, and other public works where required by the statute "for the public benefit," may "be insisted on as a duty," with mandamus as a remedy.[73] Yet the same court may on another occasion hold that: "The board has the discretion to build such bridges when

Md. 352, 17 A. 375 (1889); McCrea v. Roberts, 89 Md. 238, 43 A. 39 (1899); Rea v. Bd. of Aldermen, 217 Mass. 427, 105 N.E. 618 (1914); State ex rel. Powell v. Medical Bd., 32 Minn. 324, 20 N.W. 238 (1884); State ex rel. Zeglin v. Bd. of Commrs., 60 Minn. 510, 62 N.W. 1135 (1895); State ex rel. Granville v. Gregory, 83 Mo. 123 (1884); McCarten v. Sanderson, 111 Mont. 407, 109 P. (2d), 1108 (1941); Whitney v. Watson, 85 N.H. 238, 157 A. 78 (1931); State ex rel. Welsh v. State Medical Bd., 145 Ohio St. 74, 60 N.E. (2d) 620 (1944); Comm. ex rel. Snyder v. Mitchell, 82 Pa. St. 343 (1876); State ex rel. Hamrick v. Pocahontas Co. Ct., 92 W.Va. 222, 114 S.E. 519 (1922); Ellis v. State Rd. Comm., 100 W.Va. 531, 131 S.E. 7 (1925); State ex rel. Lockett v. Bd. of Commrs., 103 W.Va. 723, 138 S.E. 397 (1927). But see Baldaccai v. Goodlet, (Tex. Civ. App. 1912) 145 S.W. 325, where licensing was said to be discretionary when done by courts and ministerial when done administratively.

[72] *Cf.* State ex rel. William v. Bd. of Dental Examiners, 116 Fla. 196, 150 S. 136, 156 S. 705 (1934). Compare Dept. of Pub. Works v. Sup. Ct., 197 Cal. 215, 239 P. 1076 (1925); West Flagler Amus. Co. v. Racing Comm., 122 Fla. 227, 165 S. 60 (1935); Wheeling v. Preston, 123 W.Va. 32, 13 S.E. (2d) 151 (1941).

[73] State ex rel. Mobile v. Commrs., 180 Ala. 489, 61 S. 368 (1913); Peck v. Bd. of Supervisors, 90 Cal. 384, 27 P. 301 (1891); State ex rel. Garrison v. Commrs. Putnam Co., 23 Fla. 632, 3 S. 164 (1887); Bd. of Comm. of Sumpter Co. v. McMath, 138 Ga. 351, 75 S.E. 317 (1912); People ex rel. Burke v. Bloomington, 63 Ill. 207 at 208 (1872). *Cf.* Brokaw v. Hwy. Commrs., 130 Ill. 482, 22 N.E. 596 (1889); State ex rel. Roundtree v. Commrs. of Gibson Co., 80 Ind. 478 (1881); State ex rel. Winterbury v. Demaree, 80 Ind. 519 (1881); Bd. of Commrs. v. State, 113 Ind. 179, 15 N.E. 258 (1887); State ex rel. Shryer v. Bd. of Commrs., 119 Ind. 444, 21 N.E. 1097 (1889); State ex rel. Fry v. Bd. of Commrs., 125 Ind. 247, 25 N.E. 286 (1890); Bd. of Commrs. of Daviess Co. v. State ex rel. Washington, 141 Ind. 187, 40 N.E. 686 (1895); Gruber v. State ex rel. Welliver, 201 Ind. 280, 168 N.E. 16 (1929); Gushwa v. State ex rel. Oster, 206 Ind. 237, 189 N.E. 129 (1933); Ruffcorn v. Chatburn, 166 Iowa 611, 147 N.E. 1110 (1914); State ex rel. Griffith v. Bd. of Commrs. of Linn Co., 120 Kan. 356, 243 P. 539 (1926); Anderson Co. Ct. v. Stone & Son, 18 B. Mon. (57 Ky.) 848 (1857); Kaye v. Kean, 18 B. Mon. (57 Ky.) 839 (1857); Hammar v. Covington, 3 Met. (60 Ky.) 494 (1861); Catlettsburg v. Kinner, 13 Bush. (76 Ky.) 334 (1877); Leslie Co. v. Wooten, 115 Ky. 850, 75 S.W. 208 (1903); Sanger v. Kennebec Co., 25 Me. 291 (1845); McCarthy v. Street Commrs., 188 Mass. 338, 74 N.E. 659 (1905); Brophy v. Schindler, 126 Mich. 341, 85 N.W. 1114 (1901); Olson v. Honett, 133 Minn. 160, 157 N.W. 1092, 1103 (1916); Justice v. Logan Twp., 71 N.J.L. 107, 58 A. 74 (1904); State ex rel. Eastman v. Warren Co., 17 Ohio St. 559 (1867); Tripper v. Couch, 110 Ore. 446, 220 P. 1012 (1923); Howe v. Commrs., 47 Pa. St. 361 (1864); Comm. ex rel. Ferguson v. Ball, 277 Pa. St. 301, 121 A. 191 (1923); Gilmer v. Hunnicutt, 57 S. C. 166, 35 S.E. 521 (1900); State ex rel. Reynolds v. Hill, 135 Wash. 442, 237 P. 1004 (1925); State ex rel. Robinson v. Bd. of Commrs., 82 W.Va. 724, 97 S.E. 282 (1918).

they deem the public interest to require them . . . of these facts they are the judge, and it is beyond the power of the courts or of other persons to determine that question for them."[74] In some cases removal of public officers "for cause" is subject to review and correction by mandamus because ministerial,[75] in others it is deemed to be discretionary;[76] claims against the state are adjudicated on mandamus proceedings in some instances[77] and in others the writ is denied because

[74] Co. of St. Clair v. People ex rel. Keller, 85 Ill. 396 at 401 (1877). To the same effect Sholty v. Commr. of Hwys., 63 Ill. 209 (1872); Commrs. v. People ex rel. Bonker, 66 Ill. 339 (1872); Commrs. v. People ex rel. Welch, 73 Ill. 203 (1874); State ex rel. Cutter v. Kamman, 151 Ind. 407, 51 N.E. 483 (1898); Leonard v. Wakeman, 120 Iowa 140, 94 N.W. 281 (1903); O'Neil v. Stuber, 183 Iowa 542, 167 N.W. 479 (1918); Griebel v. Bd. of Supervisors, 200 Iowa 143, 202 N.W. 379 (1925); State ex rel. Weber v. Younkin, 108 Kan. 634, 196 P. 620 (1921); Comm. v. Boone Co. Ct., 82 Ky. 632 (1885); Clay City v. Roberts, 124 Ky. 594, 99 S.W. 651 (1907); Rice v. Hwy. Comm., 13 Pick. (30 Mass.) 225 (1842); Perrine v. Bd., 48 Mich. 641 (1882); Travis v. Skinner, 72 Mich. 158, 40 N.W. 234 (1888); Kingsley v. Nyland, 136 Mich. 535, 99 N.W. 744 (1904); Stephenson v. Detroit, 213 Mich. 668, 181 N.W. 1001 (1921); Olson v. Honett, 133 Minn. 160, 157 N.W. 1092, 1103 (1916); State ex rel. Davis v. State Hwy. Comm., 312 Mo. 230, 279 S.W. 689 (1925); Ward v. Commrs., 146 N.C. 534, 60 S.E. 418 (1908); Commrs. of Rollersville and P. Free Turnpike Rd. v. Sandusky Co., 1 Ohio St. 149 (1853); State ex rel. Clark v. Seattle, 137 Wash. 455, 242 P. 966 (1926).

