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The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More Mile Market down the Road of No Return.

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ARTICLES

THE EVOLVING STANDARD FOR GRANTING MANDAMUS RELIEF IN THE TEXAS SUPREME COURT: ONE MORE "MILE MARKER DOWN THE ROAD OF NO RETURN"*

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> It [writ of mandamus] was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. . . . If there be a right, and no other specific remedy, this [writ of mandamus] should not be denied.[1]

I. INTRODUCTION

The Texas Supreme Court has, until recently, consistently stated as a fundamental principle that a writ of mandamus will not issue[2]

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* *In re* Ford Motor Co., 988 S.W.2d 714, 727 (Tex. 1998) (orig. proceeding) (Baker, J., dissenting). Justice Baker used the phrase "road of no return" in four separate dissenting opinions in cases involving the granting of mandamus relief. *See In re* Allstate County Mut. Ins. Co., 85 S.W.3d 193, 200 (Tex. 2002) (orig. proceeding) (Baker, J., dissenting) ("Because the Court continues to lead us down this Road of No Return, I dissent."); *In re Ford Motor Co.*, 988 S.W.2d at 727 (Baker, J., dissenting) ("[T]his decision represents yet another mile marker down the road of no return."); *In re* EPIC Holdings, Inc., 985 S.W.2d 41, 61 (Tex. 1998) (orig. proceeding) (Baker, J., dissenting) ("This decision is yet another mile marker down the road of no return where the Court ignores its own rules and precedent."); CSR Ltd. v. Link, 925 S.W.2d 591, 604 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting) ("[T]oday's decision can only lead the Court down a road of no return."). Justice Baker created the stark visual image of a court replacing the doctrine of stare decisis with ad hoc decision making whenever it was dissatisfied with the decision of a trial court and desired to confer immediate relief. *CSR Ltd.*, 925 S.W.2d at 603–04. Once the court cavalierly began the practice of refusing to follow precedent, Justice Baker apparently was convinced that there would be no easy return to traditional mandamus jurisprudence. *See id.* at 603 (pointing out that an issue's resolution can never be deemed resolved if the court does not adhere to precedent). It is the premise of this article that he was right.

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1. Rex v. Barker, 97 Eng. Rep. 823, 824–25 (K.B. 1762).

2. *E.g.*, Walker v. Packer, 827 S.W.2d 833, 840 & n.8 (Tex. 1992) (orig. proceeding) (citing cases back to 1890). The court adopted the practice over fifty years ago of "conditionally granting" petitions for mandamus rather than granting the writ, for the simple reason that the court assumed that the lower court judges or public officials would comply voluntarily with the court's opinion without the necessity of issuing the writ itself. Of course, the writ would issue if the court or official refused to do as directed by the supreme court. *See, e.g.*, Womack v. Berry, 291 S.W.2d 677, 684 (Tex. 1956) (orig. proceeding) (assuming the lower court would "enter proper orders in accordance with this opinion," otherwise the writ would issue). Apparently the practice began because of the requirement of then-Rule 475 which was adopted as a new rule effective September 1, 1941. TEX. R. CIV. P. 475 (Vernon 1942, repealed 1955). That rule outlined the procedure

in cases where the party seeking the writ has another adequate remedy.[3] Notwithstanding this general principle, the court has

involving an original petition of mandamus to compel a court of civil appeals "to certify a question on the ground of conflict," and stated that "[i]f the petition be granted the mandamus will then issue unless the Court of Civil Appeals conform its ruling and decision to those of the Supreme Court." *Id.* Although the rule concerning other original proceedings, including mandamus in other situations, did not contain this language, by the middle of the 1950s the court began to grant mandamus conditionally in all cases. *See, e.g.*, *Womack*, 291 S.W.2d at 684 (granting petition conditionally); King v. Payne, 156 Tex. 105, 114, 292 S.W.2d 331, 337 (1956) (orig. proceeding) ("Under our established practice, the writ itself will be withheld pending compliance with our holding by the Clerk and Justices of the Court of Civil Appeals, which will undoubtedly follow."). Since the rule change effective on September 1, 1997, a party seeking a writ of mandamus is no longer required to file a motion for leave along with his petition for writ of mandamus, but instead only needs to file an original petition for writ of mandamus. TEX. R. APP. P. 52.1; TEX. R. APP. P. 121, 60 TEX. B.J. 876, 930 cmt. (Tex. 1986, repealed 1997).

3. *See* Bradley v. McCrabb, Dallam 504, 506 (Tex. 1843) (holding that the inadequacy of a legal remedy as a requirement for the issuance of mandamus was part of the common law that Texas had embraced). The supreme court has continued to express this fundamental tenet of mandamus jurisprudence since the time of the Republic. *See, e.g.*, *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) (stating that one of the two requirements for relief by mandamus is that a party "has no adequate remedy by appeal"); *Walker*, 827 S.W.2d at 840 (noting that mandamus will not issue in cases where there is an adequate remedy at law, such as an appeal); Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding) (noting that the requirement of establishing a lack of an adequate appellate remedy is a "fundamental tenet" of mandamus); Aycock v. Clark, 94 Tex. 375, 376–77, 60 S.W. 665, 666 (1901) (orig. proceeding) ("[I]t is elementary law that a mandamus is never awarded where the law has provided another plain, adequate, and complete remedy."); Arberry v. Beavers, 6 Tex. 457, 464 (1851) (orig. proceeding) (stating that mandamus is available when the "law affords no other adequate means of redress"). In Texas, writs of mandamus were traditionally issued to compel a government official to perform some duty that was considered purely ministerial; that is, "when the duty to do the act commanded [was] clear and definite and involve[d] the exercise of no discretion." Turner v. Pruitt, 161 Tex. 532, 534, 342 S.W.2d 422, 423 (1961) (orig. proceeding); Lloyd v. Brinck, 35 Tex. 1, 10 (1871) (orig. proceeding) (stating that the writ of mandamus will issue to compel an inferior court to perform a duty that is "simply ministerial and involves no judicial discretion"). Although mandamus is still available to command the performance of ministerial duties, the authority of the court to issue mandamus has been enlarged to include the power to correct a trial court's clear abuse of discretion, in proper cases. *Walker*, 827 S.W.2d at 839 (noting that the writ has been used to remedy a trial court's clear abuse of discretion since the 1950s); *Womack*, 291 S.W.2d at 682 (stating that "the writ may issue in a proper case to correct a clear abuse of discretion"). The ultimate legal basis for the issuance of writs of mandamus is found in the Texas Constitution. The Texas Constitution provides that the supreme court "may issue writs of mandamus . . . as may be necessary to enforce its jurisdiction" and authorizes the legislature to "confer original jurisdiction on the Supreme Court to issue writs . . . in such cases as may be specified." TEX. CONST. art. V, § 3(a). The legislature has responded and conferred original jurisdiction on the supreme court to issue writs of mandamus against judges and justices of the State of Texas as well as against all governmental officials, with a few exceptions, "agreeable to the principles of law."

recognized over its history that in certain cases of extraordinary circumstances the remedy by appeal will be deemed inadequate.[4] Furthermore, from time to time the court, although mentioning the principle, has taken a more lenient approach to its application and granted mandamus relief in spite of the availability of other legal remedies.[5] In addition, in other cases the court has wholly failed to mention this basic principle.[6] But in 1992, in *Walker v. Packer*,[7] the court made a Herculean effort to place mandamus jurisprudence in Texas on a clear and predictable[8] course consistent with its historical roots.[9] In *Walker*, the Texas Supreme

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TEX. GOV'T CODE ANN. § 22.002(a) (Vernon 2004). The sole focus of this article is mandamus proceedings in the Texas Supreme Court that are directed toward an inferior court or judge.

4. *See, e.g.*, Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (holding that in child support mandatory venue issues, justice demands a quicker resolution than can be had by appeal).

5. *See, e.g.*, Cleveland v. Ward, 116 Tex. 1, 14, 285 S.W. 1063, 1068 (1926) (orig. proceeding), *overruled by* Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (articulating a more lenient standard where mandamus relief would be available if the available remedy was not as "convenient, beneficial, and effective as mandamus"). As a matter of common law history, the inadequate remedy that must exist before relief to mandamus can be had was a legal remedy, not an equitable one. *See, e.g.*, Yett v. Cook, 115 Tex. 175, 184, 268 S.W. 715, 718–19 (1925) (orig. proceeding) (stating that the writ of mandamus under Texas law is "to be construed in light of the common law"); Tex. Mexican Ry. Co. v. Locke, 63 Tex. 623, 628 (1885) (orig. proceeding) (noting that under English law, mandamus issued only when there was no other adequate *legal* remedy); *see also* JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES § 15 (Chi., Callaghan & Co. 1874) ("[F]rom the very nature and essence of the remedy . . . the writ never lies where the party aggrieved has another adequate remedy at law."). However, even though mandamus is a legal remedy, "its issuance is largely controlled by equitable principles." Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding) (denying mandamus relief to one who was not diligent in exercising his legal rights); *see also* Westerman v. Mims, 111 Tex. 29, 39, 227 S.W. 178, 181–82 (1921) (orig. proceeding) (remarking that the one seeking mandamus relief must come before the court with "clean hands").

6. *See, e.g.*, Barker v. Dunham, 551 S.W.2d 41, 42, 46 (Tex. 1977) (orig. proceeding) (granting conditionally a writ of mandamus in a discovery context without discussing the requirement of inadequate remedy).

7. Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

8. *Id.* at 842 (disapproving prior cases where the court relaxed the requirement of a legal remedy's inadequacy, and other authorities that implied that a remedy would be inadequate merely because it might involve more delay or cost than mandamus); *see also In re* Ford Motor Co., 988 S.W.2d 714, 723 (Tex. 1998) (orig. proceeding) (Enoch, J., concurring in part and dissenting in part) ("*Walker* was our laudable effort to set mandamus proceedings in Texas on a predictable course."); Charles W. "Rocky" Rhodes, *Demystifying the Extraordinary Writ: Substantive and Procedural Requirements for the Issuance of Mandamus*, 29 ST. MARY'S L.J. 525, 526 (1998) (stating that, in *Walker*, the court attempted to harmonize mandamus jurisprudence).

9. *Walker*, 827 S.W.2d at 840 n.8 (citing over twenty cases from 1890–1991 in support

Court asserted that one of the two fundamental, historical, and traditional tenets necessary for the issuance of a writ of mandamus was the lack of an adequate remedy.[10] Notwithstanding *Walker's* unequivocal pronouncement,[11] the court began a twelve year venture of slowly chipping away at the firm foundation that was mandamus jurisprudence in Texas. By conditionally granting mandamus in case after case where the trial court's incidental rulings were clearly erroneous, and in spite of a clear remedy by appeal, the court simply chose to provide a "quick fix."[12] However, on September 3, 2004, the Texas Supreme Court, deciding *In re Prudential Insurance Co. of America*,[13] abandoned

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of the well-settled requirement that mandamus will not issue where there is an adequate remedy by appeal).

10. *Id.* at 842 (asserting that "[t]he requirement that mandamus issue only where there is no adequate remedy by appeal is sound" and a "fundamental tenet" of mandamus law); *see also* Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding) (characterizing the requirement of an inadequate remedy by appeal as "a fundamental tenet of writ practice"). Several opinions of the Texas Supreme Court prior to *In re Prudential Insurance Co. of America*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding), cited *Walker* for this very proposition. *In re* AIU Ins. Co., 148 S.W.3d 109, 116 (Tex. 2004) (orig. proceeding); *In re* State Bar of Tex., 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding); *In re* Allstate County Mut. Ins. Co., 85 S.W.3d 193, 197 (Tex. 2002) (orig. proceeding). Since the *Prudential* decision on September 3, 2004, the supreme court has not again referred to this requirement as a fundamental tenet of mandamus law.

11. *See Walker*, 827 S.W.2d at 842 ("The requirement that mandamus issue only where there is no adequate remedy by appeal is sound.").

12. Travelers Indem. Co. of Conn. v. Mayfield, 923 S.W.2d 590, 595 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting); *see also In re AIU Ins. Co.*, 148 S.W.3d at 124 (Phillips, C.J., dissenting) ("The writ of mandamus should not be an alternative to appeal, available whenever an appellate court decides that trial court errors demanded swift correction."); *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d at 198–99 (Baker, J., dissenting) (asserting that the court ignores the requirement that a relator establish an inadequate remedy to obtain mandamus relief); *In re* Masonite Corp., 997 S.W.2d 194, 201 (Tex. 1999) (orig. proceeding) (Baker, J., dissenting) (pointing out that granting of mandamus relief when an appeal is an available remedy provides no "guidance on this issue for future cases"); *In re Ford Motor Co.*, 988 S.W.2d at 723 (Enoch, J., dissenting) (lamenting that *Walker*'s teachings are in doubt); *In re* D.A.S., 973 S.W.2d 296, 300 (Tex. 1998) (orig. proceeding) (Baker, J., dissenting) (arguing that the court is only giving "lip service [to] the lack of an adequate appellate remedy"); Elaine A. Carlson & Karlene S. Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. TEX. L. REV. 953, 1029 (2000) (noting that the application of the *Walker* test has not always been straightforward or consistent). *But see* Charles W. "Rocky" Rhodes, *Demystifying the Extraordinary Writ: Substantive and Procedural Requirements for the Issuance of Mandamus*, 29 ST. MARY'S L.J. 525, 527–28 (1998) (asserting that "much of the . . . court's post-*Walker* [mandamus] case law can be harmonized").

13. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

any pretext of paying lip service to *Walker* and attempted to replace this fundamental tenet of mandamus jurisprudence with a new, ad hoc balancing test.[14] In *Prudential*, the court stated that the word "adequate" had no comprehensive definition, but was "simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts."[15] The court then pronounced that an appellate remedy was "adequate" if the detriments to mandamus review outweighed the benefits; however, if the detriments to such review were outweighed by the benefits, the "courts must consider whether the appellate remedy is adequate."[16] Although the court did not apply this balancing test to the case at hand,[17] this new test could portend a radical shift in mandamus jurisprudence in Texas, as well as expand the jurisdictional reach of the Texas Supreme Court over trial court interlocutory orders.

This Article will examine whether these possible ramifications of the *Prudential* case are in the best interest of Texas mandamus jurisprudence. Part II will briefly review the historical development of the remedy of mandamus from its inception and

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14. *Id.* at 135–36. The dissenting opinion by Chief Justice Phillips chastised the majority opinion for retreating from the tenets of mandamus jurisprudence and establishing a new balancing test. *Id.* at 141–43 (Phillips, C.J., dissenting).

15. *Id.* at 136 (majority opinion). The court noted that these jurisprudential considerations included both public and private concerns. In trying to give insight into what these considerations might be, the court drew a distinction between incidental and significant rulings in exceptional cases. In the case of incidental interlocutory trial court rulings the court noted that mandamus relief interfered with the proceedings, tied up appellate courts, and increased costs and delays at the trial court level. However,

> mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.

Id.

16. *In re Prudential*, 148 S.W.3d at 136. The court was quick to note that this balancing test was "practical and prudential," not "abstract or formulaic," noting that flexibility was the principal virtue of the writ of mandamus. *Id.*

17. *Id.* at 138–39 (holding that there was no remedy for the trial court's refusal to apply the contractual jury waiver). The court's opinion never addressed the question of the remedy's adequacy, for in the mind of the majority there was simply no remedy by way of appeal. *Id.* at 138. The dissent strongly disagreed. *Id.* at 141 (Phillips, C.J., dissenting) (arguing that an appeal could correct the trial court's error).

refinement in English common law, to its use and application by the United States Supreme Court prior to the inception of the Republic of Texas. This part of the article will focus primarily on uncovering and unpacking the historical, philosophical, and legal justifications for the requirement of an inadequate remedy at law as a prerequisite for the issuance of a writ of mandamus.[18] Part III will trace the development of mandamus jurisprudence at the Texas Supreme Court from the time of the Republic until the controversial *Prudential* decision. This section will focus primarily upon the development of a more lenient standard for the application of the fundamental principle, culminating in the *Walker* decision, and will analyze and evaluate the historical, philosophical, and legal justifications for the expansion and subsequent limitations on mandamus relief. Part IV will examine and analyze the *Prudential* decision in light of then-existing Texas mandamus jurisprudence and discuss the practical impact of the *Prudential* decision upon mandamus jurisprudence in Texas. The impact of the case upon the authority of the court to undertake supervision of trial courts' interlocutory rulings will be discussed as well. Part V will suggest that the court reject the *Prudential* balancing test as an improper expansion of the court's mandamus authority, and that mandamus relief should return to its historical role—one of extraordinary relief in extraordinary circumstances[19]—and not the quick-fix remedy available in the ordinary case to avoid availing oneself of existing, more time consuming, and costly conventional remedies.[20]

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18. This reflects the classical legal approach as noted by Mr. Justice Holmes: "The history of what the law has been is necessary to the knowledge of what the law is." OLIVER W. HOLMES, JR., THE COMMON LAW 37 (1881).

19. *See, e.g.*, Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (explaining that because of the extraordinary nature of mandamus relief its issuance is limited to those "situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies" (quoting Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding))).

20. The court had consistently held that economics and time delays should generally play no role in the determination of whether mandamus relief should be granted. *See, e.g.*, *Walker*, 827 S.W.2d at 842 (disapproving prior supreme court decisions "to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus"); Iley v. Hughes, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958) (orig. proceeding) (observing that delay through the appellate process is not enough to justify mandamus relief). *But see In re Prudential*, 148 S.W.3d at 136–37 ("*Walker* [did] not require [the court] to turn a blind eye . . . . [to an] irreversible waste of judicial and public resources." (quoting *In re* Masonite Corp., 997 S.W.2d 194, 198 (Tex.

II. HISTORICAL ROOTS OF THE WRIT OF MANDAMUS

A. *English Common Law*

Long before any Texas court contemplated the remedy of mandamus, English common law courts had developed a significant body of law on the subject.[21] Most academics[22] trace the birth of mandamus to the year 1615 in the opinion by Lord Coke, Chief Justice of King's Bench,[23] in *Bagg's Case*.[24] That

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1999) (orig. proceeding))).

21. For two detailed treatises on the law of mandamus in England, see generally THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS (London, Wm. Benning & Co. 1848), and JOHN SHORTT, INFORMATIONS, MANDAMUS AND PROHIBITION (Phila., Blackstone Publ'g Co. 1888). Both works give not only a brief history of the writ as developed in England, but also examples of when and how the writ had been used in England. One commentator labeled Tapping's work an "exhaustive and unreadable treatise on the writ," noting that it contained 252 pages of "analysis of all [English and Irish] cases, arranged alphabetically according to subject matter." STANLEY A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 539 (J.M. Evans ed., 4th ed. 1980).

22. *See* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 72 (1963) (asserting that the origins of modern mandamus came from Lord Coke's expansive declaration in *Bagg's Case*); STANLEY A. DE SMITH, *The Prerogative Writs: Historical Origins*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS app. 1, at 591 (J.M. Evans ed., 4th ed. 1980) (declaring that the modern writ of mandamus had its beginnings in 1615 with *Bagg's Case*); *see also* Louis L. Jaffee & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q.R. 345, 359 (1956) (U.K.) (asserting that Lord Coke stated in *Bagg's Case* a notion of supervision of errors judicial and extra-judicial); Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 530 (1923) (regarding *Bagg's Case* "as the well-head of *Mandamus*"). However, Thomas Tapping postulates that mandamus had its initial origins in the Magna Charta and that *Bagg's Case* was merely "the first writ, in its judicial form, which had reference to municipal corporations." THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 2 (London, Wm. Benning & Co. 1848).

23. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES *41 (relating that the court of King's Bench got its name from the fact that the King himself used to sit in person). However, by the close of the medieval period the King ceased to be personally present and had entrusted his judicial power to his judges. *Id.* By the time Lord Coke was Chief Justice of the King's Bench in the seventeen century, the jurisdiction of the court was extensive. *See generally* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 212–31 (7th ed., rev. 1956) (concluding that the judges of King's Bench had general jurisdiction throughout England); WILLIAM BLACKSTONE, 3 COMMENTARIES *41–43 (calling the court of King's Bench "the supreme court of common law"). Blackstone described the King's Bench as both a court of original jurisdiction in many cases but "likewise a court of appeal, into which may be removed by writ of error all determinations of the court of common pleas, and of all inferior courts of record in England." *Id.* at 42–43. He noted

case involved one of twelve chief burgesses, or magistrates, of the borough of Plymouth, who alleged that he had been wrongly removed from his office by the mayor and the commonalty of Plymouth (i.e., his fellow burgesses). Bagg sued out a writ of restitution[25] in the court of King's Bench, and the court entered a rule requiring the mayor and the commonalty to show cause for Bagg's removal.[26] In effect, Bagg questioned whether the action

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that the King's Bench was the supreme common law court with the power to "command[] magistrates and others to do what their duty requires, in every case where there is no other specific remedy." *Id.* at 42. Finally, Blackstone noted that it was the business of King's Bench to supervise the inferior courts "not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice." *Id.* at 110–11.

24. Bagg's Case, 77 Eng. Rep. 1271 (K.B. 1615).

25. *Id.* Prior to *Bagg's Case* there had been some earlier proceedings in which the writ of restitution had been used as a remedial action to restore property or office that had been lost as a result of erroneous judicial or official action. *See, e.g.*, Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 487–88 (1963) (believing the importance of these earlier decisions was to establish the authority of the King's Bench to review and reverse alleged improper actions of extra-judicial officials). For some time after *Bagg's Case*, this new writ was often referred to as a writ of restitution for the simple reason that it was issued to compel restitution to offices. *See* STANLEY A. DE SMITH, *The Prerogative Writs: Historical Origins*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS app. 1, at 592 & n.96 (J.M. Evans ed., 4th ed. 1980) (citing a number of seventeenth century cases which referred to this new writ as a writ of restitution). Shortly after *Bagg's Case* the court used this "new writ" for purposes other than merely restoring one to office, and with this expanded use emerged "[a] more comprehensive theory of mandamus." *See* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 80–82 (1963) (tracing the development of mandamus jurisprudence beyond the simple restoration to office following *Bagg's Case*); Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 487–88 (1963) (noting how Lord Coke was able to transform such meager precedents into "powerful pronouncements").

26. Bagg's Case, 77 Eng. Rep. 1271, 1272 (K.B. 1615). The general procedure for obtaining the writ of mandamus in England began with filing an application for a rule for a writ of mandamus. *See* JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES §§ 500–02, 529–33 (Chi., Callaghan & Co. 1874) (distinguishing between the alternative writ of mandamus and the peremptory or absolute writ of mandamus). The application, generally supported by an affidavit, would outline the right of the party to the relief sought, mentioning the duty that had been neglected or omitted by the defendant and praying that the defendant show cause why the writ should not be issued absolute. *Id.* The court then would issue a rule to show cause directed to the judge or official, ordering that he perform the official duty or act demanded (sometimes referred to as the alternative writ), or show cause why mandamus should not issue. *Id.* After notice, the defendant was required to file a verified return or answer. Failure to file a return could lead to contempt proceedings. *Id.* If the answer was deemed insufficient by the court, in that it legally failed to justify the actions of the defendant, the peremptory mandamus would issue compelling absolute performance of the duty. *Id.* If the return showed a sufficient cause, even if false, there were no further proceedings on the mandamus,

of the municipal corporation, professing to act under a Crown charter, was lawful. The return of the writ told of a vicious campaign by Bagg to impair the authority of the various lord mayors of Plymouth, using a dedicated plan of outright contempt and vilification.[27] Lord Coke judged their response insufficient as it gave no legal basis to justify Bagg's removal,[28] and thus, the court issued a writ of restitution to restore him to office.[29] Although there was limited precedent for Lord Coke's actions in restoring Bagg to office,[30] there was no authority for his sweeping

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although the applicant would have a cause of action for false answer. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES *111 (outlining briefly the procedures for obtaining a writ of mandamus); *see generally* THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 282–339 (London, Wm. Benning & Co. 1848) (detailing the procedures for issuance of the writ of mandamus by King's Bench).

27. *Bagg's Case*, 77 Eng. Rep. at 1273–77.

28. *Id.* at 1277, 1281. The return, or answer, to the alternative writ of restitution in this case was in the form of a lengthy affidavit containing a recitation of facts that responded to the writ's demand that the respondents show cause for Bagg's disenfranchisement. *Id.* at 1272–77. The problem, according to Lord Coke, was that the answer did not allege any acts committed by Bagg that would provide a legal reason to remove him from office, although there might have been a basis for punishment for contempt. *Id.* at 1281. It should be pointed out that, at common law, the judges were bound by the sworn facts as set out in the return in the case of the prerogative writs of habeas corpus and mandamus. *See* Opinion on the Writ of Habeas Corpus, 97 Eng. Rep. 29, 42–44 (H.L. 1758) (stating the rule for both mandamus and habeas corpus that the facts recited in the return are taken as true, subject to an action for damages in a subsequent action); *Bagg's Case*, 77 Eng. Rep. at 1280 (observing that if the facts recited in the return were sufficient to justify the action to disenfranchise Bagg, the peremptory writ would not issue, even if such factual recital were false); *see also* THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 6–7 (London, Wm. Benning & Co. 1848) (noting the refusal of the judges of King's Bench to inquire into the factual assertions of the return). In the case of mandamus, this problem was cured by a statute that permitted the applicant to controvert the return in the summary mandamus proceeding itself. *See* 9 Ann., c. 20, § 4 (1710) (noting in the introduction of the statute that it was "[a]n Act for rendering the Proceedings upon Writs of Mandamus, and Informations in the nature of a Quo Warranto, more speedy and effectual; and for the more easy trying and determining the Rights of Offices and Franchises in Corporations and Boroughs").

29. *Bagg's Case*, 77 Eng. Rep. at 1277 (stating that "a writ was directed to the mayor and commonalty to restore him").

30. *See, e.g.*, EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 72 (1963) (asserting that the case was "singularly unsupported by authority" other than Lord Coke's vague reference to the Magna Charta's provision that "No free man shall be disseised . . . of his liberties or customs . . . unless by the judgment of his peers or the law"); Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q.R. 345, 359 (1956) (U.K.) (observing that, prior to *Bagg's Case*, King's Bench had been restoring individuals to municipal offices when they had been unjustly removed, "but the origin of this rather surprising activity is not at all clear");

Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 529 & n.31, 530 (1923) (noting that earlier uses of mandamus had not involved the ordering of a public official "to perform a public duty" on the application of an aggrieved individual). Shortly after *Bagg's Case* this "new writ" was used for purposes beyond that of merely restoring one to office; thus began the development of "[a] more comprehensive theory of mandamus." *See* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 80–82 (tracing the development of mandamus jurisprudence beyond the simple restoration to office following *Bagg's Case*); Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F 478, 487–88 (1963) (lauding Lord Coke for transforming such meager precedents into "powerful pronouncements"). Mandamus, along with prohibition, quo warranto, habeas corpus, and certiorari, were usually lumped together under the classification of prerogative writs. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 226–30 (7th ed., rev. 1956). A prerogative writ was a form of command that came in the name of the Crown and was originally one which issued only at the request of the King himself. *See* JOHN SHORTT, INFORMATIONS, MANDAMUS AND PROHIBITION 243–44 (Phila., Blackstone Publ'g Co. 1888) (stating that a prerogative writ was "a writ issuing, not as ordinary writs, or strict right, but at the discretion of the Sovereign acting through that Court, in which the Sovereign is supposed to be personally present"); *see also* STANLEY A. DE SMITH, *The Prerogative Writs: Historical Origins*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 593–95 (J.M. Evans ed., 4th ed. 1980) (portraying the roles of Lord Mansfield and Blackstone in making the use of the term prerogative writs commonplace in reference to mandamus, habeas corpus, certiorari, and prohibition). Stanley de Smith points out that the first time these extraordinary writs were designated together as prerogative writs was by Lord Mansfield in *Rex v. Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759). STANLEY A. DE SMITH, *The Prerogative Writs: Historical Origins*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 594 (J.M. Evans ed., 4th ed. 1980). The common characteristics of these prerogative writs during Lord Mansfield's tenure on King's Bench have been summarized as follows:

> First, the writs were closely associated with the exercise of royal authority and with King's Bench, having long been used by the Crown in the administration of the state. Second, prerogative writs were issued by the court, after reviewing the sufficiency of the petition and supporting affidavits; in contrast to such "extraordinary" writs, most common law writs issued as a matter of course without any required showing of cause. Third, the prerogative writs were seen as the "suppletory means of substantial justice"—the remedial mode to which the subject turned whenever remedies at law were unavailable. Fourth, the writs sought an adjudication by way of summary proceedings; the writs were enforceable through contempt sanctions and were not subject to appeal.

James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 919–20 (1997) (citations omitted). Lord Coke would have never asserted that this new writ he was developing was a prerogative writ.

> But for Coke to have designated them [prerogative writs] would have been wholly inconsistent with his views upon the relationship between the royal prerogative and the common law; for had not the King "committed . . . his whole power of judicature to several courts of justice," and was not the greatest of these the Court of King's Bench? These writs, then, were writs that issued pre-eminently out of the King's Bench; they were not the King's prerogative writs.

assertion of jurisdiction by the court of King's Bench in the following obiter dicta[31] to the case:

> And in this case, first, it was resolved, that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due

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STANLEY A. DE SMITH, *The Prerogative Writs: Historical Origins*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 592–93 (J.M. Evans ed., 4th ed. 1980); *see also* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 70–71 (1963) (arguing that Lord Coke took the position that "the King had delegated all of his judicial power to the courts"); *see generally* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1529 n.53 (2001) (observing that common law mandamus developed from "a simple directive from the king to an inferior officer, and only later evolved into a freestanding proceeding to secure relief" where there were no adequate remedies); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 917–20 (1997) (discussing the development of the prerogative writs and the expansion of King's Bench jurisdiction in England).

31. Leading jurists of the common law were well known for inserting significant legal propositions into their opinions that were not necessary and sometimes not even relevant to the issues in the case before them. Sometimes this obiter dictum became so engrained in the law that it was regarded as part of the legal principles of the common law itself. The dicta in *Bagg's Case* influenced the common law for centuries. *See, e.g.*, STANLEY A. DE SMITH, *The Prerogative Writs: Historical Origins*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 595 (J.M. Evans ed., 4th ed. 1980) (stating that the writ of mandamus historically became the "remedy of last resort for the subject"). Another example is Lord Coke's dictum in *Dr. Bonham's Case*:

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610) (citations omitted). Lord Coke was attempting to place in the hands of the King's Bench the ultimate authority for determining the validity of any law passed by Parliament. Although this doctrine was rejected in England and replaced with parliamentary supremacy, William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 468–69 (2005), it has been argued to be the basis of judicial review assessing the constitutionality of statutes passed by legislative bodies. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 505 (2006) (stating that in the traditional accounts "judicial review is legitimized by English constitutional and common law, often *Dr. Bonham's Case* in particular"). *But see* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 468–69 (2005) (arguing that pre-revolutionary precedents do not really explain the development of the principles of judicial review in America).

course of law.[32]

From this humble beginning—of restoring to municipal office an individual who had been unjustly removed—the writ of mandamus sprang forth and was given life.[33]

Over the next 150 years, the writ's use was expanded beyond merely restoring one to public office and was used to compel

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32. *Bagg's Case*, 77 Eng. Rep. at 1277–78 (citations omitted). In his classic work, Lord Coke modified the last clause to read: "[B]ut that this shall be reformed or punished in one court or other by due course of law." 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 71 (London, E. & R. Brooke 1797) (1644). Apparently Lord Coke, as Chief Justice of the King's Bench, was asserting the right of King's Bench to exercise the prerogative of the King and correct errors made by local administrative officials that adversely impacted ordinary citizens. *See* Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 530 (1923) ("[T]he unpopular Chief Justice simply takes the King's prerogative into his own hand, and uses it against a recalcitrant body professing to act under a Crown charter."). Louis Jaffe and Edith Henderson commented on the broad and sweeping language of Lord Coke:

> From this meagre beginning Coke conceived the notion of a sweeping jurisdiction over all errors judicial and extra-judicial . . . .
>
> . . . .
>
> This asserted jurisdiction bears, perhaps, some resemblance to the jurisdiction of the Council and the prerogative courts. Coke's opinion in *Bagg's Case* may have been part of his war on the prerogative . . . and to this end he may have been staking a claim by the common law courts to the jurisdiction of the Star Chamber or even of the Council itself.

Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q.R. 345, 359–60 (1956) (U.K.). The expansion of the jurisdiction of the court of King's Bench was in direct opposition to the absolutist position of King James I; perhaps as a result of his opposition to the King, Lord Coke, a firm believer in the supremacy of the common law, was shortly deposed of his office as Chief Justice of King's Bench. *See, e.g.*, EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 69–70 (1963) (asserting that in some way *Bagg's Case* contributed to Lord Coke's downfall); 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 459–65 (7th ed., rev. 1956) (tracing the conflict between Lord Coke, who was trying to assert independence for the common law courts, and Jacobean absolutism); Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus,* 9 N.Y.L.F. 478, 489 (1963) (stating that Lord Coke's assertion of power was in direct conflict with the Star Chamber, which had been operating in this jurisdictional area at the wishes of King James). Lord Coke firmly believed that the King's Bench not only was a court to hear the pleas of the Crown and to correct errors of other courts, but its jurisdiction was plenary and extended to correct any other manner of misgovernment. 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 71 (London, E. & R. Brooke 1797) (1644).

33. One hundred and fifty years later, Lord Mansfield, then Chief Justice of King's Bench, noted that *Bagg's Case* was "the first instance of a mandamus in the case of a corporator." The King v. Barker, 96 Eng. Rep. 196, 196 (K.B. 1761). Louis Jaffe has boldly asserted that "Lord Coke . . . appears to have invented mandamus, if not out of whole cloth then at least out of a few rags and tatters." Louis Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269 (1961).

performance of a wide array of public or quasi-public duties which had been wrongly refused.[34] During this developmental period, two Chief Justices of the King's Bench played significant roles in the expansion of the uses for the writ, thus propelling King's Bench into Lord Coke's image of having a general supervisory role over all lower courts and administrative officials.[35] Although

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34. *See generally* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 127–42 (1963); STANLEY A. DE SMITH, *The Prerogative Writs: Historical Origins*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 592 (J.M. Evans ed., 4th ed. 1980); THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 29–281 (London, Wm. Benning & Co. 1848) (listing all cases involving the writ of mandamus in England and Ireland from *Bagg's Case* to 1848). In 1646, the new writ was given the name mandamus for the first time in *Luskins v. Carver*, 82 Eng. Rep. 488, 488 (K.B. 1682). EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 129 (1963). Louis Jaffe and Edith Henderson wrote that for the first fifty years following Lord Coke's sweeping language, the writ was used primarily to restore individuals to office. But then they observed:

> Very gradually the new remedy was extended to other fact situations; it issued in 1649 to the prerogative courts, requiring them to grant administration of a descendant's estate according to statute; in 1661 to a town officer who had been removed, commanding him to deliver the records of his office to his successor; in 1672 to the Mayor's Court of London, requiring it to give judgment for the relator when a verdict had gone in his favour; in 1699 to certain justices of the peace, to require them to make a rate for the poor.

Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q.R. 345, 360 (1956) (U.K.) (citations omitted).

35. This development coincided with the demise of conciliar jurisdiction during the seventeenth century in England. The Tudors and the Stuarts had maintained administrative control over local authorities through their various councils, especially the Star Chamber which had become a court of substantial power and jurisdiction. The so-called Glorious Revolution of 1688 and the Act of Settlement, filed in 1700 and passed in 1701, in large part abolished this conciliar jurisdiction, leaving King's Bench and its developing prerogative jurisdiction as the only surviving method of centralized control over local government administration. *See* 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 492–516 (5th ed. 1942) (tracing conciliar jurisdiction during the Tudor and Stuart periods). In discussing the development of mandamus as a general supervisory writ under the leadership of Lord Holt and Lord Mansfield during this troubled period in English history, Harold Weintraub has the following insightful observation:

> This judicial leadership came about quite naturally through the collapse of the Stuarts, the impetus to judicial independence gained from the Act of Settlement of 1700, and the absence, from the onset of the struggle with the Stuarts, of a central, supervisory authority over local activities. The revitalized role of the writ of mandamus . . . is therefore the offspring of accidents of English constitutional history. As Holdsworth points out, the system we inherited from England could easily have come under full executive control, if Stuarts had prevailed, rather than under judicial surveillance.

Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and*

Lord Coke had pronounced the lofty concepts governing the issuance of the writ by King's Bench, he left it to his successors to articulate clearly the fundamental principles of mandamus jurisprudence and make it a coherent body of common law.[36] In *Knipe v. Edwin*,[37] King's Bench, under the leadership of Chief Justice Holt,[38] granted a writ of mandamus to place a person in a public office despite the fact that an action on the case would have fully compensated the individual in damages.[39] In that case,

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Mandamus, 9 N.Y.L.F. 478, 493 (1963) (citations omitted).

36. It should be noted that, at common law, the King's Bench's award of peremptory (absolute) mandamus was not an appealable order. Dublin v. Rex, 1 Eng. Rep. 425, 427 (K.B. 1724); *see also* Rt. Hon. Lord Goddard, *A Note on Habeas Corpus,* 65 L.Q.R. 30, 34–35 (1949) (U.K.) (explaining why there was no appeal from mandamus at common law). *See generally* ROBERT J. SHARPE, THE LAW OF HABEAS CORPUS 194–95 (1976) (stating that, at common law, appeals lay only from a formal judgment, and as prerogative writs were summary, no formal judgment was entered).

37. Knipe v. Edwin, 87 Eng. Rep. 394 (K.B. 1695).

38. Lord Holt's contribution to the growth and development of the English common law in general, and prerogative writs in particular, was remarkable. In fact, the authors of one of the leading property casebooks have this to say of Lord Holt:

> After the flight of James II to France, abandoning the throne, Holt, as a member of the House of Commons, played a leading role in establishing a constitutional monarchy under William and Mary, a system that survives today. Subsequently he was appointed chief justice, which office he held from 1689 to 1710. He was noted for his integrity and independence and for his common sense as well as his deep learning in the law.... Chief Justice Holt was the first of a line of enlightened judges who, in the eighteenth century, shaped English law to accommodate the needs of a mercantile society that would dominate world trading. Lord Mansfield, who served as chief justice from 1756 to 1788, was perhaps the most notable of these.

JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 23 n.4 (2d ed. 1988). During his tenure as Chief Justice of King's Bench, 1689–1710, in addition to the *Knipe* decision, Lord Holt wrote a large number of other mandamus opinions. *E.g.*, Rex v. Mayor of Oxford, 91 Eng. Rep. 372, 372–73 (K.B. 1697) (holding that mandamus would lie to return to office an official removed without legal justification); Regina v. Bailiffs of Ipswich, 91 Eng. Rep. 378, 378 (Q.B. 1706) (holding that mandamus would lie to reinstate a public official illegally removed from office); The King v. St. John's College, 90 Eng. Rep. 245, 247 (K.B. 1695) (denying mandamus on procedural grounds but boldly stating that it was the duty of King's Bench to see that the laws of the realm are followed). In the general area of prerogative writs, Lord Holt expanded the supervisory jurisdiction of King's Bench to all inferior courts. *See, e.g.*, Groenvelt v. Burwell, 91 Eng. Rep. 134, 134 (K.B. 1701) (holding that no lower court is exempt from supervision by King's Bench to insure that they are acting within their respective jurisdictions); Ashby v. White, 92 Eng. Rep. 126, 136 (Q.B. 1703) (observing that when a party has a right he must have the legal remedy to vindicate or maintain it, for "it is a vain thing to imagine a right without a remedy").