[75] Bratton v. Dice, 93 Colo. 593, 27 P. (2d) 1028 (1933); State Comm. v. Lehl, 108 Colo. 397, 118 P. (2d) 1080 (1941); McDevitt v. Corfman, 108 Colo. 571, 120 P. (2d) 963 (1941); Delahanty v. Warner, 75 Ill. 185 (1874); People ex rel. Iddings v. Dreher, 302 Ill. 50, 134 N.E. 22 (1922); McCarthy v. Emerson, 202 Mass. 352, 88 N.E. 668 (1909); Thomas v. Municipal Council, 227 Mass. 116, 116 N.E. 497 (1917); Stiles v. Council, 229 Mass. 208, 118 N.E. 347 (1918); State ex rel. Coduti v. Hauser, 219 Minn. 297, 17 N.W. (2d) 504 (1945); State ex rel. Guion v. Miles, 210 Mo. 127, 109 S.W. 595 (1908); State ex rel. Stomp v. Kansas City, 313 Mo. 352, 281 S.W. 426 (1926); Perkins v. Burks, 336 Mo. 248, 78 S.W. (2d) 845 (1934); State ex rel. Walther v. Johnson, 351 Mo. 293, 173 S.W. (2d) 411 (1943); State ex rel. Quintin v. Edwards, 40 Mont. 287, 106 P. 695 (1909); Shepp v. City of Camden, 132 N.J.L. 59, 38 A. (2d) 453 (1944); Comm. v. Primrose, (Pa. 1941) 2 W. and S. 407; Comm. ex rel. O'Brien v. Gibbons, 196 Pa. St. 97, 46 A. 313 (1900).

[76] State ex rel. Julian v. Bd. of Commrs., 170 Ind. 133, 83 N.E. 83 (1907); State ex rel. Harrington v. Fortune, 197 Ind. 345, 151 N.E. 5 (1925); State ex rel. Szweda v. Davies, 198 Ind. 30, 152 N.E. 174 (1926); Bd. of Pub. Safety v. State ex rel. McGee, 200 Ind. 129, 154 N.E. 490 (1926). Compare Solo v. Detroit, 303 Mich. 672, 7 N.W. (2d) 103 (1942); Bradycamp v. Metzger, 310 Pa. St. 320, 165 A. 387 (1933); Luellen v. Aberdeen, 20 Wash. (2d) 594, 148 P. (2d) 849 (1944).

[77] People ex rel. Donovan v. Retirement Bd., 326 Ill. 529, 158 N.E. 220 (1927); Kisler v. Cameron, 39 Ind. 488 (1872); Henderson v. State ex rel. Overman, 53 Ind. 60 (1876); Wolf v. State ex rel. Kennard, 90 Ind. 16 (1883); Owen Co. Council v. State ex rel. Gailmore, 175 Ind. 610, 95 N.E. 253 (1911); Bd. of Commrs. v. State ex rel. Reed, 179 Ind. 644, 102 N.E. 97 (1913); Terr. ex rel. Tanner v.

such administrative determinations are discretionary; [78] in some states where a public contract must be let to the "lowest responsible bidder," the determination of the eligible bidder will be reviewable on mandamus,[79] in other cases the writ is found inappropriate; [80] whether the signatures to a nominating petition are valid or the ballots cast at an election are legally sufficient to elect a relator, are questions sometimes

Potts, 3 Mont. 364 (1879); State ex rel. Eaves v. Rickards, 16 Mont. 145, 40 P. 210 (1895); Bd. of Ed. v. Bd. of Commrs., 171 Okla. 464, 43 P. (2d) 139 (1935); McQueen v. Kittitas Co., 115 Wash. 672, 198 P. 394 (1921). Compare People ex rel. Whitely v. Common Council, 27 Mich. 131 (1873); Nicely v. Raker, 250 Pa. St. 392, 95 A. 558 (1915).

[78] Curtis v. Moore, 38 Idaho 193, 221 P. 133 (1923); State ex rel. Godfrey v. Bd. of Commrs., 63 Ind. 497 (1878); State ex rel. Johnston v. Wayne Co., 157 Ind. 356, 61 N.E. 715 (1901); State ex rel. Morgan v. Monroe Co. Council, 158 Ind. 102, 62 N.E. 1000 (1902); Bd. of Commrs. v. Mowbray, 160 Ind. 10, 66 N.E. 46 (1902); Green v. Purnell, 12 Md. 329 (1858); Wailes v. Smith, 76 Md. 469, 25 A. 922 (1893); Kerwin v. Rettie, 294 Mich. 308, 293 N.W. 660 (1940), People ex rel. Harris v. Commrs., 149 N.Y. 26, 43 N.E. 418 (1896); Runkle v. Comm. ex rel. Keppelman, 97 Pa. St. 328 (1881).

[79] Citizens Bank and Sec. Co. v. Commissioners' Court, 209 Ala. 646, 96 S. 778 (1923); Stanley-Taylor Co. v. San Francisco, 135 Cal. 486, 67 P. 783 (1902); State ex rel. Ross v. Robinson, 1 Kan. 188 (1862); State ex rel. Robt. Mitchell Furniture Co. v. Toole, 26 Mont. 22, 66 P. 496 (1901); State ex rel. Whedon v. York Co., 13 Neb. 57, 12 N.W. 816 (1882); State ex rel. Globe Pub. Co. v. Saline Co., 19 Neb. 253, 27 N.W. 122 (1886); Beaver & Butt v. Trustees, 19 Ohio St. 97 (1869); Compare Quinchard v. Bd. of Trustees, 113 Cal. 664, 45 P. 856 (1896).

[80] Kelly v. Chicago, 62 Ill. 279 (1871); People ex rel. Assyrian Asphalt Co. v. Kent, 160 Ill. 655, 43 N.E. 760 (1896); Hanlin v. Independent Dist., 66 Iowa 69, 23 N.W. 268 (1885); State ex rel. Speer v. Baker, 4 Kan. 379 (1868); Vincent v. Ellis, 116 Iowa 609, 88 N.W. 836 (1902); Madison v. Harbor Bd., 76 Md. 395, 25 A. 337 (1893); Md. Paving Co. v. Mahool, 110 Md. 397, 72 A. 833 (1909); Mayo v. Co. Commrs., 141 Mass. 74, 6 N.E. 757 (1886); Talbot Paving Co. v. Detroit, 91 Mich. 262, 51 N.W. 933 (1892); State ex rel. Journal Co. v. McGrath, 91 Mo. 386, 3 S.W. 846 (1886); Anderson v. Public Schools, 122 Mo. 61, 27 S.W. 610 (1894); State ex rel. Eaves v. Richards, 16 Mont. 145, 40 P. 210 (1895); State ex rel. Stuewe v. Hindson, 44 Mont. 429, 120 P. 485 (1912); State ex rel. Vickers v. Bd., 77 Mont. 316, 250 P. 606 (1926); State ex rel. Silver v. Kendall, 15 Neb. 262, 18 N.W. 85 (1883); State v. Scott, 17 Neb. 686, 24 N.W. 337 (1885); State ex rel. Union Fuel Co. v. Lincoln, 68 Neb. 597, 94 N.W. 719 (1903); State ex rel. Neb. Bldg. and Inv. Co. v. State Institutions, 105 Neb. 570, 181 N.W. 530 (1921); Hoole v. Kinkead, 16 Nev. 217 (1881); People ex rel. Belden v. Contracting Bd., 27 N.Y. 378 (1863); People ex rel. Bullard v. Contracting Bd., 33 N.Y. 382 (1865); East River Gas-Light Co. v. Donnelly, 93 N.Y. 557 (1883); State ex rel. Howlett v. Directors, 5 Ohio St. 234 (1855); State ex rel. Clough & Co. v. Commrs. of Shelby Co., 36 Ohio St. 326 (1881); Comm. ex rel. Snyder v. Mitchell, 82 Pa. St. 343 (1876); Am. Pavement Co. v. Wagner, 139 Pa. St. 623, 21 A. 160 (1891); Free Press Assoc. v. Nichols, 45 Vt. 7 (1872); Times Pub. Co. v. Everett, 9 Wash. 518, 37 P. 695 (1894); Bellingham Amer. Pub. Co. v. Bellingham Pub. Co., 145 Wash. 25, 258 P. 836 (1927); State ex rel. Phelan v. Bd. of Ed., 24 Wis. 683 (1869).

called ministerial,[81] and sometimes discretionary.[82] And the character of other miscellaneous functions and powers varies from state to state and case to case.[83] In those instances where mandamus is found avail-

[81] Wahl v. Waters, 11 Cal. (2d) 81, 77 P. (2d) 1072 (1938); State ex rel. Hutchins v. Tucker, 106 Fla. 905, 143 S. 754 (1932); State ex rel. Gandy v. Page, 125 Fla. 348, 169 S. 854 (1936); Tanner v. Deen, 108 Ga. 95 (1899); People ex rel. Fuller v. Hilliard, 29 Ill. 413 (1862); Williams v. Lewis, 6 Idaho 184, 54 P. 619 (1898); State ex rel. Fullheart v. Buckles, 39 Ind. 272 (1872); Sarlls v. State ex rel. Trumble, 201 Ind. 88, 166 N.E. 270 (1928); McDonald v. State ex rel. Gibbs, 202 Ind. 409, 175 N.E. 276 (1930); State ex rel. Wells v. Marston, 6 Kan. 315 (1870); Brown v. Commrs. of Rush Co., 38 Kan. 436, 17 P. 304 (1888); Houston v. Steele, 98 Ky. 596, 34 S.W. 6 (1896); Strong, Petitioner, 20 Pick. (37 Mass.) 484 (1838); Swift v. Bd. of Registrars, 281 Mass. 264, 183 N.E. 727 (1932); Rich. v. Bd. of Canvassers, 100 Mich. 453, 59 N.W. 181 (1894); Bradley v. State Canvassers, 154 Mich. 274, 117 N.W. 649 (1908); Oren v. Secretary of State, 171 Mich. 590, 137 N.W. 227 (1912); Michigan State Dental Society v. Secretary of State, 294 Mich. 503, 293 N.W. 865 (1940); State ex rel. Hudson v. Pigott, 97 Miss. 599, 54 S. 257 (1911); State ex rel. Hammerstein v. Williams, 95 Mo. 159, 8 S.W. 415 (1888); State ex rel. Brooks v. Fransham, 19 Mont. 273, 48 P. 1 (1897); State ex rel. Stringfellow v. Bd. of Commrs., 42 Mont. 62, 111 P. 144 (1910); State ex rel. Lynch v. Batani, 103 Mont. 353, 62 P. (2d) 565 (1936); State ex rel. Wolff v. Geurkink, 111 Mont. 417, 109 P. (2d) 1094 (1941); State ex rel. Townsend v. Hill, 10 Neb. 58, 4 N.W. 514 (1880); State ex rel. Campbell v. Campbell, 129 Neb. 177, 260 N.W. 917 (1935); Territory ex rel. Lester v. Suddith, 15 N.M. 728, 110 P. 1038 (1910); State ex rel. v. Foster, 38 Ohio St. 599 (1883); Stearns v. State ex rel. Biggers, 23 Okla. 462, 100 P. 909 (1909); Potts v. Phila., 195 Pa. St. 619, 46 A. 195 (1900); Smith v. Lawrence, 2 S.D. 185, 49 N.W. 7 (1891); State ex rel. Stewart v. Marks, 6 Lea (74 Tenn.) 12 (1880); State ex rel. Bancroft v. Frear, 144 Wis. 79, 128 N.W. 1068 (1910). Compare McLeod v. State Bd. of Canvassers, 304 Mich. 120, 7 N.W. (2d) 240 (1942); State ex rel. Scharnikov v. Hogan, 24 Mont. 383, 62 P. 583 (1900). *Cf.* also Faulkner v. Bd. of Supervisors, 17 Ariz. 140, 149 P. 382 (1915).

[82] Perry v. Reynolds, 53 Conn. 527, 3 A. 555 (1885); Leary v. Jones, 51 Colo. 185, 116 P. 130 (1911); State ex rel. Lilienthal v. Deane, 23 Fla. 121, 1 S. 698 (1887); Davies v. NezPerce Co., 26 Idaho 450, 143 P. 945 (1914); State ex rel. Dayton Gravel Rd. Co. v. Bd. of Commrs., 131 Ind. 90, 30 N.E. 892 (1891); State ex rel. Byres v. Bailey, 7 Iowa 390 (1858); Capper v. Stoller, 88 Kan. 387, 128 P. 207 (1912); Booe v. Kenner, 105 Ky. 517, 49 S.W. 330 (1899); White v. Laird, 127 Md. 120, 96 A. 318 (1915); State ex rel. Richardson v. Baldry, 331 Mo. 1006, 56 S. W. (2d) 67 (1932); Britt v. Bd. of Canvassers, 172 N.C. 797, 90 S.E. 1005 (1916); Dalton v. State, 43 Ohio St. 652, 3 N.E. 685 (1885); McKee v. Adair Co. Elect. Bd., 36 Okla. 258, 128 P. 294 (1912); Madden v. Moore, 228 Pa. St. 503, 77 A. 821 (1910); Corbett v. Naylor, 25 R.I. 520, 57 A. 303 (1904); Ex parte Scarborough, 34 S.C. 13, 12 S.E. 666 (1891); Arberry v. Beavers, 6 Tex. 457 (1851); Lucas v. Bd. of Canvassers, 116 W.Va. 427, 181 S.E. 77 (1935). Compare Borchard v. Bd. of Supervisors, 144 Cal. 10, 77 P. 708 (1904); Wolfskill v. City Council, 178 Cal. 610, 174 P. 45 (1918); Lehigh Sewer Pipe & Tile Co. v. Town of Lehigh, 156 Iowa 386, 136 N.W. 934 (1912).

[83] *Cf.* Greenwood Cem. Land Co. v. Rouett, 17 Colo. 156, 28 P. 1125 (1892) (grant of public lands); Goddard v. Town of Seymour, 30 Conn. 394 (1862) (property taxation); State ex rel. Foote v. Bartholomew, 103 Conn. 607, 132 A. 30 (1925)

able, the court leaves no doubt but that it has investigated the matter and found the facts. There are frequent references to the evidence and what it shows in the opinion of the court; so frequent that proceedings on mandamus become analogous to action on appeal or *certiorari* with the sole difference that the administrative determination carries far less weight than the decision of a lower court.[84]

It is only when the language of the statute specifically refers to the opinion, judgment or discretion of the administrative officer that the courts admit the existence of administrative discretion with any uniformity. The reference must be specific and leave no doubt that it is the administrator whose judgment is desired, for if the statute merely provides that the agency "may" act, the word "may" is judicially construed to mean "shall" with baffling irregularity.[85]

A Kansas statute illustrates the distinction referred to above. As originally enacted, the statute provided that whenever the state superintendent of insurance "shall have reason to suspect" financial insta-