39. *Knipe*, 87 Eng. Rep. at 395. Frederic Maitland, a leading English authority on the forms of action at common law, explained the action of case in the following terms:

> The title of Case covers very miscellaneous wrongs—specially we may notice slander

Edwin sought a writ of mandamus to compel his admission as bailiff following his appointment by the high steward. Knipe, who had already been admitted to the office by others, responded to the suit by asserting that Edwin's remedy, if any, lay in a suit on the case for damages and not in mandamus. The court held that although a successful action on the case would have led to a recovery of damages for the lost office, such action would not put Edwin in possession of the office of bailiff to which the court determined he was legally entitled. Thus, the court granted the mandamus commanding Edwin's admission to office.[40]

Like many of the cases of the early common law, no precedent or other authority was given by the court to explain or justify the court's holding. But clearly, the court perceived that the wrong that had occurred was the deprivation of office, and King's Bench had the authority to reform that wrong and to place the individual where he had a right to be but for the breach of duty toward him by public officials. As in *Bagg's Case,* mandamus was available to compel public officials to perform their legal duties toward others; but unlike *Bagg's Case*, where no alternative remedy had been tendered, for the first time the court held that even if there were a possible damage remedy, such was not sufficient to negate the availability of mandamus relief.[41] In effect, King's Bench would grant this extraordinary remedy even in the face of other remedies, if such other remedies could not provide the relief available from mandamus.

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and libel (for which, however, there are but few precedents during the middle ages, since bad words are dealt with by the local courts, and defamation by the ecclesiastical courts), also damage caused by negligence, also deceit.

F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW 360–61 (7th prtg. 1929) (1909). Maitland noted that although case began as an offshoot of trespass, the actions of assumption and trover became its greatest independent branches. *Id.* at 360, 362.

40. *Knipe*, 87 Eng. Rep. at 394–95. Harold Weintraub calls this a "far-reaching decision" as it had the effect of altering the long-standing rule that monetary damages were the sole remedy against public officials. Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus,* 9 N.Y.L.F. 478, 495 (1963) (comparing the result to the issuance of injunction decrees on grounds that there was "no amount of monetary damages [that] could compensate" for the legal interest that stood to be lost).

41. *See generally* WILLIAM BLACKSTONE, 3 COMMENTARIES *116 (observing that as all wrongs are nothing but a deprivation of a right, one "natural remedy" for every wrong is putting the individual "in possession of that right").

This nascent principle of mandamus jurisprudence was given additional impetus in the case of *The Queen v. Heathcote*.[42] *Heathcote* involved a simple election controversy between the Lord Mayor of London and the residents of one of the wards of London.[43] The residents had selected four individuals to be returned to the Court of Aldermen which was to select one of the four to serve as alderman for the ward. The lord mayor had rejected three of those selected by the residents and substituted three other individuals that he had selected.[44] A writ of mandamus to compel the lord mayor to return the four names elected by the ward residents to the Court of Aldermen was refused for a number of reasons.[45] The primary reason for refusing to issue the writ was that two of the three judges were of the opinion that mandamus would not be effective in resolving the dispute and that other remedies would be more effectual and less expensive.[46] The two justices in the majority were clearly convinced that other remedies were available in this case—mandamus to the Court of Aldermen or a complaint brought by

42. The Queen v. Heathcote, 88 Eng. Rep. 620, 622–24 (Q.B. 1712) (stating that this decision is for the purpose of pronouncing "what remedy the inhabitants of a *ward* have" when their elected officials are wrongly removed from office).

43. *Id.* at 620.

44. *Id.*

45. *Heathcote*, 88 Eng. Rep. at 621. Two of the justices opposing the issuance of mandamus were of the opinion that granting the writ to compel the lord mayor to return to the Court of Aldermen the correct names would place him in a predicament. If he answered the writ that the names that he had already returned to the court were the ones selected by the ward members, he faced possible action for wrongful return. If he were to answer the writ claiming the four elected by the ward members were the correct ones, he would subject himself to an action for false return in delivering the initial return to the court. *Id.* at 623 (Eyre, J.); *id.* at 625 (Parker, C.J.). Furthermore, Chief Justice Parker was of the opinion that the mandamus was unnecessary and should not issue because there was another remedy for those not returned by the lord mayor—an action on the case for false return. *Id.* at 626. All three judges were of the opinion that the court had jurisdiction to issue the writ even though the case was not a normal case for the issuance—"to restore persons turned out, or to admit those refused." *Id.* at 623 (Eyre, J.).

46. The Queen v. Heathcote, 88 Eng. Rep. 620, 623 (Q.B. 1712) (Eyre, J.); *id.* at 625–26 (Parker, C.J.). Justice Eyre asserted that mandamus should not be granted against the lord mayor, but that the court would be willing to entertain a mandamus against the Court of Aldermen, suggesting the four to be chosen and compelling them to choose one. He stated that the mandamus to the lord mayor would not be effective to resolve the matter. *Id.* (Eyre, J.). Chief Justice Parker was against any mandamus in this case. The mandamus against the lord mayor was, in his opinion, "unnecessary" and "ineffectual." *Id.* at 625 (Parker, C.J.).

those selected by the residents of the ward who were not on the lord mayor's return to the Court of Aldermen.[47] Justice Eyre, echoing Lord Holt's earlier opinion in *Knipe*, stated what was becoming a fundamental tenet of common law mandamus jurisprudence: "I agree, therefore, that unless some mandamus, I say some mandamus, will lie in this case, there is no remedy; for as for actions upon the case for false returns, they lie only in damages, but can never restore the persons wronged to the possession of their right."[48] Given the length of discussion engaged in by two of the three justices on alternative remedies, it is apparent that the King's Bench was grappling with the understanding that there were certain limitations on the super-visory writ known as mandamus. Clearly, in *Heathcote* the court realized that mandamus had certain limitations and was not always effective in achieving justice for the parties.[49]

Following in the footsteps of Lord Coke and Lord Holt, Lord Mansfield, during his tenure as Chief Justice of King's Bench from 1756 to 1788, painted in broad strokes, putting the finishing touches on the new implement of the King's Bench's supervisory authority by greatly seeking to increase the wrongs that would fit under its umbrella. More importantly, he stated succinctly what have become the two fundamental tenets of mandamus law. First, mandamus would issue for the improper or capricious exercise of discretion.[50] Second, in the landmark mandamus case of *Rex v.*

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47. *Heathcote*, 88 Eng. Rep. at 624 (Eyre, J.); *id.* at 625 (Parker, C.J.) (noting that the complaint would be "more compendious and less expensive" than the mandamus).

48. *Id.* at 623 (Eyre, J.) (emphasis omitted). Chief Justice Parker's suggested alternative remedy was not for damages, but a complaint brought by the injured parties to "bring the persons chosen before the Court of Aldermen." *Id.* at 625 (Parker, C.J.).

49. The Queen v. Heathcote, 88 Eng. Rep. 620, 626 (Q.B. 1712) (Parker, C.J.). Chief Justice Parker remarked on the ineffectiveness of mandamus to solve the problem in this case:

> [M]andamus will not lie, in the first place, to the Court of Aldermen [as the writ sought was directed to the lord mayor]; that the alderman have no authority but upon the return of the lord mayor, and consequently that a mandamus to the Court of Aldermen can be of no use, unless it be subsequent to the mandamus to Sir Gilbert Heathcote: this objection supposes the Court of Aldermen concluded by the return of the lord mayor; and if this be so, then there is no way to let these persons into their right, but by setting aside the return already made; which cannot be done by mandamus, but by action of deceit only.

Id. (emphasis omitted).

50. Rex v. Askew, 98 Eng. Rep. 139, 141 (K.B. 1768) (viewing such to be a failure to exercise discretion as required by law). In *Askew*, a doctor sought a writ of mandamus to

Barker,[51] Lord Mansfield held that mandamus would issue only where the aggrieved party had no other specific remedy.[52] The

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compel the College of Physicians to induct him as a member after his admission to the college had been denied by the governing board of physicians. *Id.* at 140. While noting that mandamus would be the proper remedy if the doctor had been denied a right—and had no other remedy been available to obtain that right—Lord Mansfield stated:

> [T]hat the judgment and discretion of determining upon this skill, ability, learning, and sufficiency to exercise and practise this profession is trusted to the College of Physicians: and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid, and unprejudiced; not arbitrary, capricious, or biassed; much less, warped by resentment, or personal dislike.

Id. at 141. In reaching this result Lord Mansfield was following earlier precedent that distinguished between ministerial and judicial (discretionary) functions. Although the distinctions were not fully established, it was clear that lower courts and officials had some discretion in reaching their decisions that involved fact finding, and when they were correctly performing that task, they were free from the supervision of King's Bench. But, if the law when applied to the facts gave rise to a duty that they had to perform, their discretion vanished, and they had a purely non-discretionary (ministerial) duty to comply with the law. Furthermore, if in their fact finding they acted in an arbitrary and capricious manner, they were acting outside of their area of discretion and could be compelled to comply with the law. *See generally* Louis L. Jaffee and Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q.R. 345, 360 (1956) (U.K.) (noting a series of cases which stated that the basis for mandamus was a "ministerial" duty). In this case the mandamus was not issued because the reasons given by the defendants, in response to the rule to show cause, established valid and sufficient bases for denying the doctor membership. *Askew*, 98 Eng. Rep. at 144.

51. Rex v. Barker, 97 Eng. Rep. 823 (K.B. 1762). *Barker* has remained a recognized landmark case in the area of mandamus jurisprudence. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168–69 (1803) (discussing the legal justification of when mandamus may issue); Bradley v. McCrabb, Dallam 504, 507 (Tex. 1843) (orig. proceeding) (discussing the principle that mandamus will issue when "the other modes of redress are inadequate or tedious").

52. *Barker*, 97 Eng. Rep. at 824–25 (stating that the writ of mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one"). In the earlier case of *Rex v. Blooer*, 97 Eng. Rep. 697 (K.B. 1760), Lord Mansfield laid the groundwork for his significant pronouncement in *Barker*. *Blooer* involved a dispute between parishioners and a vicar over who had the right to make the appointment of a curate of a local chapel. The curate appointed by the vicar had been forcibly removed from the chapel by the parishioners who desired to appoint their own curate. The curate sought a writ of mandamus to recover his right to preach in the chapel. The parishioners asserted that the writ should not issue because the curate had other remedies in ejectment and trespass. *Id.* at 699. Although Lord Mansfield did not cite any of Lord Holt's opinions, his response to these assertions sounds familiar. He noted that "[n]either of these actions, if he could bring them, would be a specific remedy. In the one, he might recover damages; in the other, he might recover the land; but by neither would he be restored to his pulpit, and quieted in the exercise of his function and office." *Id.* at 699. In stating this basic principle of current mandamus practice, Lord Mansfield pulled together vague references in earlier cases in an attempt to

Barker case involved the typical situation in which mandamus relief was sought during the seventeenth and eighteenth centuries—an individual seeking an office from which he had been denied. In *Barker*, Mr. Norton sought a writ of mandamus to compel certain trustees to permit Christopher Mends, a duly elected minister, to use a meeting house that certain trustees held in trust for public worship of Protestant dissenters. The trustees supported the election of another to the office, while the majority of the congregation seemed to side with Mends. Lord Mansfield, observing that mandamus had been granted to admit a vast array of individuals to public office, saw no reason that mandamus should not be extended to protect this minister.[53] However, because it was unclear as to the validity of either individual to hold the position as minister, Lord Mansfield suggested a new election or a trial to determine the present status of the parties.[54] The

articulate the beginnings of a comprehensive theory of mandamus. Edith Henderson postulated that the simple idea of mandamus as a general cure-all for enforcing legal rights was much too broad and indefinite, and Mansfield felt the need to place a certain limitation upon its exercise. That limit, according to Henderson, was that King's Bench would refuse to exercise mandamus in cases where the applicant had another specific remedy. EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 140–41 (1963); *see also* Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus,* 9 N.Y.L.F. 478, 498 (1963) (noting that in the *Barker* case Lord Mansfield "fully invigorate[d] the tentative searchings of" *Blooer*). Following *Barker*, Lord Mansfield often referred to the lack of a specific remedy as a condition for the issuance of mandamus. *See, e.g.*, The King v. Bank of Eng., 99 Eng. Rep. 334, 335 (K.B. 1780) ("When there is no specific remedy, the Court will grant a mandamus that justice may be done."); Rex v. Univ. of Cambridge, 96 Eng. Rep. 316, 319 (K.B. 1765) (referring to the *Barker* case and noting that mandamus will lie when there is a right being deprived and no other remedy).

This statement of the principle is slightly different from the generalized manner in which the Texas courts refer to this principle today. *See* Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (stating that mandamus will not issue where there is "a clear and adequate remedy at law" (citing State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding))). The emphasis on a specific remedy was important given the English history before *Barker*. It is apparent that the remedy suggested as the alternative to mandamus must be such as to deliver to the applicant the very relief that mandamus would provide. *Blooer,* 97 Eng. Rep. at 699 (holding that the alternative remedies had to achieve the same result as mandamus). Early Texas cases followed this principle and held that the alternative remedy had to be specific such that it gave the relator the right he had been deprived of or displaced from. *See, e.g.*, Tex. Mexican Ry. Co. v. Locke, 63 Tex. 623, 628–29 (1885) (orig. proceeding) (stating that a suit for damages would not provide the same remedy as the performance of the duty obtained through mandamus).

53. *Barker*, 97 Eng. Rep. at 825.

54. *Id.*

trustees refused.[55] Thus, the court issued the mandamus,[56] as there was no other remedy that could achieve the specific relief of giving Mr. Mends the right to use the meeting house.[57] Lord Mansfield put his holding in the following words:

> To deny this writ, would be putting Protestant Dissenters and their religious worship, out of the protection of the law. This case is intitled to that protection; and can not have it in any other mode, than by granting this writ. The defendants have refused either to go to a new election, or to try it in a feigned issue.[58]

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55. *Id.* at 826.

56. *Id.* After the mandamus was granted, Mends (referred to in the later case as Mence)—not being sure of the validity of his election—moved the congregation for a new election which he again won. However, the trustees still refused him admission and he applied for another mandamus. The King v. Barker, 96 Eng. Rep. 196, 196 (K.B. 1762). Finally, a peremptory mandamus was issued by consent ending the controversy. *Barker*, 97 Eng. Rep. at 826.

57. *Barker*, 97 Eng. Rep. at 826. In addition to the new election option, the trial of the validity of the elections, the court also rejected the common law remedy of ejectment. The King v. Barker, 96 Eng. Rep. 169, 169 (K.B. 1761) (noting that a clergyman was not to be driven to ejectment). The common law remedy of ejectment was an action to regain possession of land from which one had been ousted. *See, e.g.*, F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW 352–53 (1929 ed.) (discussing the common law action of ejectment); *see also* WILLIAM BLACKSTONE, 3 COMMENTARIES *200–01 (describing the elements of the common law cause of action of ejectment).

58. *Barker*, 97 Eng. Rep. at 826. In effect, mandamus was the only remedy given the fact that the trustees refused, and could not be compelled to accept, other possible avenues to solve this problem. One of the justices also noted that the action by way of assize did not lie in this case either. *Id.* at 825 (Wilmot, J.). At one time in the long history of the common law, an assize of darrein presentment was a remedy for one claiming an advowson, or a right to present someone to the bishop for clergy in a vacant church. *See* Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2078–79 (1985) (explaining that the assize of darrein presentment involved an action challenging an appointment to an ecclesiastical office brought by one claiming the superior right of appointment). By the time of the *Barker* case this remedy had become obsolete, being replaced by the action *quare impedit*. *See* 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 24–25 (5th ed. 1942) (stating that the writ's name came from its command that the defendant show why he hindered the plaintiff from his possession of the advowson). Holdsworth notes that the advowson was closely related to the title to land and both fell within the jurisdiction of the royal courts. *Id.* at 138; *see also id.* at 138–43 (discussing briefly the history of advowson at common law). Holdsworth additionally notes that the assize of darrein presentment was falling out of use by the sixteenth century. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 276 (7th ed. 1956). Even before becoming obsolete, the remedy by way of assize was never a specific legal remedy in cases where the party did not have a seisin of the office; "it was always, therefore, an incompetent remedy, in cases where a party requires to be admitted to an office, to which his title has not been perfected by a seisin." Dew v. Sweet Springs Dist. Ct. Judges, 13 Va. (3 Hen. & M.) 1, 23 (1808) (emphasis deleted).

Mandamus issued in this case not so much because there were no other remedies, but because the other remedies were ineffective in achieving the relief to which the court determined Mr. Mends was entitled.

Shortly thereafter, in *The King v. Bank of England*,[59] Lord Mansfield further amplified what he meant by asserting that mandamus would issue only in those cases where there was no other specific remedy.[60] In *Bank of England*, mandamus was sought by the executors of an estate to compel a bank to transfer bank stock to them that had belonged to their testator. The bank had refused to transfer the stock to the executors because its banking practices required that certain documentation be presented before it would authorize the stock transfer; the executors had failed to provide the required documentation.[61] Lord Mansfield, holding that the executors had a remedy that would "lie for complete satisfaction equivalent to [the] specific relief" that would have been achieved through mandamus, denied the issuance of the extraordinary remedy.[62] Although neither the court nor any of the counsel whose arguments are reported mentioned this other "specific remedy," a reporter's note following the published decision finished the story by stating that the executors subsequently brought an action in assumpsit to recover the stock.[63] Thus, another legal remedy existed that provided the very same relief that could have been achieved through mandamus, and therefore the writ did not issue.

Over the next decade the court continued to explain the types of remedies which would be "specific" or adequate enough to lead to

59. The King v. Bank of Eng., 99 Eng. Rep. 334 (K.B. 1780).

60. *Id.* at 335.

61. *Id.* at 334 n.1 (stating that, as a matter of practice, the bank required "the production either of a probate of the will of the person last intitled, or a certificate of the actual death of such person").

62. *Id.* at 335.

63. *Id.* at 335 n.1. Although the early history of the action of assumpsit is vague and obscure, by the sixteenth century the action had been rather well established as a form of recovery in contract or quasi-contract. Although not fully explained in the reporter's note to the case, in the action of assumpsit on the case they brought against the bank, the executors probably alleged that the bank possessed the stock which it was obligated under the law to pay over to the executors. This was an early form of *indebitatus assumpsit* based upon the legal fiction that the bank, being indebted to the executors, promised to pay or deliver the stock. *See generally* Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2082–83 (1985) (giving a brief "taxonomy" of the common law form of the action referred to as "assumpsit").

a denial of mandamus relief. In *The King v. Bishop of Chester*,[64] King's Bench denied a writ of mandamus to compel a bishop to license a curate to preach in a chapel.[65] The court noted that there was a clear and well understood remedy by way of *quare impedit* for a complete resolution of this matter, and thus mandamus would not issue.[66] Justice Buller, a member of the court that included Justice Mansfield, explained the principle that mandamus would not lie if there were another specific remedy:

> In ancient cases the grounds on which this Court has granted or refused a mandamus are not explicitly stated; but during the time Lord Mansfield has presided here, he has taken great pains to state particularly the grounds on which this Court will either grant or refuse such writs. He has always said, this Court will not interpose by granting a mandamus, unless the party making the application has no other specific legal remedy. It must be a legal and a specific remedy. Some cases have been mentioned at the Bar, where the Court granted a mandamus even though the party had another special legal remedy, such as an assize for office. But those offices have generally been such as are created by letters patent; and it is peculiarly the duty of this Court to see that the powers created by the King's charters are properly exercised. Besides the Court have said, in answer to those particular cases, that though the party had a remedy by assize, yet it is now obsolete, and therefore they have made an exception in those instances.[67]

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64. The King v. Bishop of Chester, 99 Eng. Rep. 1158 (K.B. 1786).

65. *Id.* at 1164.

66. *See id.* at 1164 (Buller, J.) (noting that mandamus would not lie in this case because the party had another specific remedy). Lord Mansfield stated during arguments in an earlier case that "[i]f a quare impedit does lie, a mandamus does not." Powell v. Milbank, 96 Eng. Rep. 502, 503 (K.B. 1771), *reprinted as* note (d) to *Bishop of Chester*, 99 Eng. Rep. at 1160, 1162. Thus, the court clearly recognized the remedy of *quare impedit*—that is, actions to settle controversies over an advowson, i.e., the right to fill a vacancy in a church position—would be a specific remedy that would achieve the same result as mandamus and therefore its availability in the proper case would prevent the issuance of mandamus. Holdsworth notes that actions in *quare impedit* might require a jury to examine documentary evidence stretching back over several centuries. However, since each case would involve only a single advowson, the task for a jury was not substantially more difficult than that of tracing the chain of title to an individual piece of real property. *See* 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 24–25 (5th ed. 1942).