(property taxation); East Side Blaine Co. Livestock Assn. v. Bd. of Land Commrs., 34 Idaho 807, 198 P. 760 (1921) (grant of public lands); People v. Cook Co. Bd. of Review, 351 Ill. 301, 184 N.E. 325 (1933) (property taxation); Holliday v. Henderson, 67 Ind. 103 (1879) (publication of corp. statements); State ex rel. Dalrymple v. Stockwell, 7 Kan. 103 (1871) (approval of a bond); Traynor v. Beckham, 116 Ky. 13, 74 S.W. 1105, 76 S.W. 370 (1903) (commissioning public officers); McCreary v. Williams, 153 Ky. 49, 154 S.W. 417 (1913) (commissioning public officers); Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 N.E. 870 (1908) (scaling weghts and measures); Mansfield v. Sec., 228 Mass. 262, 117 N.W. 311 (1917) (construction of the ballot); Peterson v. School Bd., 73 Mont. 442, 236 P. 670 (1925) (admitting to public schools); State ex rel. School Dist. v. Cooney, 102 Mont. 521, 59 P. (2d) 48 (1936) (accrediting a school); Gantenbein v. West, 74 Ore. 334, 144 P. 1171 (1915) (commissioning public officers); Putnam v. Narblad, 134 Ore. 433, 293 P. 940 (1930) (commissioning public officers); Houseman v. Comm. ex rel. Tener, 100 Pa. St. 222 (1882) (approving a bond); Easler v. Maybank, 191 S.C. 511, 5 S.E. (2d) 288 (1939) (calling an election); Startup v. Harmon, 59 Utah 329, 203 P. 637 (1921) (appropriations). Compare Farmers' Co-op. Union v. Thresher, 62 Cal. 407 (1882); Hobart v. Tax Collector, 66 Cal. 210, 5 P. 83 (1884); Allied Mtg. Cos. v. Gilbert, 189 Ga. 756, 8 S.E. (2d) 45 (1940); Perrault v. Robinson, 29 Idaho 267, 158 P. 1074 (1916).

[84] *Cf.* note 100, infra.

[85] *Cf.* Kemble v. McPhaill, 128 Cal. 444, 60 P. 1092 (1900); McKinnon v. State, 72 Fla. 223, 72 S. 676 (1916); Brokaw v. Highway Commrs., 130 Ill. 482, 22 N.E. 596 (1889); Gray v. State ex rel. Coghlen, 72 Ind. 567 (1880); Phelps v. Lodge, 60 Kan. 122, 55 P. 840 (1899); Johnson and Connelly, 88 Kan. 861, 129 P. 1192 (1913); McClauskey v. Brown, 94 Kan. 366, 146 P. 1186 (1915); Metcalf v. Cook, 168 Md. 475, 178 A. 219 (1935); Jordan v. Davis, 10 Okla. 329, 61 P. 1063 (1900); Allen v. Byrd, 151 Va. 21, 144 S.E. 469 (1928); Cliffs Chem. Co. v. Wis. Tax Comm., 193 Wis. 295, 214 N.W. 447 (1927). But see Easler v. Maybank, 191 S.C. 511 at 515, 5 S.E. (2d) 288 (1939). Compare Patterson, "Ministerial and Discretionary Official Acts," 20 MICH. L. REV. 848 at 857 (1922).

bility on the part of an insurance company, he "may investigate" and, "if any satisfactory evidence" supports his suspicion, revoke the company's license to do business. The entire statute referred to the superintendent's opinion and his judgment; accordingly, mandamus was refused to coerce him into granting a license renewal.[86] But one year later the statute was amended to provide that licenses might be revoked or refused "if the solvency of such company has been impaired." This was held to confer a ministerial duty on the superintendent to grant or withhold a license on the basis of the facts of the case.[87] There are relatively few instances where the statute clearly makes the administrator's judgment or discretion a factor in his action. But where such is the case, mandamus will customarily be denied.[88]

C. *Availability of Mandamus to Correct Procedural Mistakes Made by the Administrative Body*

If this represents the only instance where a fairly consistent rule is applied in denying mandamus, no greater uniformity is to be expected when the writ is made available. Only one class of cases here is clear enough to be predictable. When the administrative body has not followed the procedural provisions of the statute and of due process, its action can be annulled by mandamus without characterizing the

[86] Dwelling-House Ins. Co. v. Wilder, 40 Kan. 561, 20 P. 265 (1889).

[87] Kansas Home Ins. Co. v. Wilder, 43 Kan. 732, 23 P. 1061 (1890).

[88] *Cf.* Eve v. Simon, 78 Ga. 120 at 121 (1886), where the statute merely provided that the administrator "shall have power to grant the license or refuse the same" without qualification; and, Darby v. Pence, 17 Idaho 697, 107 P. 484 (1910), where the law provided for a license "if the applicant for the license is, in the opinion of the council, a proper person." To the same effect, Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140 (1924); Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784 (1926); Twin Falls Co. v. Ross, 52 Idaho 328, 14 P. (2d) 622 (1932); Kelley v. Chicago, 62 Ill. 279 (1871); City of Madison v. Korbly, 32 Ind. 74 (1869); State ex rel. Harrington v. Fortune, 197 Ind. 345, 150 N.E. 5 (1925); Bailey v. Ewart, 52 Iowa 111, 2 N.W. 1009 (1879); Perry v. Bd. of Supervisors, 133 Iowa 281, 110 N.W. 591 (1907); Cecil v. Toenjes, 210 Iowa 407, 228 N.W. 874 (1930); Stanley v. Monnet, 34 Kan. 708, 9 P. 755 (1886); Martin v. Ingham, 38 Kan. 641, 17 P. 162 (1888); George's Creek Coal and Iron Co. v. Allegheny Co., 59 Md. 255. (1882); Robey v. Co. Commrs., 92 Md. 150, 48 A. 48 (1900); Foote & Co. v. Harrington, 129 Md. 123, 98 A. 289 (1916), writ of error denied in 246 U.S. 657, 38 S.Ct. 425 (1917); Peabody v. School Comm., 115 Mass. 383 (1874); Keough v. Holyoke, 156 Mass. 403, 31 N.E. 387 (1892); State ex rel. State Pub. Co. v. Smith, 23 Mont. 44, 57 P. 449 (1899); State ex rel. Bowler v. Bd., 106 Mont. 251, 76 P. (2d) 648 (1937); Matz v. Clairton, 340 Pa. St. 98, 16 A. (2d) 300 (1940); State ex rel. Lockett v. Bd. of Commrs., 103 W.Va. 723, 138 S.E. 397 (1927).

functions performed as either ministerial or discretionary.[89] However, it is to be noted that cases of this type usually result in the annulment of administrative action without reference to the substantive merits of the relator, as distinguished from the great bulk of decisions noted above, where mandamus is available to determine the merits of the relator's claims. In other words, here the administrative body is free to reinstitute proceedings which may validly arrive at the same result.

In this respect these cases are similar to a part of the third class of decisions noted above—i.e., where mandamus is used to annul action of an administrative body based upon what the court considers improper justification. In this class of cases the courts usually admit that the agency possesses discretion but nonetheless use mandamus to annul or coerce administrative action where the administrative decision is based on reasons which the court considers in excess of jurisdiction conferred. Thus in Alabama when the statute provided that certain claims would be payable only if they had the governor's approval, mandamus issued when in answer to the alternative writ the governor did not allege a proper reason for his refusal. The court admitted that this was a discretionary power and that legitimate reasons could be given for withholding approval, yet seemingly assumed that the governor had presented all possible justification under the circumstances in his return.[90] In Iowa, a school board was forced to annul an order of expulsion issued because a pupil had broken a window in the school building and his parents had refused to pay for it. Although the action was taken under a rule of the board, it was in excess of the board's jurisdiction since "it would be very harsh and obviously unjust to

[89] State v. Bd. of Supervisors, 14 Ariz. 222, 127 P. 727 (1912); Carroll v. Racing Bd., 16 Cal. (2d) 164, 105 P. (2d) 110 (1940); State ex rel. Page v. Hollingsworth, 117 Fla. 288, 157 S. 887 (1934); Evans v. Swendsen, 34 Idaho 290, 200 P. 136 (1921); East Side Blaine Co. Livestock Assn. v. Bd. of Land Commrs., 34 Idaho 807, 198 P. 760 (1921); State ex rel. Szweda v. Davies, 198 Ind. 30, 152 N.E. 174 (1926); City of Peru v. State ex rel. McGuire, 210 Ind. 668, 199 N.E. 151 (1936); State ex rel. Shanks v. Common Council, 212 Ind. 38, 7 N.E. (2d) 968 (1936); State ex rel. Price v. Lawrence, 3 Kan. 89 (1865); McCarthy v. Emerson, 202 Mass. 352, 88 N.E. 668 (1909); Corrigan v. School Comm., 250 Mass. 334, 145 N.E. 530 (1924); Cassidy v. Transit Dept., 251 Mass. 71, 146 N.E. 357 (1924); Peckham v. Mayor, 253 Mass. 590, 149 N.E. 622 (1925); Graves v. School Comm., 299 Mass. 80, 12 N.E. (2d) 176 (1937); State ex rel. Jones v. Cook, 174 Mo. 100, 73 S.W. 489 (1902); Nagel v. Barrett, 353 Mo. 1049, 186 S.W. (2d) 589 (1945). *Cf.* State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S.W. (2d) 822 (1943).

[90] State ex rel. Turner v. Henderson, 199 Ala. 244, 74 S. 344 (1917). See *contra*, Wood v. State Civil Service Comm., 113 Colo. 135, 155 P. (2d) 133 (1945).

deprive a child of education for the reason that through accident and without intention of wrong he destroyed property of the school district."[91] It can be inferred from such decisions that merely because an administrative agency has the power to find facts in the first instance there is no ground for necessarily assuming that the agency will be immune to suits for mandamus to correct its findings. For example, when mandamus was sought to compel the Corporation Commissioners of California to distribute a corporation's surplus capital to stockholders, the court said:

> ". . . In determining whether the directors of a corporation shall be permitted to make dividends from other than surplus profits the commissioner no doubt exercises some discretion, which in a strict sense is in its nature judicial; but the exercise of purely administrative functions quite often calls for that kind of discretion. What section 309 requires the commissioner to do is, not to adjudicate—unless every exercise of judgment is to be called a judicial act—but to perform a duty of ascertainment—to determine, by an examination of witnesses and the books and records of the corporation and from a consideration of values, whether, if the

[91] Perkins v. Bd. of Directors, 56 Iowa 476 at 479-480, 9 N.W. 356 (1881). To the same effect, see, State ex rel. Daly v. Henderson, 199 Ala. 428, 74 S. 951 (1917); State ex rel. Martin v. Henderson, 199 Ala. 701, 74 S. 952 (1917); State ex rel. Towle v. Stone, 236 Ala. 82, 181 S. 281 (1938); Ariz. Corp. Comm. v. Heralds of Liberty, 17 Ariz. 462, 154 P. 202 (1916); Wood v. Strother, 76 Cal. 545, 18 P. 766 (1888); People ex rel. Bettingell v. Grand County, 53 Colo. 494, 127 P. 960 (1912); State ex rel. Jordan v. Pattishall, 99 Fla. 296, 126 S. 147 (1930); Thomas v. Glindeman, 33 Idaho 394, 195 P. 92 (1921); People ex rel. O'Kelley v. Allman, 382 Ill. 156, 46 N.E. (2d) 974 (1943); Bd. of Commrs. v. State ex rel. Ennis, 15 Ind. 250 (1860); Michigan City v. Roberts, 34 Ind. 471 (1870); Pub. Serv. Comm. v. State M.H. and L. Co., 184 Ind. 273, 111 N.E. 10 (1915); Clark v. Bd. of Dir., 24 Iowa 266 (1868); Murphy v. Bd. of Dir., 30 Iowa 429 (1870); Smith v. Dir. of Ind. Sch. Dist., 40 Iowa 518 (1875); Dove v. Ind. School Dist., 41 Iowa 689 (1875); State ex rel. Dalrymple v. Stockwell, 7 Kan. 67 (1871); Bd. of Ed. v. Tinnon, 26 Kan. 1 (1881); State ex rel. Griffith v. Bd. of Commrs., 113 Kan. 203, 213 P. 1062 (1923); Fox v. Petty, 235 Ky. 240, 30 S.W. (2d) 945 (1930); Eastern Mass. St. Ry. Co. v. Mayer, 308 Mass. 232, 31 N.E. (2d) 543 (1941); State ex rel. School Dist. v. Thompson, 325 Mo. 1170, 30 S.W. (2d) 603 (1930); State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S.W. (2d) 12 (1941); State ex rel. Quintin v. Edwards, 40 Mont. 287, 106 P. 695 (1909); State ex rel. Loney v. Ind. Acc. Bd., 87 Mont. 191, 286 P. 408 (1930); Jackson v. State ex rel. Majors, 57 Neb. 183, 77 N.W. 622 (1898); People ex rel. Empire City Trotting Club v. State Racing Comm., 190 N.Y. 31, 82 N.E. 723 (1907); Nicely v. Raker, 250 Pa. St. 386, 95 A. 566 (1915). Compare Kinzer v. School Dist., 129 Iowa 441, 105 N.W. 686 (1906).

dividends be made, the corporation will remain in a safe financial condition. This is a ministerial or administrative function." [92]

Similarly, the Indiana Supreme Court has said:

"From the provisions of this act it is apparent that the Public Service Commission is required to hear and determine the facts upon which the application is based and the facts thus determined constitute the foundation upon which its order shall be based. If the facts thus found are such as to entitle the utility to a certificate of authority to issue and sell bonds in a given amount, it is the duty of the commission to issue such a certificate. Under such circumstances the act required is ministerial and not discretionary." [93]

Like statements can be found in other cases.[94] Even when a court occasionally cites fact finding as a criterion of discretionary power,[95] it is usually evident that the judge merely agrees with the result arrived at by the administrative body.

From time to time courts reveal in their decisions that the best criterion for predicting the availability of mandamus is whether the court has arrived at the same conclusions on the available evidence as the administrative body. There are few courts and few decisions where "it is clear that mandamus will not lie to control the action of the board merely because it may have committed an error in the trial and decision of a matter which it had jurisdiction to try and decide." [96] Rather, most courts would appear to agree with the Ohio court when it said:

"But the performance of ministerial duties requires the exercise of intelligence, sense and judgment. Ministerial duties must

[92] Dominguez Land Corp. v. Daugherty, 196 Cal. 468 at 483, 238 P. 697 (1925).

[93] Pub. Serv. Comm. v. State ex rel. Merchants Heat and Light Co., 184 Ind. 273 at 277-278, 111 N.E. 10 (1916).

[94] Middleton v. Low, 30 Cal. 596 (1866); Inglin v. Hoppin, 156 Cal. 483, 105 P. 582 (1909); Wahl v. Waters, 11 Cal. (2d) 81, 77 P. (2d) 1072 (1938); Nisbet v. Frincke, 66 Colo. 1, 179 P. 867 (1919); People ex rel. Blue Danube Co. v. Busse, 248 Ill. 11, 93 N.E. 327 (1910); Sweitzer v. Fisher, 172 Iowa 266, 154 N.W. 465 (1915); Kansas Milling Co. v. Ryan, 152 Kan. 137, 102 P. (2d) 970 (1940); Craig v. Frankfort Distilling Co., 189 Ky. 616, 225 S.W. 731 (1920); Strong, Petitioner, 20 Pick. (37 Mass.) 484 (1838); Poole v. State Bd. of Cosmetic Art Exam., 221 N.C. 199, 19 S.E. (2d) 635 (1942); State ex rel. Wheeler & Co. v. Bd., 80 W.Va. 638, 93 S.E. 759 (1917).