67. *Bishop of Chester*, 99 Eng. Rep. at 1164. Holdsworth stated that the "possessory assizes (cause of action to recover possession) were falling out of use by the sixteenth century." 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 275–76 (7th ed. 1956). Blackstone defined a letter patent in the following words:

> The king's grants .... whether of lands, honours, liberties, franchises, or ought

In *The King v. Marquis of Stafford*,[68] the court—in 1790, shortly after Lord Mansfield's tenure as Chief Justice of King's Bench—once again was faced with the issue of what kind of remedy it would take to prevent the issuance of mandamus relief. *Marquis of Stafford* involved the appointment of an individual to be the curate of a chapel. The inhabitants had nominated an individual, but the lord of the manor had refused to present his name to the bishop for a license to become curate.[69] The court initially thought that mandamus ought to lie because it was of the opinion that the remedy of *quare impedit* did not lie.[70] In the arguments of counsel on this issue the parties debated whether the other remedy

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besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentes*: so called, because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large.

WILLIAM BLACKSTONE, 2 COMMENTARIES *346. The English courts were clear that the other remedy that would prevent the issuance of mandamus had to be a legal remedy, not a remedy in equity. Chief Justice Ellenborough put it in these words:

> [T]his court [King's Bench], in the exercise of this authority to grant the writ of mandamus, will render it as far as it can the suppletary means of substantial justice in every case where there is no other *specific legal remedy* for a legal right; and will provide as effectually as it can that others exercise their duty wherever the subject matter is properly within its control.

The King v. Archbishop of Canterbury, 104 Eng. Rep. 789, 796 (K.B. 1812) (emphasis added); *see also* THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 22 & n.(k) (London, Wm. Benning & Co. 1848) (reiterating that the specific remedy needed to refuse a writ of mandamus must be a legal remedy).

68. The King v. Marquis of Stafford, 100 Eng. Rep. 782 (K.B. 1790).

69. *Id.* at 782–83 (claiming the man to be of "indecent and immoral life").

70. *Id.* at 783. Although the writ of mandamus might lie in some cases involving disputes over vacancies in various church positions, it was not available in most cases by this time because of the availability of the writ of *quare impedit*. Historically, there had been some argument that mandamus as opposed to *quare impedit* would lie if the lands upon which the chapel occupied were "donative" and held in trust for church purposes, or in cases where it was a mere chapel of ease where sacraments could not be observed as opposed to a parochial chapel where all the sacraments could be performed. *Id.* at 783–84. However, once the court was reminded of the decision in *Bishop of Chester*, 99 Eng. Rep. at 1164, where the court held that *quare impedit* was the proper remedy even in cases of donative lands, and advised that certain sacraments were performed at this chapel, it was clear that the action of *quare impedit* was available in this case. Holdsworth pointed out that the mere gift of the land for the church did not convey away the advowson, "the right to present a clerk to the bishop." 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 138, 140–43 (5th ed. 1942) (noting that a lord could convey away the manor and keep the advowson or convey the advowson and retain the manor).

needed to be as convenient as mandamus.[71] Although the court did not address these arguments, it decided not to grant the writ because the applicants had not established that they possessed a legal right that could be the subject of mandamus.[72]

King's Bench subsequently addressed the issue of whether the alternative remedy had to be as convenient as mandamus in *The King v. Severn & Wye Railway Co.*[73] In *Severn & Wye*, a railroad company had been granted a public charter pursuant to acts of Parliament to build a line between two cities and to charge certain rates for passage. A short time after the completion of the track, the railway owners took up several hundred yards of track on a branch road to prevent competing railroads from using it.[74] A writ of mandamus was sought to compel the corporation to reinstate the tracks it had taken up. All of the judges on the court writing opinions confessed that there was a remedy by way of indictment for damages in this case.[75] Under that remedy the corporation could be fined for its non-repair of the track. Chief Justice Abbott stated, however, that the indictment was not "equally convenient, beneficial, and effectual" as mandamus in that the corporation could not be required to reinstate the track,

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71. The applicant asserted that the writ of mandamus was the "most convenient" because under the action of *quare impedit* there would be over one hundred parties to the litigation. *Marquis of Stafford*, 100 Eng. Rep. at 784. The defendants responded as follows:

> If it be objected that there may be some difficulty and inconvenience in bringing a quare impedit in this case, on account of the number of persons who must be parties to the suit, it may be answered that that (if true) is no reason why a mandamus should be granted; for a mandamus is not to give a more easy and expeditious remedy, but it is only granted in cases where there is no other remedy.

Id. at 783.

72. *See id.* at 785 (showing that the case was discharged without issuing mandamus). Chief Justice Kenyon, joined by two other justices, observed that if the inhabitants seeking the mandamus had only an equitable interest in the selection under the trust instrument creating the chapel, then they would not be entitled to the mandamus as they had no legal right to be enforced; however, if they had a legal right that needed to be enforced, they had the remedy of *quare impedit*. *Id.* at 784–85 (Ashhurst, J. and Grose, J., concurring). Justice Buller was also of the opinion that mandamus should not issue, but solely on the grounds that the only right the applicants had was an equitable one which was insufficient for the issuance of mandamus. *Id.* at 785 (Buller, J.).

73. The King v. Severn & Wye Ry. Co., 106 Eng. Rep. 501 (K.B. 1819).

74. *Id.*

75. *See id.* at 502–03 (noting that Chief Justice Abbott—along with Justices Bayley, Best, and Holroyd—recognized the possibility of issuing an indictment for damages against the railway).

which was the relief that mandamus offered.[76] In fact, he observed that upon conviction for indictment only a fine would be imposed, and the corporation could pay the fine and still refuse to reinstate the road and "at all events a considerable delay may take place."[77] Justice Best, also rejecting the argument that an indictment was a specific remedy that should bar mandamus relief, noted: "[A]n indictment does not afford a remedy equally effectual to compel the reinstating of the road, which is the purpose to be answered by the granting of this writ."[78]

Given the opinion in *Severn & Wye*, one would assume that in order to satisfy Lord Mansfield's specific remedy test, the alternative remedy must first be a legal one, and second, it must achieve the very thing that mandamus could compel. Later cases cast some doubt upon this observation. In 1839, in *The Queen v. Gamble & Bird*,[79] Chief Justice Denman stated during arguments that the *Severn & Wye* case "went quite far enough."[80] In *Gamble & Bird*, public officials sought mandamus relief against landowners to require them to repair and heighten the banks on their land that adjoined a river within the public officials' jurisdiction. The officials had another legal remedy by statute that authorized them to take all actions necessary within their jurisdiction to protect the

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76. *Id.* at 502.

77. *Id.* at 503; *see also* The King v. Comm'rs for Inclosing Lands, 105 Eng. Rep. 311 (K.B. 1813) (holding that an indictment against commissioners and the accompanying fine for failing to set aside a certain road as a public road "would not afford that convenient mode of remedy which might be attained by mandamus"). In a later case Chief Justice Denman had the following response to the argument that a party might not comply with the mandamus:

> It was urged that, our mandamus to compel obedience to an Act of Parliament implying a disobedience at present, the prosecutor may indict, and, having that remedy, does not require the extraordinary process of mandamus. This argument appears to prove too much; as it would prevent the Court from acting in all cases where an Act of Parliament is contravened. Besides, the indictment does not compel the performance, but only punishes the neglect of duty; though it was thought proper to remind us that mandamus might do no more, for that disobedience would only bring the party into contempt, and expose them to attachment, which would but end in individual suffering, and leave the required act still undone. Yet we are not in the habit of supposing that persons required to obey the Queen's writs issuing from this Court will incur the penalty of contempt for contumacy, or be advised to evade the known and ancient process of the law.

The Queen v. E. Counties Ry. Co., 113 Eng. Rep. 201, 215 (Q.B. 1839).

78. *Severn & Wye*, 106 Eng. Rep. at 503.

79. The Queen v. Gamble & Bird, 113 Eng. Rep. 339 (Q.B. 1839).

80. *Id.* at 340.

fens called Bedford Level.[81] The arguments of counsel showed a dispute as to whether this statute could be used to compel the landowners to complete the repairs.[82] Chief Justice Denman's brief, two sentence opinion denied the mandamus on grounds that "the parties have another remedy" but did not clarify what that remedy was.[83]

Two years later Chief Justice Denman further elaborated on the limits of *Severn & Wye* in *The Queen v. Victoria Park Co.*[84] In *Victoria Park*, a corporation had been established with the ability to make cash calls upon its members for additional funds. The corporation had a judgment entered against it, but did not have sufficient assets to pay the judgment. In order to pay the judgment, the corporation had made calls upon its shareholders, who had refused to respond. The applicants requested a writ of mandamus to compel the corporation to make another call on its shareholders. Although noting that the corporation no longer had the proper officer to make calls upon shareholders, the basis for the court's decision denying the mandamus was the existence of another adequate legal remedy. The court explained that since the purpose of the mandamus was to seek funds from the corporation, the applicants had the ordinary legal remedy of an execution that would achieve the same result as mandamus.[85] The court

81. *Id.* at 339–40.

82. *Gamble & Bird*, 113 Eng. Rep. at 340. The landowners argued that mandamus should not be issued in this case because the public officials had "remedies in their own hands." *Id.* The public officials argued that the only remedy provided by the statute was presentment under which they might be awarded process to seize his property and hold it to compel performance. *Id.* According to the public officials this remedy was clearly not as beneficial as mandamus. *Id.*

83. *See Gamble & Bird*, 113 Eng. Rep. at 340 ("The parties have another remedy."). The reporter noted, however, that during arguments in another case, Chief Justice Denman, referring to the *Gamble & Bird* case, stated that "[w]e thought there that the parties applying for a mandamus might, as commissioners of sewers, or as conservators of the level, enforce the doing of the repairs, and, therefore, that they had the remedy in their own hands." *Id.* at 340 n.(c).

84. The Queen v. Victoria Park, 113 Eng. Rep. 1142, 1143 (Q.B. 1841) (noting that *Severn & Wye* applies when the remedy at law is "not in its nature so complete").

85. *See id.* (holding that the court would not issue the mandamus just because the alternative remedy by execution would produce "no fruits"). Chief Justice Denman left open the question of whether mandamus would lie if the evidence clearly showed that the corporation had been evading paying debts and had not exercised the power given by Parliament to make calls upon its shareholders. The evidence before the court was that the corporation had made a call, but that its shareholders were not responding. *Id.* at 1143–44.

addressed its opinion of *Severn & Wye* in the following terms:

> It was argued that we have issued the writ, even where there was a legal remedy, in cases where that remedy was not so complete and beneficial as the writ would enforce. But that has been where the remedy at law was not in its nature so complete, . . . for [in *The King v. Severn & Wye*] the only direct effect of the indictment would have been the punishment of the defendants by fine, and not procuring for the prosecutors the benefit which they sought and were entitled to. But here the plaintiff seeks only the payment of the debt and costs: for this an execution . . . is a perfect remedy . . . .[86]

Notwithstanding Chief Justice Denman's comment made during argument in the *Gamble & Bird* decision, the English King's Bench decisions have been consistent: Mandamus would issue to command the performance of a legal duty or to correct an arbitrary action of an inferior court or public official unless an "equally convenient, beneficial, and effectual" alternative remedy was available. In effect, the alternative remedy would have to achieve the very same relief as mandamus would achieve. In attempting to summarize the extensive body of English mandamus law as it stood shortly before the American Revolution, Blackstone noted:

> A writ of *mandamus* is, in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature: and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have any thing done, and *hath no other specific means of compelling* [its] *performance.*[87]

Thus, at the time of the revolution, mandamus was regarded as an extraordinary remedy, to be granted only when justice could be obtained in no other manner. Yet the writ was clearly understood

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86. *Id.* at 1143.

87. WILLIAM BLACKSTONE, 3 COMMENTARIES *110 (third emphasis added). Blackstone then listed numerous examples of when mandamus would lie. *Id.* at *110–11.

in England to be a freestanding writ giving King's Bench general supervisory authority over all lower courts and officials and had ceased in large part to be a mere common law remedy.[88] Following the lead of Chief Justice Coke, the English courts were almost unanimous in their holdings that the existence of a right to appeal was a near fatal impediment to an application for mandamus.[89] However, they had also held that the availability of a specific legal remedy that would prevent the issuance of mandamus had to be one which was complete; that is, a remedy that would achieve as closely as possible the same result as the mandamus.

B. *The Early American Tradition*[90]

88. *See, e.g.*, James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1529 (2001) (stating that mandamus developed slowly over time to become the substantial prerogative writ by the late eighteenth century).

89. *See, e.g.*, THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 21 (London, Wm. Benning & Co. 1848) (citing a series of cases for this proposition).

90. This article will focus only briefly on the mandamus jurisprudence of the United States Supreme Court and the various states of the United States from their respective inception until approximately 1840. This focus is limited in time for the reason that once Texas became a Republic in 1836, its Congress shortly thereafter enacted the common law of England as it existed in 1840. In describing what the Republic Congress meant by the common law of England, the Texas Supreme Court explained as follows:

> Texas was never a British colony nor an American territory and the common law comes to us by adoption rather than by inheritance, so to speak. The Congressional Act of January 20, 1840, 2 Gammel's Laws, p. 177, Article 1, Vernon's Ann. Tex. Civ. Stats., simply makes the common law of England, so far as it is consistent with our constitutional and legislative enactments the rule of decision in Texas. No English statutes were adopted. *Paul v. Ball*, 31 Tex. 10, 15 [(1868)], and although Texas was an independent republic in 1840, the Act of the Congress of that year was not construed as referring to the common law as applied in England in 1840, but rather to the English common law as declared by the courts of the various states of the United States.... The common law of Texas is somewhat unique in origin and its development has not in all respects coincided with the general course of evolution discernable throughout the other American states.

S. Pac. Co. v. Porter, 160 Tex. 329, 334–35, 331 S.W.2d 42, 45 (1960) (orig. proceeding) (citations omitted); *see also* Grigsby v. Reib, 105 Tex. 597, 601, 153 S.W. 1124, 1125 (1913) (orig. proceeding) ("[T]he effect of the act of 1840 . . . was not to introduce and put into effect the body of the common law, but to make effective the provisions of the common law, so far as they are not inconsistent with the conditions and circumstances of our people."). Of course, the common law as declared by the various states was highly influenced by its English history. For a discussion of the development of the supervisory role of mandamus in the American colonies, see the three articles by Leonard S.

On February 24, 1803, the United States Supreme Court announced its decision in the case of *Marbury v. Madison*.[91] In *Marbury*, the Court held that the statutory grant of mandamus authority in section 13 of the Judiciary Act of 1789[92] was unconstitutional.[93] Thus, the Court refused to issue a writ of mandamus that had been requested by William Marbury to command the Secretary of State, James Madison, to deliver Marbury's commission as a justice of the peace for the District of

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Goodman: *Mandamus in the Colonies—The Rise of the Superintending Power of American Courts*, 1 AM. J. LEGAL HIST. 308 (1958); 2 AM J. LEGAL HIST. 1 (1957); 2 AM. J. LEGAL HIST. 129 (1958) (exploring the growth and use of mandamus in colonial Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island).

91. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803).

92. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (1789) (authorizing the Supreme Court to issue "writs of *mandamus* . . . in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States") (current version at 28 U.S.C. § 1651 (2006) (authorizing the Supreme Court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law")).

93. *Marbury*, 5 U.S. (1 Cranch) at 180 ("[A] law repugnant to the constitution is void."). Prior to reaching this significant holding, Marshall had determined that the Supreme Court clearly had the authority under section 13 of the Judiciary Act to issue a writ of mandamus to compel the secretary of state to perform his legal duty, "and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional." *Id.* at 173. The Constitution grants the Supreme Court original jurisdiction "in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. CONST. art. III, § 2, cl. 2. The mandamus proceeding brought by Marbury was an *original action,* but it was not brought against a foreign diplomat or a state. Marshall noted that Marbury was not asking the Court to exercise its appellate jurisdiction. *Marbury*, 5 U.S. (1 Cranch) at 175–76. The Court concluded that section 13 of the Judiciary Act enlarged the Court's original jurisdiction beyond the limits prescribed by Article III by authorizing it to issue mandamus to "persons holding office under the authority of the United States." *Id.* at 173. It is apparent that under Marshall's understanding of the constitutional framework of the United States there was no authority for a freestanding grant of original mandamus jurisdiction as in England. However, before *Marbury* the Court heard original applications for mandamus against executive branch officials and concluded in each case that mandamus would not issue without addressing the constitutional issue. For accounts of these cases, see 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: Cases 1790–1795, at 33–72, 284–95, 356–69 (Maeva Marcus ed., 1998) (containing, among others, United States v. Hopkins, *Ex parte* Chandler, and the reported decision in Hayburn's Case, 2 U.S. (2 Dall.) 409–10 (1792) ("[N]o decision was ever pronounced.")); *see also* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1573–74 (2001) (postulating that the entertaining of these earlier mandamus proceedings may have reflected the then position of the Court that its supervisory power under section 13 of the Judiciary Act was not subject to the constitutional limitations on its original jurisdiction).

Columbia.[94] However, before specifically addressing the constitutionality of the jurisdictional grant, Chief Justice Marshall addressed the issue of whether mandamus was the proper remedy in this case. Marshall, after quoting from both Blackstone[95] and Lord Mansfield,[96] concluded as follows: "[T]o render the

94. *Marbury*, 5 U.S. (1 Cranch) at 180. *Marbury* was only the second case that had come before the Court involving a writ of mandamus and which resulted in a written opinion. The first case was *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795). In *Lawrence*, the Minister of the French Republic had requested a district judge to issue a warrant of arrest for a French citizen who had deserted from French military service and was then residing in the United States. The district court had refused to issue the warrant in spite of a consular agreement between the two countries authorizing such action in the proper case. *Id.* at 43. Following the minister's complaint to the executive branch of the government, the attorney general sought a writ of mandamus from the Supreme Court to compel the district judge to issue the arrest warrant. *Id.* at 42. In a short per curiam opinion, the Court denied the writ of mandamus:

> We are clearly and unanimously of opinion, that a mandamus ought not to issue. It is evident, that the District Judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre: and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment, but his own.

Id. at 53. Although not citing any authority, it is clear that the Court was following English common law that mandamus lay only to compel a ministerial duty, that is, one that did not involve the exercise of discretion on the part of the judge. *See Marbury*, 5 U.S. (1 Cranch) at 172–73 (observing that Marbury had a "vested legal right, of which the executive cannot deprive him").

95. Marshall quoted from the third volume of Blackstone's *Commentaries*:

> [A writ of mandamus is] a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.

Marbury, 5 U.S. (1 Cranch) at 168 (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *110).

96. Immediately after quoting from Blackstone, Marshall quoted from Lord Mansfield's opinion in *Rex v. Barker*, 97 Eng. Rep. 823, 824–25 (1762):

> Whenever . . . there is a right to execute an office, perform a service, or exercise a franchise (more especially, if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government . . . this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

Marbury, 5 U.S. (1 Cranch) at 168–69 (declaring that Lord Mansfield, in *Rex v. Barker*,

mandamus a proper remedy, the officer to who it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy."[97] Marshall determined that the suggested specific legal remedy available was clearly inadequate under the circumstances. In reaching this conclusion he reasoned:

> It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.[98]

Although the Court determined the case was ripe for the issuance of a writ of mandamus,[99] the Court eventually held that the legislation that authorized the Court to issue mandamus in this case "appears not to be warranted by the constitution."[100]

"states with much precision and explicitness the cases in which this writ may be used").

97. *Id.* at 169.

98. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803). Marshall cited no cases or authority for this proposition. However, there was clearly English precedent for this position. *See generally* Knipe v. Edwin, 87 Eng. Rep. 394, 395 (K.B. 1695) (stating that a recovery of damages was not a sufficient remedy to prevent mandamus to compel admission to office). Detinue was the common law remedy for recovery of specific identifiable personal property from a person who had possession of the property and to recover damages for its detention. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES *151–52 (noting that the remedy had a major disadvantage in that the recovery could be defeated by the defendant's sworn oath that he had proper possession of the property).

99. *Marbury*, 5 U.S. (1 Cranch) at 173 (holding that this was a "plain case for mandamus" leaving only the question of whether such a writ could issue from the Court).

100. *Id.* at 176. Several commentators have debated whether Congress might have viewed the Judiciary Act's grant of mandamus jurisdiction as a type of general supervisory power that was outside the scope of the Court's constitutionally granted original or appellate jurisdiction. *See* Charles F. Hobson, *John Marshall, The Mandamus Case, and the Judiciary Crisis, 1801–1803*, 72 GEO. WASH. L. REV. 289, 306 (2003) (arguing that, in *Marbury*, Marshall held that "the prerogative, superintending power of mandamus was incompatible with the Constitution's grant of limited original jurisdiction"); James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1568–74 (2001) (opining that Marshall simply declined to interpret Article III of the Constitution in such a way as to preserve a freestanding conception of mandamus power). Hobson and Pfander asserted that as Marshall was clearly cognizant of the supervisory powers of King's Bench, he took a politically expedient course in declaring unconstitutional such a grant in section 13 of the Judiciary Act in order to

Although the Court did not issue mandamus in *Marbury*, Marshall clearly observed that the withholding of the commission was "violative of a vested legal right."[101] Furthermore, *Marbury* did not question the Court's authority to issue writs of mandamus to revise and correct decisions of lower courts as an exercise of appellate jurisdiction.[102] But the authority of the Court to issue

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preserve such supervisory power within the confines of the Court's original and appellate jurisdiction. Charles F. Hobson, *John Marshall, The Mandamus Case and the Judiciary Crisis, 1801–1803*, 72 GEO. WASH. L. REV. 289, 306–07 (2003) (arguing that Marshall's *Marbury* decision can be seen as an attempt to avoid complete repeal of section 13 of the Judiciary Act thus preserving certain supervisory powers for the Court); James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1582–88 (2001) (reassessing *Marbury* as a skillful effort to preserve jurisdiction for the Court).

101. *Marbury*, 5 U.S. (1 Cranch) at 162.

102. *Id.* at 175 ("[I]t is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."). While the Marshall Court struggled to find the proper jurisdictional basis for its authority to issue mandamus, it substantially limited the ability of lower federal courts to issue writs of mandamus. In a series of three cases interpreting sections 11 and 14 of the Judiciary Act of 1789, the Marshall Court effectively stripped the ability of lower federal courts to issue original writs of mandamus. McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813); M'Cluny v. Silliman, 15 U.S. (2 Wheat.) 369, 369–70 (1817); M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598, 604–05 (1821). Note that the official reporter contains an error in the name of the party "M'Cluny," referring to him as "M'Clung;" this article will refer to the party by the name as reported. Section 11 conferred original diversity jurisdiction (i.e., the United States or an alien is a party, or the matter is between citizens of different states) upon the various circuit courts (at this time these courts were composed of two Supreme Court Justices and one district judge) of the United States when the amount in controversy was more than $500. Judiciary Act of 1789, ch. 20 § 11, 1 Stat. 73, 78 (1789) (current version at 28 U.S.C. § 1332 (2006)) (conferring diversity jurisdiction upon the district courts). Section 14 provided that circuit courts had the power to issue all writs necessary for the exercise of their jurisdiction. Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 73, 81–82 (1789) (current version at 28 U.S.C. § 1651 (2006)) (authorizing the Supreme Court and all courts established by Congress to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). In *McIntire*, a writ of mandamus was sought in a federal circuit court against a federal official to compel him to grant certificates for the purchase of lands to which the applicant claimed he was entitled under federal law. *McIntire*, 11 U.S. (7 Cranch) at 505. The Court held that the circuit court did not have the jurisdiction to issue the mandamus because section 14 of the Judiciary Act conferred no jurisdiction in addition to that conferred in Section 11. *Id.* at 505–06. As this suit was not by or among one of the three specified bases for jurisdiction under Section 11, the circuit court had no jurisdiction to issue the mandamus. *Id.* at 506. In effect, based upon its reading of Section 11, the Court determined that the circuit courts did not possess federal question jurisdiction beyond the three bases for jurisdiction found in Section 11. *Id.* The Court did not issue an opinion, but merely denied a motion for mandamus. *M'Cluny*, 15 U.S. (2 Wheat.) at 370. In *M'Cluny*, the Ohio Supreme Court had refused to issue a writ of mandamus to compel the federal land registrar to file an application of one claiming to be entitled to land under

mandamus under its original jurisdiction was severely limited by the decision for the simple reason that mandamus was viewed as being initiated with an original application or petition. However, in *Ex parte Bollman*,[103] the Court treated an original petition for habeas relief—another supervisory writ—as an action lying on the appellate side of its jurisdiction.[104] Chief Justice Marshall stated it succinctly:

> In the *mandamus* case, (*ante*, *vol. 1. p. 175. Marbury v. Madison*,) it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitution. But so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*.... The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.[105]

By classifying the original petition or application for habeas corpus as an exercise of appellate jurisdiction, Marshall regained the Court's supervisory power over the lower courts.[106] However,

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federal law. *Id.* at 369. In *M'Clung* the Court held that state courts were not authorized to issue mandamus to command any duties by federal officials. *M'Clung*, 19 U.S. (6 Wheat.) at 604–05. The Court, by way of obiter dictum and relying on *McIntire*, noted that the federal circuit courts also had no authority to issue any such mandamus. *Id.* at 601. For a critique of the *M'Clung* case, see Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 458–459 (1989) (noting that the "Court offers no logical rationale for the extension" given the fact that the parties were diverse and satisfied the Section 11 jurisdictional basis) (citing DAVID P. CURRIE, FEDERAL COURTS: CASES AND MATERIALS ch. IV, § 3 at 510–11 (West, 3d ed 1982)). *But see* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1595–96 (2001) (defending the opinions that restricted mandamus jurisdiction of the lower federal courts).

103. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

104. *Id.* at 101.

105. *Id.* at 100–01.

106. Thus, while the application for a writ of habeas corpus may be called an "original" application, the writ was in fact issued by the Court under its constitutional grant of appellate jurisdiction, not its original jurisdiction. *See, e.g.*, James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1591–92 (2001) ("The gradual acceptance that the Court may exercise wide ranging appellate jurisdiction through the issuance of original writs of habeas and mandamus has done much to restore the supervisory powers that *Marbury* put at risk."); *see also* Charles Hobson, *John Marshall, the Mandamus Case, and the Judiciary Crisis, 1801–1803*, 72 GEO. WASH. L. REV. 289, 306 (2003) (arguing that Marshall avoided a "political backlash" by not defending mandamus authority as an inherent supervisory power of the Court, but rather placing the Court's "supervisory authority within the safer

although asserting that the exercise of its habeas jurisdiction was an exercise of appellate jurisdiction, Marshall rejected the argument that the Court had the authority to exercise such jurisdiction in a freestanding manner like King's Bench without constitutional or statutory authorization.[107]

In *Ex parte Crane*,[108] Marshall extended the Court's ability to supervise lower courts by way of writs of mandamus as an exercise of appellate jurisdiction.[109] In *Crane,* following the trial of the case, the attorney for the defendants prepared bills of exception including not only points of law made during the course of the trial but also the complete jury charge. The federal trial judge corrected the bills by striking the jury charge from them. The defendants moved for a writ of mandamus to compel the court to reinsert the charge in the bills in order to assist the appellate court in reviewing the case. Marshall concluded that a writ of "mandamus to an inferior court of the United States, is in the nature of appellate jurisdiction," and that the Court's power to supervise the conduct of all inferior tribunals included the power to issue a writ of mandamus to sign a bill of exception.[110] Marshall, having established the authority of the Court to issue

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confines of the Constitution's distribution of original and appellate jurisdiction").

107. *Bollman*, 8 U.S. (4 Cranch) at 93–94 (stating that while the Court might resort to the common law in determining the meaning of habeas corpus, the authority to exercise it "must be given by written law"). *See generally* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 159–73 (1962) (tracing the development of the Court's exercise of appellate jurisdiction in the case of habeas corpus).

108. *Ex parte* Crane, 30 U.S. (5 Pet.) 190 (1831).

109. *Id.* at 193 (asserting that the issuance of a writ of mandamus by the Supreme Court to an inferior court was an exercise of appellate jurisdiction).

110. *Ex parte* Crane, 30 U.S. (5 Pet.) 190, 193–94 (1831). Marshall stated that the issuance of a writ of mandamus would be "warranted by the principles and usages of law" as authorized by the Judiciary Act. *Id.* at 194. Marshall wrote that the phrase "usages of law" referred not merely to the common law, but all other usages. *Id.* Marshall observed that statutes in both England and New York authorized superior courts to issue mandamus to compel lower courts to amend or make bills of exception. *Id.* Thus, he concluded that the Judiciary Act expressly conferred similar power upon the Supreme Court. *Id.* Justice Baldwin dissented from what he perceived as an expansion of the judicial power of the Court. *Crane*, 30 U.S. (5 Pet.) at 201 (Baldwin, J., dissenting). First, he asserted that an issuance of a writ of mandamus in this case would be an impermissible exercise of original jurisdiction. *Id.* at 207–08. Secondly, Baldwin viewed the potential exercise of mandamus authority in this case to be an attempt by the Court to become a supervisor of the lower courts. *Id.* at 210. He noted that, unlike the statutory authority given to the King's Bench or the New York Supreme Court, the United States Supreme Court did not have general superintending jurisdiction. *Id.* at 210–11.

writs by way of obiter dictum, then concluded that in this case the writ should not issue.[111]

The Supreme Court during the Marshall period never questioned the strong position taken in *Marbury* that the party applying for a writ of mandamus must be without any legal remedy.[112] Nevertheless, following *Marbury*, the Supreme Court

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111. *Ex parte* Crane, 30 U.S. (5 Pet.) 190, 200 (1831). Although asserting jurisdiction to grant the writ, the Court denied the motion for writ of mandamus. The denial was premised upon a finding that the bills of exception, prepared and submitted by the applicants in the trial court, stated more than a simple point of law and thus were procedurally improper. *Id.* at 198–99. Specifically the Court said:

> If an exception may be taken in such form as to bring the whole charge of the judge before the court, a charge in which he not only states the results of law from the facts, but sums up all the evidence, the exception will not be on a single point; it will not bring up some matter of law arising upon a fact not denied: it will draw the whole matter into examination again.

Id.

112. During the Marshall years, the Court granted mandamus relief only four times. United States v. Peters, 9 U.S. (5 Cranch) 115, 141 (1809) (compelling a lower federal court to enter a judgment in an admiralty case); Livingston v. Dorgenois, 11 U.S. (7 Cranch) 577, 589 (1813) (compelling a trial court to proceed to judgment); *Ex parte* Bradstreet, 32 U.S. (7 Pet.) 634, 648–50 (1833) (compelling a trial court to reinstate a cause that it had dismissed and enter a final judgment); Life & Fire Ins. Co. of N.Y. v. Wilson, 33 U.S. (8 Pet.) 291, 304–05 (1834) (directing a trial judge to enter a judgment). In none of these cases was *Marbury* mentioned, and only once, in the *Wilson* case, did the Court address the adequacy of the legal remedy:

> By the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced. It is not a final judgment, on which a writ of error may issue, for its reversal. Without the action of the judge the plaintiffs can take no step, unless it be the one they have taken, in this case. They can neither issue execution on the judgment, nor reverse the proceedings by writ of error. And if the reasons assigned by the judge shall be deemed a sufficient answer to the rule, the plaintiffs are without remedy on their judgment.

Wilson, 33 U.S. (8 Pet.) at 303. In the cases before the Court where mandamus was denied, *Marbury* was one of the few where the adequacy of the legal remedy was addressed. However, in the large majority of cases, mandamus was denied because the particular act or duty sought to be compelled fell within the realm of discretion, and was not a ministerial action. Thus, there was no valid reason to discuss the adequacy of an alternative remedy. *See, e.g.*, *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) (refusing to grant mandamus relief to disturb a discretionary action of the trial judge in suspending an attorney from practice); Bank of Columbia v. Sweeny, 26 U.S. (1 Pet.) 567, 569 (1828) (refusing to issue mandamus to revise a trial court's interlocutory ruling that could be addressed later on appeal); *Ex parte* Roberts, 31 U.S. (6 Pet.) 216, 217 (1832) (refusing to enter mandamus to compel a trial judge to set aside the entry of a default judgment); *Ex parte* Davenport, 31 U.S. (6 Pet.) 661, 664–65 (1832) (refusing to issue mandamus to compel a trial court to change an interlocutory ruling concerning the pleadings in the case); *Bradstreet*, 33 U.S. (8 Pet.) at 590 (refusing to issue mandamus to compel a trial

rarely addressed the issue of the availability of a legal remedy. However, the Court took the rare opportunity to revisit this fundamental principal of mandamus in *Kendall v. United States ex rel. Stokes*.[113] In that case, the petitioners had duly executed contracts with a former Postmaster General of the United States under which they were entitled to certain credits and allowances for the transportation of the government's mail.[114] A subsequent Postmaster General undertook an audit of those contracts and determined that certain credits and allowances should be withdrawn and that some of the payments made should be returned.[115] Being unable to reconcile their differences with the new Postmaster General, the contract holders sought relief from Congress. Congress enacted a private bill directing the solicitor of the Department of the Treasury to conduct a full audit of the dispute according to equitable principles.[116] The legislation further directed the Postmaster General to comply with the findings of the audit.[117] However, the Postmaster General refused to pay the full amount awarded to the contract holders by the solicitor following the audit, and they sought a writ of mandamus from the circuit court in Washington, D.C., which granted a writ of mandamus to compel the Postmaster General to comply with the results of the audit.[118] An appeal to the Supreme Court followed. The Court affirmed the authority of the circuit

judge to change a discretionary ruling); Life & Fire Ins. Co. of N.Y. v. Adams, 34 U.S. (9 Pet.) 573, 605 (refusing to issue a writ of mandamus to compel a trial judge to enter a particular judgment). Following Marshall's tenure as Chief Justice, the Taney Court continued to follow the English and American precedents that mandamus would not lie to compel a trial court or public official to correct or perform an act or decision that involved matters of discretion. *See, e.g.*, Postmaster Gen. v. Trigg, 36 U.S. (11 Pet.) 173, 174 (1837) (refusing to issue mandamus to compel the trial court to enter execution on judgment as such decision was within the discretion of the trial judge); *Ex parte* Story, 37 U.S. (12 Pet.) 339, 344 (1838) (refusing to issue mandamus to compel judge to change interlocutory rulings concerning matters within his discretion); Poultney v. City of Lafayette, 37 U.S. (12 Pet.) 472, 475 (1838) (denying mandamus to compel a trial court to remand a matter to chancery court). *See generally Ex parte* Secombe, 60 U.S. (19 How.) 9, 15 (1856) ("[W]e are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion.").

113. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838).

114. *Id.* at 527.

115. *Id.*

116. *Id.* at 528.

117. *Id.*

118. *Kendall*, 37 U.S. (12 Pet.) at 609.

court to issue the mandamus because the majority[119] was of the clear opinion that the duty to be performed by the Postmaster General was purely ministerial,[120] and that there was no other specific means provided by law for compelling the performance of this duty.[121] The Postmaster General had suggested three alternative remedies for the petitioners other than mandamus: application to Congress, removal of the Postmaster General from office, or a suit for damages.[122] The Court addressed these three suggestions in turn:

> The first has been tried and failed. The second might not afford any certain relief, for his successors might withhold the credit in the same manner; and besides, such extraordinary measures are not the remedies spoken of in the law which will supersede the right of resorting to a mandamus; and it is seldom that a private action at law will afford an adequate remedy. If the denial of the right be considered as a continuing injury, to be redressed by a series of successive actions, as long as the right is denied; it would avail nothing, and never furnish a complete remedy. Or if the whole amount of the award claimed should be considered the measure of

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119. Three of the nine justices on the court dissented on jurisdictional grounds. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 626–41 (1838) (Taney, C.J., dissenting); *id.* at 641–53 (Barbour, J., dissenting). Chief Justice Taney observed that this was clearly a case where King's Bench would have exercised its general supervisory powers to issue a writ of mandamus compelling the officer to comply with the act of Congress. *Id.* at 627 (Taney, C.J., dissenting). However, he felt compelled to follow the precedents of *M'Intyre* (referring to McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813)) and *M'Clung* (referring to M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598, 603 (1821)), where the Court held that "the circuit courts of the United States, out of this district [Washington, D.C.] have not the power to issue the writ of mandamus to an officer of the general government, commanding him to do a ministerial act." *Id.* He could see no reason why the same rule should not apply to the circuit courts of Washington, D.C. *Id.* at 641. Justice Barbour agreed with the Chief Justice, that if jurisdiction lay, this was a clear case for the issuance of mandamus. *Kendall*, 37 U.S. (12 Pet.) at 642 (Barbour, J., dissenting). However, relying on precedent, he also found no jurisdiction. *Id.* Justice Catron joined with each of the dissenting opinions. *Id.* at 653. The majority of the Court distinguished *M'Intyre* and *M'Clung* by noting that the act of Congress creating the federal district, and by which the circuit court in the district was organized, declared that the law of Maryland was to apply to that portion of the district that lay on the south side of the Potomac River. *Id.* at 619–21. It just so happened that the circuit court was sitting on the south side of the Potomac when it issued the mandamus. The common law in Maryland, at the time of this congressional action, authorized the issuance of mandamus in a manner similar to King's Bench. *Id.* at 621.

120. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614 (1838).

121. *Id.*

122. *Id.*

> damages, it might, and generally would be an inadequate remedy, where the damages were large. The language of this Court, in the case of *Osborn v. United States Bank*, 9 Wheat. 844, is, that the remedy by action in such cases would have nothing real in it. It would be a remedy in name only, and not in substance; especially where the amount of damages is beyond the capacity of a party to pay.[123]

It is clear that the Court viewed none of the suggested remedies as effective to give the applicants the specific relief they were entitled to and which they would receive through the issuance of a writ of mandamus. In effect, the Supreme Court, like King's Bench, would issue mandamus in the proper case if the available alternative remedy was not as "equally convenient, beneficial, and effectual" as mandamus.

By 1840 the Supreme Court, following the lead of Lord Mansfield, had refined the first prong of mandamus jurisdiction to extend beyond compelling trial courts and officials to perform ministerial acts. First, the Court recognized that mandamus could issue in certain cases where the lower court or official had improperly exercised its discretion. Second, the Court acknowledged that it had the power to issue mandamus relief when the court or official undertook some action that was beyond its authority. Both of these expansions were identified by Chief Justice Marshall, who spoke for the Court in *Ex parte Burr*.[124] In *Burr*, Marshall recognized that inferior courts had a great deal of discretion in dealing with lawyer discipline. But he stated that the Supreme Court would intervene when a lower court's actions in suspending an attorney were "irregular" or "flagrantly

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123. *Id.* at 614–15. In *Osborn*, the Court addressed whether a court of equity could issue an injunction in the face of assertions of other supposed remedies:

> We think the reason for an injunction is much stronger in the actual, than it would be in the supposed case. In the regular course of things, the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury, would be against the agent only; and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a Court of equity. The injury would, in fact, be irreparable; and the cases are innumerable, in which injunctions are awarded on this ground.

Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 844 (1824).