[95] State ex rel. Higdon v. Jelks, 138 Ala. 115, 35 S. 60 (1902); State ex rel. French v. Johnson, 105 Ind. 463, 5 N.E. 553 (1885).

[96] Bd. of Public Safety v. State ex rel. McGee, 200 Ind. 129 at 132, 161 N.E. 490 (1926). See also Smith v. Phila., 305 Pa. St. 503, 158 A. 150 (1932).

be performed correctly; and the fact that a ministerial officer performed his duties according to his judgment is of no avail, if the duties are not correctly performed."[97]

In summation, there appears to be no dividing line or criterion for distinguishing between ministerial and discretionary administrative functions. And there is no insurmountable obstacle to judicial correction of administrative action.[98] For whether discretionary or ministerial, the courts regard the correctness of their performance as the criterion of whether a remedy should issue.[99] Occasionally, confused litigants apply for several remedies, and it is not unknown for a court to hold that the same function is controlled by both mandamus and *certiorari*, the latter usually issuing to review judicial functions only.[100] In fact, there are a few instances where the court has granted mandamus even when not requested; if the remedy sought was in their

[97] State ex rel. Campbell v. Foster, 38 Ohio St. 599 at 603 (1883). In State ex rel. Adamson v. Lafayette Co. Ct., 41 Mo. 221 at 226 (1867), the act of approving a bond was said to be "essentially a ministerial act, though coupled with a discretion." *Cf.* also Baldaccai v. Goodlet, (Tex. Civ. App. 1912) 145 S.W. 325.

[98] For example, in Griebel v. Bd. of Supervisors, 200 Iowa 143 at 149, 202 N.W. 379 (1925), a statute which provided that "it shall be the duty of the board to keep the drainage system in repair," was construed to mean "that it was not the intention of the legislature to compel the board, under all circumstances and conditions that might arise, to keep a drainage system in repair," since the court agreed with the board. See also Rich v. Bd. of Canvassers, 100 Mich. 453, 59 N.W. 181 (1894).

[99] The courts seldom put it this frankly although it is easily implied. *Cf.* Fox v. Petty, 235 Ky. 240, 30 S.W. (2d) 945 (1930). But there are statements to this effect in Vanhoose v. Yingling, 172 Ark. 1009, 291 S.W. 420 (1927); Bd. of Commrs. of Daviess Co. v. State ex rel. City of Wash., 141 Ind. 187, 40 N.E. 686 (1895); Iowa Pub. Serv. Co. v. Tourgee, 208 Iowa 36, 222 N.W. 882 (1929); State ex rel. v. Bd. of Commrs., 23 Kan. 264 (1880); Franklin v. Pursiful, 295 Ky. 222, 173 S.W. (2d) 131 (1944); State ex rel. Morris v. Sec. of State, 43 La. Ann. 590 (1891). *Cf.* Patterson, "Ministerial and Discretionary Official Acts," 20 MICH. L. REV. 848 (1922).

[100] In People ex rel. Church v. Hester, 6 Cal. 679 (1856), prohibition, mandamus, or injunction were said to be appropriate to review the legality of a tax levy. In Massachusetts, either certiorari or mandamus can be used to correct action of a city building department in granting permits, Harper v. Bd. of Appeal, 271 Mass. 482, 171 N.E. 430 (1930); or to control a city scaler of weights and measures, Money-weight Scale Co. v. McBride, 199 Mass. 503, 85 N.E. 870 (1908). *Cf.* Inglin v. Hoppin, 156 Cal. 483, 105 P. 582 (1909); Walker v. City of San Gabriel, 20 Cal. (2d) 879, 129 P. (2d) 349 (1942); Six Mile Creek Kennel Club v. Racing Comm., 119 Fla. 142, 161 S. 58 (1935); Buchsbaum & Co. v. Gordon, 389 Ill. 493, 59 N.E. (2d) 832 (1945); Howze v. Hollandsworth, 207 La. 1009, 22 S. (2d) 470 (1945); State ex rel. Walther v. Johnson, 351 Mo. 293, 173 S.W. (2d) 411 (1943); In re Whitten, 152 App. Div. 506, 137 N.Y.S. 360 (1912).

opinion improper.[101] For, regardless of the statutory terms involved, or the language of the courts, power is seldom found in an administrative body to make what a court believes to be a mistake.[102]

III

MANDAMUS TO CORRECT ADMINISTRATIVE ABUSE OF DISCRETION

In the last few decades there has grown up a new doctrine of the availability of the common law writ of mandamus. It is now said in most states that this remedy is available not only to compel the administrative performance of ministerial duties, but also to review and, if necessary, to correct administrative action when it is alleged that administrative discretion has been abused. In this latter case, the allegation of arbitrary action must usually be made clearly, else the court may deny the writ on the ground that the function is discretionary.[103]

A. *Justification for Such Use*

The courts have claimed to find this rule established in various ways.[104] In some cases it is claimed that the old English common law justifies its use to control discretion. There is small doubt, however, that Tapping, who is usually given as the authority, cannot be so

[101] Bd. of Trustees of Stanford Univ. v. State Bd. of Equal., 1 Cal. (2d) 784, 37 P. (2d) 84 (1934); Oren v. Secretary of State, 171 Mich. 590, 137 N.W. 227 (1912). Compare People ex rel. McDonald v. Bush, 40 Cal. 344 (1870); People ex rel. Oneida Valley Nat. Bank v. Bd. of Sup., 51 N.Y. 442 (1873).

[102] As exceptions, at least in language, see, Baines v. Zemansky, 176 Cal. 369, 168 P. 565 (1917); State ex rel. Szweda v. Davies, 198 Ind. 30, 152 N.E. 174 (1926); Bailey v. Ewart, 52 Iowa 111, 2 N.W. 1009 (1879); City of Louisville v. Kean, 18 B. Mon. (57 Ky.) 9 (1857); Northington v. Subtlette, 114 Ky. 72, 69 S.W. 1076 (1902); Bd. of Trustees v. McCrory, 132 Ky. 89, 116 S.W. 236 (1909); Dane v. Derby, 54 Me. 95 (1866).

[103] Prina v. Bd. of Supervisors, 16 Ariz. 252, 143 P. 567 (1914); State ex rel. Moody v. Barnes, 25 Fla. 298, 5 S. 722 (1889); People ex rel. Trader's Ins. Co. v. Van Cleave, 183 Ill. 339, 55 N.E. 698 (1899); People ex rel. Miller v. Chicago, 234 Ill. 416, 84 N.E. 1044 (1908); Bd. of Ed. v. Shepherd, 90 Kan. 628, 135 P. 605 (1913); State ex rel. Brewster v. Levitt, 96 Kan. 450, 152 P. 18 (1915); State ex rel. Boynton v. Mayor and Bd. of Commrs. of Hutchinson, 137 Kan. 231, 19 P. (2d) 714 (1933); Roe v. Wier, 181 Md. 26, 28 A. (2d) 471 (1942); McHenry v. Twp. Bd., 65 Mich. 9, 31 N.W. 602 (1887); State ex rel. Smith v. Somerset, 44 Minn. 549, 47 N.W. 163 (1890); State ex rel. Granville v. Gregory, 83 Mo. 123 (1884); Jones v. Commrs., 106 N.C. 436, 11 S.E. 514 (1890).

[104] Georgia broadened the scope of the writ to include abuses of discretion by Statute in 1903. Ga. Code Ann. (Park, 1936) § 64-102 construed in City of Atlanta v. Wright, 119 Ga. 207, 45 S.E. 994 (1903).

interpreted.[105] Florida seemingly finds an analogy between a much better established common law rule that mandamus may issue to control action of lower courts in disbarring attorneys and its use to control administrative discretion.[106] Most courts reason, when justification is thought necessary, that an abuse of discretion is equivalent to a refusal to act at all, and since mandamus extends to compel the exercise of discretion, it may extend to compel the exercise of a sound and legal discretion.[107] This of course assumes either that the exercise of a sound and legal discretion can result only in one decision in the premises; that discretion in fact does not exist; that the court can annul arbitrary administrative action without prejudicing future reconsideration;[108] or that there is no evidence to support the administrative decision.[109] Most cases where this reasoning is used result, however, in judicial decisions which finally determine the rights of the litigants on the basis of conflicting evidence.

[105] TAPPING, MANDAMUS 14 (1853). The passage usually quoted is, "It must, however, be clearly understood, that although there may be a discretionary power, yet if it be exercised with manifest injustice, the Court of B.R. is not precluded from commanding its due exercise; the jurisdiction, under such circumstances, being clearly established." But all the cases he cites merely establish the power to use mandamus to compel the entertainment of jurisdiction. As an example of this confusion, *cf.* Davis v. Co. Commrs., 63 Me. 396 (1874). In Bodinson Mfg. Co. v. Comm., 17 Cal. (2d) 321 at 329, 109 P. (2d) 935 (1941), the court admitted that: "Our late decisions have recognized that the use of *mandamus* to review acts of administrative agencies is a departure from the traditional purpose of the writ, and that many historical theories concerning *mandamus* (as, for example, the technicalities of the rule that discretion in the inferior officer will bar the issuance of the writ) will not always be applicable where the writ is used to review the acts of administrative bodies."

[106] The argument is presented in State ex rel. Wolfe v. Kirke, 12 Fla. 278 (1868); State ex rel. Rude v. Young, 30 Fla. 85, 11 S. 514 (1892); and the analogy in State ex rel. Donnely v. Teasdale, 21 Fla. 652 (1885).

[107] Evans v. Sup. Ct., 20 Cal. (2d) 186, 124 P. (2d) 820 (1942); State v. Erickson, 104 Conn. 542, 133 A. 683 (1926); Illinois State Bd. of Dent. Exam. v. People ex rel. Cooper, 123 Ill. 227, 13 N.E. 201 (1887); State ex rel. Ratner v. Jones, 114 Kan. 726, 220 P. 275 (1923); State ex rel. Griffith v. Bd. of Co. Commrs. of Linn Co., 120 Kan. 356, 243 P. 539 (1926); State ex rel. Adamson v. Lafayette Co. Ct., 41 Mo. 221 (1861); People ex rel. Otsego Co. Bank v. Bd. of Supervisors, 51 N.Y. 401 (1873); State ex rel. Mauldin v. Matthews, 81 S.C. 414, 62 S.E. 695 (1908).

[108] Olive Proration Program Committee v. Agricultural Prorate Comm., 17 Cal. (2d) 204, 109 P. (2d) 340 (1941); Walker v. City of San Gabriel, 20 Cal. (2d) 879, 129 P. (2d) 349 (1942); People ex rel. O'Kelley v. Allman, 382 Ill. 156, 46 N.E. (2d) 974 (1943). *Cf.* "Mandamus in Administrative Proceedings," 25 IOWA L. REV. 638 (1940).

[109] O'Bryan v. Sup. Ct., 18 Cal. (2d) 490, 116 P. (2d) 49 (1941); Jackson v. State ex rel. Majors, 57 Neb. 183, 77 N.W. 662 (1898); Poole v. State Bd. of Cosmetic Art Exam., 221 N.C. 199, 19 S.E. (2d) 635 (1942).

B. *Character of Review by Proceeding in Mandamus*

If the relator establishes what the courts call a *prima facie* case of abuse of discretion in the petition for mandamus, the writ will issue. This can be done in several ways. If the allegation is made that there is no evidence whatsoever to support the administrative decision, the court will hear the dispute.[110] Obviously also if the allegations are uncontroverted a sufficient case is established for judicial action.[111] But beyond this point judicial behavior cannot be reduced to rules. In some instances the courts maintain that "any" evidence, "any competent evidence" or "substantial evidence" in the record to support the administrative decision is sufficient to refute the charge of arbitrary action.[112] In some cases the answer of the defendant is sufficient without examination of the evidence, if it is uncontroverted in the petition.[113] In some cases an abuse of discretion is defined as being a decision contrary to the "weight" or the "great weight" of the evidence.[114] And in some decisions if the decision could reasonably have gone either way, the courts will not act further.[115]

[110] Webster v. Bd. of Dent. Exam., 17 Cal. (2d) 534, 110 P. (2d) 992 (1941); Ryan v. Bd. of Ed., 124 Kan. 89, 257 P. 945 (1927).

[111] Zanone v. Mound City, 103 Ill. 552 (1882); Illinois State Bd. of Dent. Exam. v. People ex rel. Cooper, 123 Ill. 227, 13 N.E. 201 (1887); Poole v. State Bd. of Cosmetic Art Exam., 221 N.C. 199, 19 S.E. (2d) 635 (1942).

[112] Inglin v. Hoppin, 156 Cal. 483, 105 P. 582 (1909); Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784 (1926); Walker v. City of San Gabriel, 20 Cal. (2d) 879, 129 P. (2d) 349 (1942); State ex rel. Felthoff v. Richards, 203 Ind. 637, 180 N.E. 596 (1932); Addison v. Loudon, 206 Iowa 1358, 222 N.W. 406 (1928); State ex rel. Boynton v. Hutchinson, 137 Kan. 231, 19 P. (2d) 714 (1933); Engle v. City Commrs., 180 Md. 82, 22 A. (2d) 922 (1941); State ex rel. Catron v. Brown, 350 Mo. 864, 171 S.W. (2d) 696 (1943); Commonwealth v. Warwick, 185 Pa. St. 623, 40 A. 93 (1898); State ex rel. Bishop v. Morehouse, 38 Utah 234, 112 P. 169 (1910).

[113] For example when an officer is removable for "cause" and it is alleged only that the cause involved is an arbitrary one, the court will not inquire into the evidence used to prove its existence, Nephew v. Comm., 298 Mich. 187, 298 N.W. 376 (1941). *Cf.* also Stark v. State Bd. of Registration, 179 Md. 276, 19 A. (2d) 716 (1941); Walter v. Bd. of Co. Commrs., 180 Md. 498, 25 A. (2d) 682 (1942); Eastern Mass. St. Ry. Co. v. Mayor, 308 Mass. 232, 31 N.E. (2d) 543 (1941).

[114] Allen v. McKinley, 18 Cal. (2d) 697, 117 P. (2d) 342 (1941); State ex rel. Felthoff v. Richards, 203 Ind. 637, 180 N.E. 596 (1932); Jackman v. Public Serv. Comm., 121 Kan. 141, 245 P. 1047 (1926); Nat. Mut. Cas. Co. v. Hobbes, 149 Kan. 625, 88 P. (2d) 1006 (1939); McHenry v. Twsp. Bd., 65 Mich. 9, 31 N.W. 602 (1887); Waier v. State Bd. of Regis., 303 Mich. 360, 6 N.W. (2d) 545 (1942); Sampson Dist. Co. v. Cherry, 346 Mo. 885, 143 S.W. (2d) 307 (1940); People ex rel. Lodes v. Dept. of Health, 189 N.Y. 187, 82 N.E. 187 (1907).

[115] McDonough v. Goodcell, 13 Cal. (2d) 741, 91 P. (2d) 1035 (1939); Peters v. Warner, 81 Iowa 335, 46 N.W. 1001 (1890); State ex rel. Conger v. Bd.