124. *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824).

improper."[125] Marshall held that the exercise of discretion by lower courts was not unlimited and at some point a court might exceed the proper use of its discretion and mandamus might lie.[126] Marshall recognized that when a lawyer was suspended by a trial court's clear abuse of discretion, there were no recognized remedies for the attorney other than mandamus.[127] Marshall also recognized that mandamus would issue if the lower court exceeded its powers.[128] Thus, if the lower court acted without jurisdiction, mandamus would lie.[129] Several years later and after Texas statehood, in *Ex parte Bradley*,[130] the Court expounded upon Marshall's incipient principle and fully explained the reasoning behind the determination that mandamus would lie when a lower

125. *Id.* at 530. In a later case the Court held that the power of a federal judge to remove an attorney from practice before it is not "an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility." *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1856). This position was consonant with the English common law. *See* Rex v. Askew, 98 Eng. Rep. 139, 141 (K.B. 1768) (holding that the exercise of discretion could not be arbitrary, capricious, or biased); *see also* THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 13–14 (London, Wm. Benning & Co. 1848) (noting that at common law if discretion was not exercised in accordance with reasonable rules or practice, mandamus could command due exercise of that discretion).

126. *Burr*, 22 U.S. (9 Wheat.) at 531.

127. *See, e.g.*, *Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 376 (1868) (holding that when the decision to suspend an attorney from practice before a federal court was the result of "caprice, prejudice, or passion" mandamus would lie as no remedy by appeal was available). The *Bradley* decision was in accord with the English precedents. *See, e.g.*, White's Case, 87 Eng. Rep. 782, 782 (Q.B. 1703) (stating that there was no remedy for an attorney to regain admission to a court other than mandamus).

128. *Burr*, 22 U.S. (9 Wheat.) at 531.

129. *See Bradley*, 74 U.S. (7 Wall.) at 364 (citing *Burr* for the principle that mandamus would lie when a lower court exceeds its jurisdictional power). This principle was part of the common law and was discussed by Blackstone as follows:

> For it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals, and therein to inforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice.

WILLIAM BLACKSTONE, 3 COMMENTARIES *110–11; *see also* THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 105 (London, Wm. Benning & Co. 1848) (stating that part of King's Bench's superintendency over inferior courts was the ability to "command them to execute faithfully all powers with which they are clothed, whenever the same are either denied, or delayed, and to restrain them from intermeddling where they have no jurisdiction").

130. *Ex parte* Bradley, 74 U.S. (7 Wall.) 364 (1868).

court exceeded its jurisdictional power.[131] In that case the Court issued a writ of mandamus to an inferior federal court, directing it to restore a disbarred attorney to its rolls because the court had no jurisdiction to disbar him.[132] The explanation given for the issuance of mandamus was stated in the following language:

> The ground of our decision ... is, that the court below had no jurisdiction to disbar the relator.... No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void.[133]

In *Bradley*, the Court stated that the mandamus would issue only where there was no other specific remedy, and observed that in the case of disbarment there was no right to appeal; thus, mandamus was the only remedy.[134]

From this brief review of Supreme Court mandamus jurisprudence, it is seen that, on the eve of Texas's independence and subsequent statehood, the law of mandamus at the federal level was well established and had in large part remained true to the English common law. First, the Court viewed itself as having the power of superintendence over lower courts through the Judiciary Act.[135] Further, the Court acknowledged that mandamus was an

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131. *Id.* at 377–78.

132. *Id.* at 379.

133. *Id.* at 377. The Court stated that the alleged contempt that gave rise to the disbarment of the attorney occurred before another court, and therefore the court that issued the disbarment had no jurisdiction. *Id.*; *see also* Virginia v. Rives, 100 U.S. 313, 323–24 (1879) (observing that mandamus "is a remedy when the case is outside ... the jurisdiction of the court or officer to which or to whom the writ is addressed"); *Ex parte* Robinson, 86 U.S. (10 Wall.) 513 (1873) (holding that mandamus was a proper remedy where an inferior court entered an order in a matter in which it had no jurisdiction).

134. *Bradley*, 74 U.S. (7 Wall.) at 376.

135. *See Ex parte* Crane, 30 U.S. (5 Pet.) 190, 194 (1831) (noting that the Supreme Court "exercises extensive control over all the courts of the United States"). This supervisory power, however, differed from that exercised by King's Bench. First, as explained in *Marbury*, constitutional limitations restricted the Court's supervisory power. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (recognizing that the Constitution circumscribed the Court's ability "to issue writs of mandamus"). Second, the writ of mandamus was not merely a prerogative writ as in England. As Justice Thompson noted for the Court in *Kendall*, the writ of mandamus as used by the federal courts (other than the District of Columbia circuit court) was not a prerogative writ under the principles of common law. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 620–21 (1838). If mandamus were a prerogative writ, Justice Thompson reasoned, only the Supreme Court could issue it. *Id.* at 621. He further explained the difference between the English prerogative writ and the power of federal courts to issue mandamus:

extraordinary remedy that was not available to correct every error of law or fact made by inferior courts.[136] Finally, the Court emphasized that the petitioner must establish the absence of an adequate legal remedy.[137]

While this development was occurring at the federal level, various states were concurrently developing their respective laws of mandamus. As a general rule, the states followed the lead of *Marbury* and held that mandamus would not issue if there was a specific legal remedy available.[138] Like their federal counterpart,

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> But this power [granted by the Judiciary Act to issue mandamus agreeable to principles and usages of law] is not exercised, as in England, by the king's bench, as having a general supervising power over inferior courts; but only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed.

Id. at 622. In addition, Justice Thompson observed that several states, including Maryland, had modified English common law by expanding the usage of the writ to "other judicial tribunals than the highest court of original jurisdiction." *Id.* at 621.

136. *See* United States v. Lawrence, 3 U.S. (3 Dall.) 42, 53 (1795) (holding that mandamus did not lie in cases involving an exercise of discretion).

137. *See Marbury*, 5 U.S. (1 Cranch) at 169 (stating that the applicant for mandamus must be without a specific legal remedy). Subsequently, the Court often cited *Marbury* for this very proposition. *See, e.g.*, Reeside v. Walker, 52 U.S. (11 How.) 272, 291–92 (1851) (citing *Marbury*); *see also* Kendall v. United States, 44 U.S. (3 How.) 87, 100 (1845) ("Whenever, therefore, a mandamus is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding.").

138. *See generally* State *ex rel.* Mead v. Dunn, Minor 46, 47 (Ala. 1821) (stating that the availability of another specific remedy generally provided a sufficient reason for refusing to grant a writ of mandamus); Taylor v. Governor, 1 Ark. 21, 23 (1837) (observing "[t]hat a party applying for the writ must show . . . no other adequate specific legal remedy" was a universally established principle); Am. Asylum v. Phoenix Bank, 4 Conn. 172, 178 (1822) (referring to the general rule that "mandamus is never granted[] when a person has another specific remedy"); *Ex parte* Gowen, 4 Me. 58, 59 (1826) (indicating that the Supreme Court of Maine lacked authority to issue mandamus where another adequate remedy existed); *In re* Strong, 37 Mass. (20 Pick.) 484, 495 (1838) (stating that mandamus would generally not lie if there were another adequate specific remedy); County of Boone v. Todd, 3 Mo. 140, 140 (1832) (stating that as a general rule, mandamus would not issue when another specific remedy existed); Hull v. Supervisors of Oneida, 19 Johns. 259, 262 (N.Y. Sup. Ct. 1821) (holding that mandamus would issue to compel performance of a ministerial duty when "no other legal remedy exists"); Richards, Truesdell & Co. v. Wheeler, 2 Aik. 369, 370 (Vt. 1827) (holding that mandamus would lie "where a party has . . . no other specifick remedy to compel the performance"). In discussing the adequacy of other available remedies, the Supreme Court of Pennsylvania in *Commonwealth v. Johnson*, 2 Binn. 275 (Pa. 1810), stated:

> [Mandamus is called for] because the supervisors are public officers, directed by the act of assembly to pay such orders as are legally drawn by the justices, and because the surveyors have no other specific remedy. It is said that the supervisors may be indicted for neglect of duty. But if they were indicted and convicted, the orders might still be unpaid. It is said also that if they withhold payment without just cause, they

> are liable to an action. Granting that they are, it must be brought against them in their private capacity; and there is no form of action against them, which, being carried to judgment, will authorize an execution to be levied on the treasury of the Northern Liberties. Now it was to this treasury that the surveyors had a right to look, when they acted under their commission from the governor. It may be said, that in truth their contract was with the township, and from the township they have a right to expect payment.

Id. at 279. The Virginia Supreme Court also had the opportunity to determine whether a particular remedy provided by statute was sufficient to prevent the issuance of mandamus in *King William Justices v. Munday*, 29 Va. (2 Leigh) 165 (1830):

> [I]t is laid down, that it is, in general, sufficient reason with the court to refuse a mandamus, that the party applying for it has another specific remedy; and many cases are quoted in support. It seems an exception to this general rule, that the remedy is obsolete, or inconvenient, or incomplete: in such cases, the court exercises sound discretion in granting or refusing the writ. In our legislation, I find nothing to change this settled course of the law.... The law being thus settled, we are only to inquire, whether the petitioner for this mandamus, had a specific legal remedy? And this is answered by the passage cited from the 9th section of the statute, 2 Rev. Code, ch. 236, []and all such contracts made by county courts, or others appointed by them, shall be available and binding upon the justices and their successors, so as to entitle the undertaker to his stipulated reward in the county levy, or to a recovery thereof with costs, by action of debt against the justices refusing to levy the same.
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> ... [Therefore,] the mandamus is dismissed.

Id. at 169–70.

Although many state courts often referred to the writ of mandamus as a prerogative writ, they were not referring to the same concept that prevailed in England—issuance solely by one court (the King's Bench) in the name of the King or Queen. In large part, these state courts were simply referring to the fact that the writ was issued by a superior court directing a person or lower court to perform a legal duty that was required of them on account of the office or position that was held. *See generally Dunn*, Minor at 46 (explaining that in Alabama "[t]he writ of Mandamus is said to be a high prerogative writ" issuing from a superior court to compel the performance of a ministerial duty); *Taylor*, 1 Ark. at 23 (distinguishing Arkansas's mandamus from the prerogative writ of England as a "constitutional writ secured to the citizen[s]"); *Am. Asylum*, 4 Conn. at 178 (stating that the writ of mandamus in Connecticut was referred to as a prerogative writ as it "lies to enforce the execution of an act, when otherwise justice would be obstructed; and, regularly, issues only in cases, relating to the public and the government"); Runkel v. Winemiller, 4 H. & McH. 429, 449 (Md. 1799) (observing that the Maryland Supreme Court had similar authority to that of the King's Bench to issue writs of mandamus to supervise inferior courts); State *ex rel.* Atkins v. Todd, 4 Ohio 351, 351–52 (1831) (stating that the Supreme Court of Ohio had the authority, as in England, to supervise lower courts to enforce ministerial duties); *King William Justices*, 29 Va. (2 Leigh) at 169 (explaining that there was nothing in the laws of Virginia that distinguished its superior courts from those of England in the issuance of prerogative writs). In discussing prerogative writs, the Massachusetts Supreme Court said:

> Now it seems to us that this law ought to be executed in every county, and the only question is, whether this Court can enforce it, by virtue of their general superintending power over all courts of inferior jurisdiction. And of this we entertain no doubt; for besides the general authority given by St. 1782, c. 9, the second section

state courts noted that in special circumstances mandamus would issue even in the face of another specific legal remedy if such remedy was not "equally convenient, beneficial, and effectual" as mandamus.[139] In such cases, the state courts followed the English

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expressly provides, that it "shall have power to issue all writs of prohibition and mandamus, according to the law of the land, to all courts of inferior judiciary powers, and all processes necessary to the furtherance of justice, and the regular execution of the laws." The common law, in regard to this subject, is the law of the land, and it is very clear that the Court of King's Bench might by mandamus compel the performance of duty by all inferior tribunals, whether that duty be of a judicial or ministerial nature.

Mandamus is a prerogative writ introduced to prevent disorder from a failure of justice and defect of police; and therefore ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

Commonwealth v. Justices of the Court of Sessions, 19 Mass. (2 Pick.) 414, 418–19 (1824) (citation and footnote omitted).

139. The King v. Severn & Wye Ry. Co., 106 Eng. Rep. 501, 502 (K.B. 1819); *see, e.g.*, Etheridge v. Hall, 7 Port. 47, 54 (Ala. 1838) (citing English and New York authority for the proposition that "[t]he general rule ... must be understood to relate to a specific remedy, which will place the party in the same situation as he was before the act complained of"); *Am. Asylum*, 4 Conn. at 178 (citing English precedent for the proposition that "an action on the case[] which affords satisfaction equivalent to specific relief" would preclude the issuance of mandamus); State v. Bruce, 5 S.C.L. (3 Brev.) 264, 271–72 (1812) (holding that quo warranto was not a sufficient alternative remedy for an elected official who had been replaced by another, as the successful result of quo warranto would be merely to oust the replacement and not reinstate the elected official); *King William Justices*, 29 Va. (2 Leigh) at 169 (accepting the English rule that mandamus may lie if the specific remedy available to the party applying is obsolete, inconvenient, or incomplete); Dew v. Judges of the Sweet Springs Dist. Court, 13 Va. (3 Hen. & M.) 1, 23 (1808) (relying on Blackstone's *Commentaries* for the proposition that when the alternative specific remedy is tedious, such as requiring multiple actions to achieve the result, mandamus may lie). It is clear that the various states understood that the general rule that a writ would not lie if the party had another remedy meant another specific legal remedy that would place the party in the same position as the relief accorded by mandamus. The New York Supreme Court articulated the rule in these terms:

> The proposition is, I believe, universally true, that the writ of mandamus will not lie in any case where another legal remedy exists, and it is used only to prevent a failure of justice. By legal remedy is meant a remedy at law, and though the party might seek redress in chancery, that of itself is not a conclusive objection to the application; that may and should influence the court in the exercise of the discretion which they possess in granting the writ under the facts and circumstances of the particular case, but does not affect its right or jurisdiction. Nor does the fact that the party is liable to indictment and punishment for his omission to do the act, to compel a performance of which this writ is sought, constitute any objection to the granting of the writ. The principle which seems to lie at the foundation of applications for this writ and the use of it is, that whenever a *legal right* exists, the party is entitled to a *legal remedy*, and when all others fail, the aid of this may be invoked.

common law and permitted mandamus in those exceptional situations where the other remedy was not truly a specific remedy in affording the aggrieved party the right to which he was entitled under the law.[140] In many of these early state opinions, the word "adequate" became synonymous with "specific," such that the principle was stated that the alternative remedy must be one which would lead to adequate relief.[141]

People *ex rel.* Moulton v. Mayor of New-York, 10 Wend. 393, 396–97 (N.Y. Sup. Ct. 1833).

140. *See generally* JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES § 17 (Chi., Callaghan & Co. 1874) (stating that the remedy must be adequate not only in the general sense, but also "must be specific and appropriate to the particular circumstances of the case"). After surveying the law on the subject of the nature of the alternative remedy in *State v. Holliday*, 8 N.J.L. 205 (1825), the New Jersey Supreme Court issued a writ of mandamus, in spite of the fact that other remedies existed, to an overseer to open and clear a road in his district as assigned to him by the township committee. *Id.* at 205–08. In discussing the nature of the other remedies, the court stated:

> The remedy then, the right of resort to which shall deny the use of the writ of mandamus . . . must . . . be *specific,* by which I understand a remedy framed to effect directly the desired end. A mandamus has been refused where a *quare impedit* would lie . . . . A mandamus was also refused because there was another remedy by information in nature of a *quo warranto.* In such case if the defendant be convicted, judgment of ouster as well as a fine is given against him . . . . In [several English cases,] applications for mandamus to compel the transfer of bank shares were refused, for by action against the bank a recovery of the value of the shares might be had, and the purchase of other shares thereby enabled. Complete satisfaction, entirely equivalent to specific relief, might thus be obtained, as no possible difference could exist between the shares sought and the shares to be purchased. Let us now examine whether there is, beside the mandamus, *a . . . specific* method of compelling the overseer to open and make the road in question. By the 18th section of the act concerning roads an overseer may be presented by the grand jury or informed against by the attorney-general for not opening and clearing out an highway and on conviction may be fined. By the 37th section, the overseer on conviction, before a magistrate, of neglect or refusal to perform any of the duties enjoined on him by the said act, may be subjected to a penalty not exceeding twenty dollars nor under five dollars, with costs. But it is manifest that the penalty may be paid or the fine satisfied, and yet the road may not be opened and cleared out nor the public be enabled to enjoy the use of it. These remedies then cannot be denominated specific. It is no objection to say that the mandamus may be disobeyed and the court can then only fine and imprison him to whom it is directed. For the law presumes the officer will yield obedience to the writ unless he shew sufficient cause on which the court, not he, is to decide.

Id. at 206–07 (citations omitted).

141. *See, e.g., Taylor*, 1 Ark. at 23 (observing that the principle that a party applying for the writ must show "no other adequate specific legal remedy" was a universally established principle); *Bruce*, 5 S.C.L. (3 Brev.) at 271 (stating that if the applicant had no other legal remedy "whereby he can obtain adequate relief," he would be entitled to the writ). The South Carolina court cited no precedent for the principle, while the Arkansas court cited *The King v. Marquis of Stafford*, 100 Eng. Rep. 782 (K.B. 1790). In *Marquis*,

III. TEXAS MANDAMUS TRADITION PRIOR TO *PRUDENTIAL*[142]

A. *The Republic of Texas: The Inception of Mandamus Jurisprudence*

It was into this body of well-established law of mandamus that Texas was thrown when it declared and won its independence from Mexico in 1836. The Constitution of the Republic of Texas provided that the Supreme Court of the Republic would have only appellate jurisdiction.[143] In addition, the constitution authorized the congress to "introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require."[144] With respect to the power to issue

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the court refused to issue mandamus because of the existence of another legal remedy and rejected an argument that mandamus had to be issued because of the inconvenience of the alternative remedy. *Id.* at 783–84.

142. As the courts of appeal in Texas are obligated to follow the decisions of the Texas Supreme Court on matters of law, I am limiting the inquiry in this article to decisions of the Texas Supreme Court. *See generally* Lubbock County v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 585 (Tex. 2002) (stating that the function of abrogating or modifying established precedent lay with the supreme court, not the courts of appeals); Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964) (observing that the supreme court's decisions were binding on lower courts).

143. REPUB. TEX. CONST. of 1836, art. IV, § 8, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1074 (Austin, Gammel Book Co. 1898). However, the court's civil appellate jurisdiction was unlimited by the constitution. *See* TEX. CONST. of 1845, art. IV, § 3 ("The Supreme Court shall have appellate jurisdiction only, which shall be co-extensive with the limits of the State; but in criminal cases, and in appeals from interlocutory judgments, with such exceptions and under such regulations as the Legislature shall make.").

144. REPUB. TEX. CONST. of 1836, art. IV, § 13, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1074 (Austin, Gammel Book Co. 1898). The Congress of the Republic of Texas responded by enacting the common law of England "so far as it is not inconsistent with the Constitution or the Acts of Congress now in force," and noted that the common law "together with such acts [constitute] the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress." Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3, 3–4, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 177, 177–78 (Austin, Gammel Book Co. 1898). On the other hand, the congress rejected the common law system of pleading and instead adopted the petition and answer form. *See* Act approved Feb. 5, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 88, 88, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 262, 262 (Austin, Gammel Book Co. 1898) ("[T]he adoption of the common law shall not be construed [as an] adopt[ion of] the common law system of pleading ...."). Nevertheless, the common law of England was to be "followed and practiced by the courts" so far as not inconsistent with laws passed by congress. Act approved Dec. 20, 1836, 1st Cong., R.S., § 41, 1836 Repub. Tex. Laws 148, 156–57, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1208, 1216–17

writs, the first Congress of the Republic of Texas authorized the Supreme Court of the Republic of Texas to "grant writs of habeas corpus, and all other remedial writs and process granted by said judges, by virtue of their office, agreeably to the principles and usages of law."[145] All but one of the supreme court cases during the republican period mentioning mandamus[146] involved appeals from writs of mandamus issued by the district courts of the State of Texas.[147] The most significant case of this era was *Bradley v.*

(Austin, Gammel Book Co. 1898). *See generally* James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237 (1986) (giving a descriptive history of the Texas Supreme Court during the republican period).