Once the allegation is made and the court has decided that the case is a proper one for its intervention, the form which its intervention will take must be determined. In a few instances the court will grant the petition of the relator apart from the substantive merits of his claims, if his allegations are sufficient and uncontradicted.[116] More often, the court will weigh all the evidence in the record and come to its independent conclusions.[117] And in at least two states it has been held that the federal and state constitutions compel a complete trial *de novo* in the courts.[118] Most cases, however, fall between these clear cut types so that there is no typical review on mandamus. Without pursuing the matter further, one is forced to conclude that amidst such confusing diversity "review by a proceeding in mandamus has many characteristics of certiorari, some characteristics of a motion for a new trial, but few if any characteristics of mandamus."[119]

C. *Reasons for Development of Such Use*

At least a part of the true reason for the development of this confusion, as distinguished from its explanation, would appear to be simply

of Freeholders, 55 N.J.L. 112 (1892); State ex rel. Baker v. Hanefield, 134 Ohio St. 540, 18 N.E. (2d) 404 (1938); Souder v. Phila., 305 Pa. St. 1, 156 A. 245 (1931).

[116] State ex rel. Roberts v. Knox, 153 Fla. 165, 14 S. (2d) 262 (1943); State ex rel. Adamson v. Lafayette Co. Ct., 41 Mo. 221 (1867). *Cf.* Seymour v. Ely, 37 Conn. 103 (1870); State ex rel. United Dist. Heating, Inc. v. State Office Bldg. Comm., 124 Ohio St. 413, 179 N.E. 138 (1931); McCrory v. Phila., 345 Pa. St. 154, 27 A. (2d) 55 (1942); and note 91, supra.

[117] Drummey v. State Bd. of Funeral Dir., 13 Cal. (2d) 75, 87 P. (2d) 848 (1939); Manor v. McCall, 5 Ga. 522 (1848); Dale v. Barnett, 105 Ga. 259, 31 S.E. 167 (1898); State ex rel. Donnelly v. Teasdale, 21 Fla. 652 (1885); Peters v. Warner, 81 Iowa 335, 46 N.W. 1001 (1890); Kansas City, K.V. & W.R. Co. v. Public Utilities Comm., 101 Kan. 557, 167 P. 1138 (1917); Jackman v. Public Serv. Comm., 121 Kan. 141, 245 P. 1047 (1926); State ex rel. Morris v. Sec. of State, 43 La. Ann. 590 (1891); State ex rel. People's State Bank v. Police Jury, 154 La. 389, 97 S. 584 (1923); Roe v. Wier, 181 Md. 26, 28 A. (2d) 471 (1942); Aspinwall v. Boston, 191 Mass. 441, 78 N.E. 103 (1906); Scudder v. Bd. of Selectmen, 309 Mass. 373, 34 N.E. (2d) 708 (1941); Waier v. State Bd. of Regis., 303 Mich. 360, 6 N.W. (2d) 545 (1942); State ex rel. McCleary v. Adcock, 206 Mo. 550, 105 S.W. 270 (1907); Barry v. State ex rel. Hampton, 57 Neb. 464, 77 N.W. 1096 (1899); State v. Freeholders, 23 N.J.L. 214 (1851); Raffel v. Pittsburgh, 340 Pa. St. 243, 16 A. (2d) 393 (1940); Sanborn v. Wier, 95 Vt. 1, 112 A. 228 (1920).

[118] Laisne v. Bd. of Optom., 19 Cal. (2d) 831, 123 P. (2d) 457 (1942); Dare v. Bd. of Med. Exam., 21 Cal. (2d) 790, 136 P. (2d) 304 (1943); Russel v. Miller, 21 Cal. (2d) 817, 136 P. (2d) 318 (1943); State ex rel. Jordan v. Pattishall, 99 Fla. 296, 126 S. 147 (1930).

[119] Traynor, J., in Dare v. Bd. of Med. Exam, 21 Cal. (2d) 790 at 803, 136 P. (2d) 304 (1943).

that in many instances the courts are confronted with what they believe to be injustices needing correction.[120] Several obstacles lie in the way of the use of other remedies. If the courts use appeal, certiorari, or prohibition, which are usually said to be available to control judicial action, they may be confronted with all the embarrassments of the separation theory, and the fact that these are difficulties largely of their own creation does not simplify the situation.[121] Since injunction is an equitable remedy and must come fairly early in the administrative process to be effective, it is not too frequently sought. Other remedies such as quo warranto are too specialized. What litigants usually seek, then, is a legal remedy of general effectiveness which will be available at various stages of the administrative process and which will present the fewest possible opportunities for raising diversionary constitutional issues. Mandamus comes closest to filling these requirements. Its sole drawback has been that its availability is sometimes limited by the ministerial-discretionary power distinction. But since, as has been seen, it is possible to eliminate discretion by enlarging the definition and number of jurisdictional questions which can be determined only in the courts, this is a problem of no real difficulty. In fact, it is merely a re-phrasing of the already determined scope of the writ to say that it will be available to correct abuses of discretion, the existence of which are always jurisdictional matters. For no court would ever admit that an administrative tribunal could be delegated a power to abuse its powers.

The foregoing is intended as an explanation rather than a justification of the present use of mandamus. For it is difficult to justify the judicial development of this remedy except on the grounds of expediency in a given situation, and this the courts have consistently refused to do. Certainly, in the case of those eight states where the courts have held the writ beyond legislative control, no reasonable justification can

[120] The courts frequently support their use of mandamus by pointing out that without it no remedy would be available. *Cf.* Tulare Water Co. v. Water Comm., 187 Cal. 533, 202 P. 874 (1922); Drummey v. State Bd. of Funeral Dir., 13 Cal. (2d) 75, 87 P. (2d) 848 (1939); Dare v. Bd. of Med. Exam., 21 Cal. (2d) 790, 136 P. (2d) 304 (1943); Bodinson Mfg. Co. v. Ind. Comm., 17 Cal. (2d) 321, 109 P. (2d) 935 (1941); State v. Erickson, 104 Conn. 542, 133 A. 683 (1926); State ex rel. Donnelly v. Teasdale, 21 Fla. 652 (1885); Valentine v. Ind. School Dist., 187 Iowa 555, 174 N.W. 334 (1919); State ex rel. Griffith v. Bd. of Co. Commrs. of Linn Co., 120 Kan. 356, 243 P. 539 (1926); State ex rel. Morris v. Sec. of State, 43 La. Ann. 590 (1891).

[121] *Cf.* McGovney, "Court Review of Administrative Decisions in California," 30 CAL. L. REV. 507 (1942).

be made for its judicial modification. The inability or unwillingness of the courts generally to apply the premises of their own creation logically and consistently leaves much to be desired; for the separation of powers theory, the doctrine of judicial review, and the distinction between ministerial and discretionary action seemingly are applied in this connection only in ways and under circumstances which contribute to judicial power without enlarging judicial responsibilities, logic to the contrary notwithstanding. From the governmental point of view, the administrative tribunal is encouraged to act hastily since it can assume that its errors will be corrected by the courts when they occur. From the public's point of view the advantages of the administrative process that lie in expertness and absence of expensive and time-consuming litigation are largely lost.

Experience in all states would seem to demonstrate that no single remedy can be used uniformly to review the decisions of all or even a large number of administrative tribunals performing the specialized and significantly different functions of modern government. The decision of the scope and kind of review to be given is one which is being made for each tribunal in any event. If some measure of logic and predictability is a virtue in the law, provision for judicial review must be made in detail in the statutes establishing individual agencies. It should be made there since this is a question of public policy rightfully belonging to the legislative branch of government. The demonstrated unwillingness of legislatures to face the problem cannot change the nature of the function.