145. Act approved Dec. 15, 1836, 1st Cong., R.S., § 8, 1836 Repub. Tex. Laws 79, 80, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1139, 1140 (Austin, Gammel Book Co. 1898). The authority to issue such writs "agreeabl[e] to the principles and usages of law" was strikingly similar to that of the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (authorizing the Supreme Court of the Republic to issue writs of mandamus in cases "warranted by the principles and usages of law").

Although the justices of the Supreme Court of the Republic of Texas were elected in December of 1836, the court did not meet for the first time until 1840. *See* James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 248–53 (1986) (tracing the political intrigue behind this seeming mystery). After convening, the supreme court established certain rules to govern practice in Texas courts; District Court Rule 31 permitted the issuance of the writ of mandamus following an ex parte hearing. TEX. DIST. CT. R. 31, 1 Tex. 852 (1840, superseded by statute 1841). Obviously dissatisfied with the rule, the republican congress enacted legislation prohibiting judges of the state from issuing ex parte writs of mandamus and requiring all judges of the state, in issuing mandamus, to observe the rules of common law as modified by acts of the republic. Act approved Jan. 25, 1841, 5th Cong., R.S., § 9, 1841 Repub. Tex. Laws 82, 84, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 546, 548 (Austin, Gammel Book Co. 1898). *See generally* Robert W. Stayton, *The General Issue in Texas*, 9 TEX. L. REV. 1, 1–3 (1930) (tracing various procedural issues that faced mandamus practice during the republic and into early statehood). This aversion to granting mandamus ex parte continued into statehood. *See* Act approved May 11, 1846, 1st Leg., R.S., § 4, 1846 Tex. Gen. Laws 200, 201, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1506, 1507 (Austin, Gammel Book Co. 1898) (conferring on district courts the power to grant mandamus "provided, [t]hat no mandamus shall be granted on an [ex parte] hearing, and any peremptory mandamus granted without notice, shall be deemed void"); *see also* TEX. R. CIV. P. 694 (mandating that district and county courts shall not grant mandamus ex parte and "any peremptory mandamus granted without notice shall be abated on motion").

146. The only case decided by the Supreme Court of the Republic of Texas that did not involve an appeal from a writ of mandamus issued by a district court was *Dangerfield v. Secretary of State*, Dallam 358 (Tex. 1840) (orig. proceeding). In *Dangerfield*, the court issued mandamus, pro forma, directing the President of the Republic of Texas to permit election of the chief justices of the counties. *Dangerfield*, Dallam at 358–59.

147. *See, e.g.*, Kent v. Kelso, Dallam 523 (Tex. 1843) (reversing the district court's grant of mandamus to compel the sale of property); Taylor v. Duncan, Dallam 514 (Tex. 1843) (examining the district court's authorization to grant various writs); Roman v.

McCrabb.[148] *Bradley v. McCrabb* involved the granting of mandamus by a district court to restore the plaintiff to the office of district clerk from which he had been removed.[149] The plaintiff had been properly elected to that office and had been holding the office as the duly qualified clerk.[150] At the request of the district judge, the plaintiff relinquished his office to the defendant, who claimed the office under a "pretended election."[151] The trial court entered a mandamus commanding the defendant to yield his office back to the plaintiff until the end of his elected term.[152]

Moody, Dallam 512 (Tex. 1843) (affirming mandamus issued by a district court in an election case); Bradley v. McCrabb, Dallam 504 (Tex. 1843) (analyzing a district court's mandamus order in an election case); Allen v. Ward, Dallam 371 (Tex. 1840) (affirming the judgment of the district court); Bd. of Land Comm'rs v. Bell, Dallam 366 (Tex. 1840) (comparing procedurally the issuance of mandamus and peremptory mandamus). The Constitution of the Republic of Texas, as well as the laws of the republic, authorized district courts to grant mandamus relief. *See* REPUB. TEX. CONST. of 1836, art. IV, § 3, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1073 (Austin, Gammel Book Co. 1898) (establishing the jurisdiction of district courts); Act approved Dec. 20, 1836, 1st Cong., R.S., § 41, 1836 Repub. Tex. Laws 148, 156, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1208, 1216 (Austin, Gammel Book Co. 1898) (directing courts of the Republic of Texas to apply English common law when not inconsistent with republican law). Even today, trial courts hold the authority to issue writs of mandamus. TEX. GOV'T CODE ANN. § 24.011 (Vernon 2004) (providing that district judges "may . . . grant writs of mandamus . . . necessary [for] the enforcement of [their] jurisdiction"). However, "an appeal from an original proceeding for a writ of mandamus initiated in the trial court . . . is [treated] different[ly] from an original proceeding for a writ of mandamus [initiated] in an appellate court." Anderson v. City of Seven Points, 806 S.W.2d 791, 792 n.1 (Tex. 1991). The trial and appeal of a writ of mandamus proceeding initiated at the district court level are treated in the same manner as any other civil action. *Id.* (quoting Griffin v. Wakelee, 42 Tex. 513, 516 (1874)). In contrast, the grant of a writ of mandamus by a court of appeals is not appealable to the Texas Supreme Court; such ruling is only reviewable through another original petition for writ of mandamus filed in the Texas Supreme Court. *Id.*; *see also* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917–18 (Tex. 1985) (orig. proceeding) (explaining that the issue in a new proceeding for mandamus before the supreme court did not involve a determination of whether the court of appeals abused its discretion in granting the mandamus, but "whether the trial court's order is so arbitrary, unreasonable, or based upon so gross and prejudicial an error of law as to establish abuse of discretion").

148. Bradley v. McCrabb, Dallam 504 (Tex. 1843). None of the other supreme court cases dealing with the issue of mandamus during the republican era analyzed as thoroughly or evaluated as completely the aspects of mandamus jurisprudence. *See, e.g.*, *Roman*, Dallam at 514 (stating that the issues of the propriety of granting mandamus were discussed at length in *Bradley v. McCrabb* and did not require repetition).

149. *Bradley*, Dallam at 504–06.

150. *Id.* at 504–05.

151. *Id.* at 505.

152. *Id.* at 505–06.

The defendant appealed.[153] The supreme court, acknowledging that it was statutorily required to observe the rules which governed the issuance of such writs at common law, began a detailed discussion of the use of the writ of mandamus at common law.[154] The court noted that, at common law, the writ was uniformly used to compel the restoration to office of one who had been improperly removed from that office.[155] Summarizing the common law on mandamus, the court stated: "It [mandamus] will not only issue in cases where the party having a specific legal right has no other legal operative remedy, but where the other modes of redress are inadequate or tedious the writ will be awarded."[156]

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153. *Id.* at 506.

154. *Bradley*, Dallam at 506–08.

155. *Id.* at 506 (citing WILLIAM BLACKSTONE, 3 COMMENTARIES *110).

156. *Id.* (citing as support for this statement Blackstone's *Commentaries*, a South Carolina case, *State v. Bruce*, 5 S.C.L. (3 Brev.) 264, 270 (1812), and two English cases, *Wright v. Fawcett*, 98 Eng. Rep. 63, 65–66 (K.B. 1767), and *Rex v. Barker*, 97 Eng. Rep. 823, 824 (K.B. 1762)). Interestingly, the *Wright* case did not even address the issue in *Bradley v. McCrabb*, as *Wright* involved procedural issues concerning the validity of the return. *Wright*, 98 Eng. Rep. at 65–66. Blackstone, the *Bruce* case, and the *Barker* case supported the limited proposition that mandamus would issue if there were no other legal operative remedy. *Bruce*, 5 S.C.L. (3 Brev.) at 270; *Barker*, 97 Eng. Rep. at 824; WILLIAM BLACKSTONE, 3 COMMENTARIES *110. Only Blackstone, however, recited that mandamus would issue if the other remedy were tedious. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES *110 (stating that the writ may issue in some cases where the applicant has a "more tedious method of redress, as in the case of admission or restitution to an office"). The example of tedium given by Blackstone referred to the problems of title to and possession of public offices. *Id.*

Since the time of *Barker*, mandamus had been the remedy of choice in the proper case to obtain restoration or admission to office. A problem arose, however, if the office was already being held by one under color of title. Generally, the common law remedy of quo warranto or "information in nature of a quo warranto" was available to determine disputed questions concerning title to public office. *Bruce*, 5 S.C.L. (3 Brev.) at 270–71. The general rule under the English common law was that mandamus would not lie to compel the admission of another person to the office when the office was already filled by one holding under color of title, nor could mandamus determine the dispute over the title to the office. This was because there was another specific remedy available by way of quo warranto. *See* The Queen v. Councillors of Derby, 112 Eng. Rep. 528, 528–29 (Q.B. 1837) (holding that the proper remedy was quo warranto because the office was filled); The King v. Mayor of Colchester, 100 Eng. Rep. 141, 141–42 (K.B. 1788) (denying mandamus and granting quo warranto because the office was in possession by another); *see also* People *ex rel.* Arcularius v. Mayor of New-York, 3 Johns. Cas. 79, 79 (N.Y. Sup. Ct. 1802) (per curiam) (stating that mandamus would not lie because the determination of disputed title to office could not be validly undertaken without the person in office being a party); *Bruce*, 5 S.C.L. (3 Brev.) at 270–71 (stating that quo warranto was the specific remedy to remove an unlawful office holder). However, although quo warranto could determine disputed title to the office, it could not be used to compel admission to the office by the

The court noted that, in its opinion, the reason for the restriction in exercise of mandamus jurisdiction at common law to "cases where there was no other legal, specific . . . remedy" was that the judgment awarding a writ of mandamus in an inferior court was not subject to appeal.[157] However, the court reasoned that under the republic's laws, final decisions of the district court were subject to appeal, and as such, the restriction applicable at common law "can have no foundation or support in the structure of our judicial system."[158] The court then noted that at the trial court level, the remedy of quo warranto would have been available to force the defendant "to show by what warrant or title [he] claim[ed] [the office]."[159] Nonetheless, the court observed that mandamus "operates a more complete and effectual remedy" because the

successful quo warranto applicant; thus, resort to mandamus is necessary. *See, e.g.*, *Bruce*, 5 S.C.L. (3 Brev.) at 270 (stating that mandamus lies to restore one to the office to which he is legally entitled); Rex v. Barker, 97 Eng. Rep. 823, 826 (K.B. 1762) (issuing a writ of mandamus to compel trustees to grant a duly elected minister access to a meeting house). More importantly, however, in cases where the existing office holder was improperly holding office (not under color of title), and the title of the applicant was clear, mandamus would issue even though quo warranto was an available remedy. In these cases, it would be tedious to first file the quo warranto proceeding to determine title and then file the mandamus to compel admission to office, because mandamus could achieve both the ouster and the restoration. *See* Dew v. Judges of the Sweet Springs Dist. Court, 13 Va. (3 Hen. & M.) 1, 20–47 (1808) (reviewing the common law in detail as it related to restoration and admission to office). *See generally* WILLIAM BLACKSTONE, 3 COMMENTARIES *262–63 (noting that in cases involving private offices, quo warranto would lead to merely a judgment of ouster); JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION §§ 49–72 (Chi., Callaghan & Co. 1874) (summarizing the availability of quo warranto and mandamus in cases of admission and restoration to office). It should be noted that a later Supreme Court of the Republic of Texas stated the rule in its traditional form. *See* Bd. of Land Comm'rs of Milam County v. Bell, Dallam 366, 366 (Tex. 1840) (stating without citation to any support or authority that "[i]t is clear that a *mandamus* will not issue where the party has another legal and specific remedy").

157. *See* Bradley v. McCrabb, Dallam 504, 506–07 (Tex. 1843) (noting that no writ of error laid from the granting of the mandamus at common law, and therefore the decision of the inferior court was not subject to review by a superior court). The court concluded that under Texas law a writ of mandamus issued by a district court was a final judgment and subject to appellate review. *Id.* at 507; *see* Estate of Soy v. McMullen, Dallam 363, 363 (Tex. 1840) (holding that under its organizational statute, the supreme court could only hear a case after a final judgment except as provided by law); *see also* Act approved Dec. 15, 1836, 1st Cong., R.S., § 3, 1836 Repub. Tex. Laws 79, 79, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1139, 1139 (Austin, Gammel Book Co. 1898) (authorizing the supreme court to hear appeals from final judgments).

158. *Bradley*, Dallam at 507.

159. *Id.*

successful party would not only recover his office, but could require all the documents of his office be turned over.[160] Thus, one observes that in the only case during the Republic of Texas that discussed in any detail the writ of mandamus, the Texas Supreme Court had, as directed by the legislature, adopted the mandamus jurisprudence of the common law.

B. *The Early Statehood Years, 1845–1910: The Formative Period*

During the first sixty to seventy years following statehood, the Texas Supreme Court's opinions in the area of mandamus jurisdiction continued to reflect the influence of the English common law and remained faithful to those teachings. It was also during this era that the court began to develop its own precedents, and by the end of this initial period, it became rare indeed for the court to cite English precedent which so frequently dominated the early decisions. Nevertheless, the court's own precedents remained firmly based upon this earlier common law experience.

The first constitution of the State of Texas authorized the Supreme Court of Texas to "issue writs of *mandamus* . . . as shall be necessary to enforce its own jurisdiction, and also compel a Judge of the District Court to proceed to trial and judgment in a cause."[161] The legislature of the state quickly implemented a statute concerning the organization of the supreme court and its jurisdiction, including implementation of this constitutional grant of authority.[162]

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160. *Id.*

161. TEX. CONST. of 1845, art. IV, § 3. Similarly, the constitutions of 1861, 1866, 1869, and the current constitution—originally enacted in 1876—provided that the supreme court would have original jurisdiction to issue mandamus. *See* TEX. CONST. art. V, § 3 (providing that the court may issue writs of mandamus under regulations prescribed by law to enforce its jurisdiction); TEX. CONST. of 1869, art. V, § 3 (providing that the court could issue mandamus "under such regulations as may be [permitted] by law . . . to enforce its own jurisdiction"); TEX. CONST. of 1866, art. IV, § 3 (providing that the court could issue writs of mandamus to enforce its jurisdiction); TEX. CONST. of 1861, art. IV, § 3 (providing that the court could issue writs of mandamus to enforce its jurisdiction and to compel a district judge to proceed to trial or judgment).

162. Act approved May 12, 1846, 1st Leg., R.S., § 3, 1846 Tex. Gen. Laws 249, 249, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1555, 1555–56 (Austin, Gammel Book Co. 1898). Although the statute authorizing the exercise of original mandamus jurisdiction has been amended from time to time throughout the history of Texas to specify against whom the court could issue mandamus, the provision that the court was authorized to issue writs of mandamus "agreeable to the principles of

The first significant case involving mandamus following statehood was *Arberry v. Beavers*.[163] *Arberry* involved a contested election in which it was alleged that the chief justice of the county had failed to count and record all the votes cast.[164] The trial court issued a writ of mandamus to compel the judge to perform his duty in accordance with the law of the state on the regulation of elections.[165] Following the issuance of the writ by the district court, an appeal was taken to the supreme court.[166] The court took the opportunity to summarize its understanding of common law principles of mandamus and to incorporate those principles into Texas precedent with these words:

> This process [the writ of mandamus], in modern practice, is regarded as an action, by the party on whose relation it is granted, to

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law regulating those writs" has been a mainstay of the legislation. *See, e.g.*, TEX. GOV'T CODE ANN. § 22.002(a) (Vernon 2004) (authorizing the supreme court to issue writs of mandamus "agreeable to the principles of law regulating those writs, against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals"). Similarly, the thirty-third Texas legislature provided:

> The Supreme Court, or any justice thereof, shall have power to issue . . . writs of mandamus . . . agreeable to the principles of law regulating such writs against any district judge, or Court of Civil Appeals or judge of a Court of Civil Appeals, or officer of the State government, except the Governor . . . .

Act of Mar. 26, 1913, 33d Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107, 108, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 480, § 26, 1985 Tex. Gen. Laws 1720, 2048. The issuance of these writs was regulated by common law principles to the extent that the common law had not been modified by the constitution or statute. *See, e.g.*, Terrell v. Greene, 88 Tex. 539, 545, 31 S.W. 631, 634 (1895) (orig. proceeding) (stating that the legislature had conferred power upon the supreme court to issue writs of mandamus "in all . . . cases as are allowable at common law").

163. Arberry v. Beavers, 6 Tex. 457 (1851). Although several other cases involving mandamus had reached the court prior to *Arberry*, for the most part those cases dealt only with procedural matters and did not involve any discussion of mandamus jurisprudence. *See, e.g.*, Bracken v. Wells, 3 Tex. 88, 92 (1848) (stating that the application to the court for issuance of a writ of mandamus did not need to be sworn); Smith v. Power, 2 Tex. 57, 67–68 (1847) (discussing issues of notice and return following service of the writ); *see also* Comm'r of the Gen. Land Office v. Smith, 5 Tex. 471, 479 (1849) (discussing the distinction between ministerial and discretionary duties under Texas law); Glasscock v. Comm'r of the Gen. Land Office, 3 Tex. 51, 53 (1848) (acknowledging as a general principle that mandamus would not issue to compel performance of an act involving discretion or an alternative).

164. *Arberry*, 6 Tex. at 458.

165. *Id.* at 459.

166. *Id.*

> enforce a private right, when the law affords no other adequate means of redress.
>
> It lies to compel public officers and courts of inferior jurisdiction, to proceed to do those acts which clearly appertain to their duty. But it does not lie to instruct them as to the manner in which they shall discharge a duty, which involves the exercise of discretion or judgment. The distinction seems to be, that, if the inferior tribunal has jurisdiction, and refuses to act, or to entertain the question for its decision, in cases where the law enjoins upon it to do the act required, or if the act be merely ministerial in its character, obedience to the law will be enforced by *mandamus*, where no other legal remedy exists. But, if the act to be performed involves the exercise of judgment, or if the subordinate public agent has a discretion in regard to the matter within his cognizance, and proceeds to exercise it according to the authority conferred by law, the superior Court cannot lawfully interfere to control or govern that judgment or discretion, by *mandamus*.[167]

The court then explained the legal principles governing the determination of whether a specific duty was a discretionary or ministerial action, evaluated the duty of the chief justice in this case, and determined that his action lay in the area of discretion.[168] Accordingly, the court held that the granting of the mandamus was erroneous on procedural grounds.[169] However, the court did state in obiter dictum that a gross abuse of discretion or complete refusal to act on a duty could lead to the issuance of a writ of mandamus "where there was no other adequate remedy provided by law."[170]

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167. *Id.* at 464–65. The court cited two cases from other states in support of the position that it had taken. *See* Rice v. Comm'rs of Highways of Middlesex, 30 Mass. (13 Pick.) 225, 227–28 (1832) (stating that mandamus did not lie to correct a public official in the exercise of discretion); Hull v. Supervisors of Oneida, 19 Johns. 259, 262–63 (N.Y. Sup. Ct. 1821) (stating that a public official's discretionary actions were not subject to mandamus).

168. *Arberry*, 6 Tex. at 469–74.

169. *Id.* at 474–75.

170. *Id.* at 472. Justice Wheeler, the author of the *Arberry* opinion, articulated the same concern in a later case:

> [A] public officer, [performing a required] duty which involves the exercise of discretion, may be guilty of so gross an abuse of the discretion confided to him, or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law, and that in such a case a *mandamus* would afford a remedy where there was no other adequate remedy provided by law.

Meyer v. Carolan, 9 Tex. 250, 255 (1852) (Wheeler, J., concurring). *But see id.* at 254

Following *Arberry*, the Texas Supreme Court consistently noted that mandamus was an extraordinary remedy[171] that was available only in those cases in which there was an inadequate legal remedy.[172] Thus, it was clear that in those situations where a final judgment had been entered in a cause, the proper remedy to correct trial court errors was an appeal or writ of error to the appellate court and not mandamus.[173] In the same light, the court

(majority opinion) (asserting that if a public official "wantonly disregard[ed]" his required duty that a suit for malfeasance of office, not mandamus, would lie).

171. *See, e.g.*, *In re* Kuntz, 124 S.W.3d 179, 180 (Tex. 2003) (orig. proceeding) (recognizing that mandamus was an extraordinary writ); Munson v. Terrell, 101 Tex. 220, 221, 105 S.W. 1114, 1115 (1907) (orig. proceeding) (stating that mandamus was "an extraordinary writ, and rests largely in the sound discretion of the court"); Ark. Bldg. & Loan Ass'n v. Madden, 91 Tex. 461, 462, 44 S.W. 823, 824 (1898) (orig. proceeding) (noting that mandamus was a remedy of last resort and should not issue if the applicant "is left in no worse position without the writ than he would be should a mandamus issue"); Hume v. Schintz, 90 Tex. 72, 74, 36 S.W. 429, 429 (1896) (orig. proceeding) (recognizing that mandamus was an extraordinary writ); Jones v. T.H. McMahan & Gilbert, 30 Tex. 719, 728 (1868) (referring to all writs issued by the district court as extraordinary); Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 329 (1859) (referring to the writ of mandamus as an extraordinary remedy).

172. *See, e.g.*, Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) ("[The] requirement that mandamus will not issue where [the relator has] an adequate remedy by appeal is well-settled."); Aycock v. Clark, 94 Tex. 375, 377, 60 S.W. 665, 666 (1901) (orig. proceeding) (stating that where there was another "plain, adequate, and complete remedy," mandamus would never be awarded); Steele v. Goodrich, 87 Tex. 401, 403, 28 S.W. 939, 939–40 (1894) (orig. proceeding) (stating that a writ of mandamus would not issue where there was an adequate remedy by appeal). This basic principle of mandamus law was succinctly stated by then-Justice Gaines: "But the writ of *mandamus* is a remedy of the last resort. It is universally held that if a party ha[s] an adequate common-law or statutory remedy he cannot resort to this writ, and the rule has been repeatedly announced in this court." Screwmen's Benevolent Ass'n v. Benson, 76 Tex. 552, 555, 13 S.W. 379, 380 (1890) (granting mandamus to reinstate a member of a voluntary association who had been expelled and had no other adequate remedy). In a later opinion, Chief Justice Gaines stated that this other remedy needed to be adequate, complete, and "reasonably necessary to the enforcement or establishment of the right which is sought to be secured." Hogue v. Baker, 92 Tex. 58, 61, 45 S.W. 1004, 1004 (1898) (orig. proceeding). Under Texas law, if an applicant establishes a clear right to mandamus, including the inadequacy of a legal remedy, then mandamus must be granted. *See* Scott v. Twelfth Court of Appeals, 843 S.W.2d 439, 442–43 (Tex. 1992) (orig. proceeding) (noting that while the decision to grant mandamus is considered discretionary, "the court's discretion lies in deciding whether the prerequisites for mandamus relief have been met, not in deciding whether to grant relief irrespective of such prerequisites").

173. *See, e.g.*, *Walker*, 827 S.W.2d at 840 (stating that mandamus will not lie when an appeal provides an adequate remedy); Abor v. Black, 695 S.W.2d 564, 566 (Tex. 1985) (orig. proceeding) (noting that the court would not supervise a trial court's incidental rulings where an adequate remedy by appeal exists); Iley v. Hughes, 158 Tex. 362, 367, 311 S.W.2d 648, 652 (1958) (orig. proceeding) (noting that mandamus would not issue to correct a trial court's errors when there was an adequate remedy by appeal); *Aycock*, 94

clearly recognized that mandamus would lie in those cases where the court refused to proceed to try a case or refused to enter any judgment upon a valid and duly entered verdict.[174]

In discussing the inadequacy of the remedy as a basis for the issuance of mandamus, Texas Supreme Courts often referred to the dictum of *Bradley v. McCrabb* noting that the alternative remedy had to be one that was effective and not one that was tedious.[175] For example, in *Terrell v. Greene*,[176] the trial court refused to permit the county attorney to appear and represent the county in a suit pending in the court.[177] The county attorney sought a writ of mandamus from the Texas Supreme Court.[178] Recognizing that an appeal was generally accepted as an adequate remedy to forestall mandamus relief, the court declared that the county attorney had no right to appeal in this case as he was not a

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Tex. at 377, 60 S.W. at 666 (noting that an appeal from a final judgment was "a complete and adequate remedy").

174. *See, e.g.*, *Aycock*, 94 Tex. at 376, 60 S.W. at 666 (reciting that a judge could be compelled by mandamus to proceed to try a case as well as to enter a judgment upon a verdict); Hume v. Schintz, 90 Tex. 72, 74, 36 S.W. 429, 430 (1896) (orig. proceeding) (holding that a trial court has no discretion but to enter a judgment according to a proper verdict); Lloyd v. Brinck, 35 Tex. 1, 6 (1872) (orig. proceeding) (holding that the entry of a judgment on a valid verdict was a purely ministerial action). The court in *Lloyd* stated that an appeal would ordinarily provide "ultimate and complete justice," but when a judge refused to enter a judgment on a valid verdict, an appeal "would be wholly inadequate if not completely unattainable, and the party aggrieved be wholly without a remedy." *Lloyd*, 35 Tex. at 8. Specifically, the court explained that such appeal would be inadequate because the possibility existed that no appealable judgment would ever be entered. *See id.* at 8–9 (describing how a trial court, having entered a new trial on its own prior to the entry of a judgment, might continue to do so in the future so that no appealable judgment would ever be entered). Thus, mandamus should issue to command the trial court to enter judgment on a verdict. *Id.* at 9–10 (noting that the authority to compel the trial court to proceed to trial and judgment was provided by statute). The statutory authority authorizing the supreme court to compel trial courts to trial and judgment remains to this date. TEX. GOV'T CODE ANN. § 22.002(b) (Vernon 2004) (authorizing the supreme court to issue writs of mandamus to compel trial courts "to proceed to trial and judgment in ... case[s] agreeable to the principles and usages of law"). *See generally* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 782 (Tex. 1967) (orig. proceeding) (noting that the statutes authorizing the appellate courts to compel entry of judgment were only applicable in cases involving a purely ministerial duty); Kleiber v. McManus, 66 Tex. 48, 50, 17 S.W. 249, 250 (1886) (orig. proceeding) (upholding as constitutional that portion of a statute authorizing the supreme court to issue mandamus to compel district courts to proceed to trial and judgment).

175. Bradley v. McCrabb, Dallam 504, 506 (Tex. 1843).

176. Terrell v. Greene, 88 Tex. 539, 31 S.W. 631 (1895) (orig. proceeding).

177. *Id.* at 541, 31 S.W. at 632.

178. *Id.*

party.[179] The court then stated by way of obiter dictum that, even assuming that the county attorney possessed the right to appeal, such appeal would not have afforded effective relief.[180] In explaining this dictum, the court noted that even if the county attorney was successful in having the case reversed following a trial in which he had been refused permission to appear, the case would have to be tried again.[181] Although not citing *Bradley v. McCrabb*'s dictum that mandamus was available for a tedious remedy, but clearly aware of its presence, the court described such remedy as "unreasonable, and unjust to the parties interested in the cause."[182] Finally, the court addressed the argument that the county attorney had another alleged complete remedy by way of suit against the county to recover the commissions for having tendered his services to the county although those services had been refused.[183] The court held that there was more than pecuniary compensation involved in the right of which the county attorney had been deprived—there was an intangible loss that accompanied the inability to discharge faithfully his public duty.[184] As the court concluded, "[t]he fact that Terrell might have recovered from the county commissions allowed him by law would not prevent him from demanding that he should be lawfully admitted to the discharge of the duties of the office to which the people of Tarrant county had elected him."[185] The court's conclusion was consistent with the common law and early American precedents that the remedy sufficient to prevent the issuance of mandamus relief had to put the applicant in the same legal position that he would have been in had mandamus been granted. In *Terrell*, mandamus issued to restore the county attorney to his office so that he was able to carry out the duty he

179. *Id.* at 544, 31 S.W. at 634.

180. *Id.*

181. *Terrell*, 88 Tex. at 544, 31 S.W. at 634.

182. *Id.*

183. Terrell v. Greene, 88 Tex. 539, 545, 31 S.W. 631, 634 (1895) (orig. proceeding). In essence, the defendants asserted that because the county attorney had tendered his service to the county to appear in the case, he was therefore under law entitled to the statutory fees for representing the county even though the court had refused to permit him to perform his duty. *Id.*. Thus, the defendants argued, the county attorney had an adequate remedy by way of action against the county to recover his fees. *Id.* The result of pursuing this remedy would be complete recovery of any pecuniary loss. *Id.*

184. *Id.*

185. *Terrell*, 88 Tex. at 545, 31 S.W. at 634.

had been elected to perform.[186] None of the other proposed remedies could have achieved this result.[187]

During this early formative period, the Texas Supreme Court stayed true to the basic fundamental principles of mandamus jurisprudence that had existed at common law. For example, even in cases where judgments entered by courts were clearly erroneous, the court refused to intervene by way of mandamus.[188] Explaining its position in these cases against an argument that appeal of a final judgment would be inadequate, the court asserted:

> If, as argued in behalf of the relators, that remedy [appeal or a writ of error] be not adequate, then no tribunal can, in any event, afford such remedy in such a case. If, with the entire record before it,—that is to say, the pleadings, the bills of exception, the statement of

186. *Id.* at 549, 31 S.W. at 636. After addressing the issue of the inadequacy of alternative remedies, the court discussed the issue of whether the district judge had discretion to prohibit the county attorney from exercising his legal right to represent the county in litigation. *Id.* at 545–48, 31 S.W. at 634–36. In concluding that this was a purely ministerial duty, the court artfully stated:

> [T]he general rule is that, where a person holds an uncontested title to an office, mandamus may be issued to put him in possession, or where he has an undisputed right to exercise the functions of an office, and, having actual and undisputed possession, he is illegally ousted or suspended from the performance of its duties, he may be restored to his rights as such officer by writ of mandamus.

Id. at 548, 31 S.W. at 635.

187. *Id.* at 545, 31 S.W. at 634.

188. *See, e.g.*, Matlock v. Smith, 96 Tex. 211, 214, 71 S.W. 956, 957 (1903) (orig. proceeding) (holding that no matter how "palpably erroneous" a judge's decision in refusing to dismiss a lawsuit, mandamus would not lie); Aycock v. Clark, 94 Tex. 375, 377, 60 S.W. 665, 666 (1901) (orig. proceeding) (holding that the determination of what judgment to enter upon a verdict involved the discretion of the trial judge, and that the judge's discretion could not be controlled by mandamus); Ewing v. Cohen, 63 Tex. 482, 483–84 (1885) (stating that the writ of mandamus could not be used to compel an inferior court to enter a different judgment). Consequently, although the supreme court clearly had the authority to direct a trial court to proceed to trial and judgment, it had no authority to direct the trial court how to try or decide a case before it. *See, e.g.*, *Ewing*, 63 Tex. at 483–84 (outlining the limitations of a writ of mandamus in terms of correcting errors). The opinions of the court during this period uniformly held that the specific judgment to render in a case was an exercise of discretion which was not subject to mandamus. *See, e.g.*, *Aycock*, 94 Tex. at 376, 60 S.W. at 666 (noting that the rendering of a judgment involved the exercise of discretion). It is rather obvious that any erroneous rulings on entering a judgment could be the subject of appeal in the future. English courts followed the same rule. *See* The King v. Justices of Middlesex, 106 Eng. Rep. 947, 947–48 (K.B. 1821) (stating that while King's Bench could issue mandamus to compel an inferior court to proceed to trial and judgment, the court was unaware of any cases that would permit it to direct that a particular judgment be entered).

> facts, the charges of the court, the verdict and judgment,—the appellate court cannot adequately correct an error in the judgment rendered in the trial court, it would seem that a law providing for an appeal is a mistake in jurisprudence.[189]

Furthermore, mandamus clearly did not lie in the area of correcting erroneous rulings or orders on motions or pleas that were mere incidents of the normal trial process. For example, in *Little v. Morris*,[190] the Texas Supreme Court refused to issue a writ of mandamus to compel a trial judge to reinstate a writ of sequestration and to annul an order for restoration of the possession of the premises pending a final resolution of the trespass to try title suit involving the land in question.[191] First, the court stated that the sequestration proceeding was not an independent cause of action, but was merely auxiliary and in aid of the trespass to try title suit.[192] Likewise, the court concluded that the trial court's order quashing the writ of sequestration and restoring the defendant to the property pending a final resolution of the underlying action was collateral and incidental to the main cause of action.[193] Finally, the court held that mandamus would not lie to correct a discretionary ruling of the trial court in the conduct of the proceedings before it.[194] As one can see, during

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189. *Aycock*, 94 Tex. at 377–78, 60 S.W. at 666 (observing that mandamus was not to function as an alternative to an appeal or writ of error). A later court put it similarly: "A writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is not the proper remedy by which to correct or reverse erroneous rulings of an inferior tribunal, whether interlocutory or final." Robertson v. Work, 114 Tex. 461, 467, 270 S.W. 1006, 1008 (1925) (orig. proceeding).

190. Little v. Morris, 10 Tex. 263 (1853).

191. *Id.* at 266–67.

192. *Id.* at 266.

193. *Id.* Justice Wheeler stated that the ruling was not subject to appeal because it was an interlocutory order over which the court had no jurisdiction. *Id.*

194. *Little*, 10 Tex. at 267 (stating that mandamus was not a form of appeal). The decision of the court was premised on the grounds that the trial court's ruling involved the exercise of discretion, and therefore the court had no authority to issue the writ. *See id.* (explaining that mandamus "does not lie ... in a matter involving the exercise of judgment"). Although the *Little* court cited no authority for this proposition, later opinions of the Texas Supreme Court have continued to hold that mandamus would not issue to control rulings made during the trial involving matters within the discretion of the trial judge. *See, e.g.*, Ewing v. Cohen, 63 Tex. 482, 485 (1885) (noting that the court was unaware of any rule of law that would permit a court to control the discretion of an inferior court on preliminary issues). In *Ewing*, Chief Justice Willie explained the philosophical basis for the court's refusal to interfere with preliminary rulings of trial courts in the following language:

this formative period of mandamus jurisprudence the court continued in the tradition of *Bradley v. McCrabb* while making no serious departures from the common law history discussed above.

> The appellee contends that the district court was merely compelling the performance of a preliminary act. Be it so, yet we know of no rule of law that places the judicial discretion of one court upon a preliminary question within the control of another, though it may be of superior jurisdiction. It is not the point at which the proceedings may have arrived that governs the right to the *mandamus*. It is the nature of the question upon which the court is called to pass, and the character of judgment it must render.

Id. at 484–85. While some cases dealing with the refusal of the supreme court to issue mandamus in the case of incidental trial court rulings have followed *Ewing* and based their decisions on the fact that the court was performing a mere discretionary duty which was not the subject of mandamus relief, the large majority of cases have asserted that there was an adequate remedy from the trial court's erroneous ruling by way of appeal following the final disposition of the matter. *See, e.g.*, Hammond v. Ashe, 103 Tex. 503, 504, 131 S.W. 539, 539 (1910) (orig. proceeding) (stating that generally appellate review, not mandamus, was the method to revise rulings made during the trial); Steele v. Goodrich, 87 Tex. 401, 403, 28 S.W. 939, 939–40 (1894) (orig. proceeding) (noting that mandamus would not lie when there was a remedy by way of appeal). The Texas Supreme Court has continued to assert that it will not micromanage trial courts by interfering with incidental rulings made during the trial of a case prior to final judgment. *See, e.g.*, Polaris Inv. Mgmt. Corp. v. Abascal, 892 S.W.2d 860, 861 (Tex. 1995) (orig. proceeding) (stating that the court has repeatedly refused to grant mandamus to correct incidental rulings of trial courts); Bell Helicopter Textron, Inc. v. Walker, 787 S.W.2d 954, 955 (Tex. 1990) (orig. proceeding) (per curiam) (noting that mandamus is not ordinarily used to review incidental trial rulings for which there is an adequate appellate remedy). The primary reason given for denial of mandamus relief in these more recent cases has been that the preliminary rulings were considered mere incidents in the normal trial process and that there would be an adequate remedy by appeal for correction of any such erroneous rulings upon entry of a final judgment. *See, e.g.*, *Bell Helicopter*, 787 S.W.2d at 955 (denying a petition for mandamus to correct an incidental ruling based on the availability of an adequate remedy through appeal). In *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. 1969) (orig. proceeding), Chief Justice Calvert stated that the court has uniformly held that it lacked jurisdiction to issue writs of mandamus to correct or supervise courts in various incidental rulings including:

> (1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante veredicto, (7) motions for new trial, and a myriad of interlocutory orders and judgments; and, as to each, it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled.

Id. at 954. He observed that the court's intervention in these incidental matters in situations where there was an adequate remedy by appeal would not only destroy the orderly trial proceedings, but would also make outmoded the fundamental principle of the American legal system—trial and appeal. *Id.*

C. *The Maturation of Mandamus Jurisprudence, 1910–1991*

Shortly after the beginning of the twentieth century, two modest shifts occurred in mandamus jurisprudence. One of these changes openly expanded mandamus authority beyond purely ministerial actions into the area of abuse of discretion that had first been mentioned in the *Arberry* decision.[195] The other shift, initiated by Chief Justice Cureton, opened the way for a more lenient procedure for the granting of mandamus relief that remained viable until finally questioned and limited by the decision in *Walker v. Packer*.[196] The first case of significance in these shifts in focus was *Wright v. Swayne*.[197] *Wright* involved a dispute over the title to land in Tarrant County.[198] The case was tried to juries on three separate occasions, and on each occasion the jury answered questions favorable to the defendants.[199] Upon each occasion, the plaintiffs filed a lengthy motion for new trial alleging errors by the trial judge and attacked the verdict on factual insufficiency grounds.[200] The trial court granted all three motions.[201] The order granting the third motion for new trial merely recited that the court was fully satisfied that it should be granted.[202] The defendants sought mandamus relief to compel the judge to execute the third judgment by naming commissioners to partition the

195. Arberry v. Beavers, 6 Tex. 457, 472 (1851) (implying that mandamus would issue to correct a gross abuse of discretion when there was no other adequate remedy at law).

196. Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (disapproving of previous cases to the extent that they relaxed the requirement of inadequacy of a legal remedy, and "hold[ing] that an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining [mandamus]").

197. Wright v. Swayne, 104 Tex. 440, 140 S.W. 221 (1911) (orig. proceeding). Justice Ramsey, rather presumptuously assuming the importance of the case for the future of mandamus jurisprudence, began his opinion with the following language:

> We have concluded that under the case as made the petitioners are not entitled to the writ asked. In view of the importance of the question, however, as well as out of respect to learned counsel, we have thought it proper to write our views at some length, and, in order to make the opinion of value as a precedent, as well as to make it easily understood, it is necessary to give some detailed statement of the case, the questions involved, and how they arose.

Id. at 441–42, 140 S.W. at 221.

198. *Id.* at 442, 140 S.W. at 221.

199. *Id.*

200. *Id.*

201. *Wright*, 104 Tex. at 442, 140 S.W. at 221.

202. *Id.* at 443, 140 S.W. at 222.

property on the basis that the judge was prohibited from granting the third motion by statute[203] and that his action in granting the motion was unauthorized and therefore void.[204] In response to the application filed in the supreme court, the trial judge stated that he had granted the third motion for new trial in part because of an error that he had committed during the trial of the case in admitting certain testimony that, in his opinion, materially influenced the jury against the plaintiff.[205] Therefore, the judge asserted, his action in granting the new trial was not in contravention to the statute prohibiting the granting of more than two new trials because he had made an error of law.[206] In analyzing the issue, the court noted that if the action of the court were void and of no effect:

> [I]t is not doubted or denied that petitioners would be entitled to the due execution of the judgment in their favor, and, if the court should wilfully refuse to execute its own judgments according to their true intent and effect, we would have the authority and it would be our duty to direct it to proceed to execute the judgment and sentence of the law.[207]

In effect, the court was stating that if the trial court entered an order that was void, the trial court would move outside its protected area of discretion and enter the area of pure ministerial

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203. *Id.* at 442–43, 140 S.W. at 221–22 (observing that article 1372 of the Revised Statutes provided that "not more than two new trials shall be granted to either party in the same cause, except when the jury have been guilty of some misconduct or have erred in matter of law"). Article 1372 was a codification of the original provision enacted in 1846 and was subsequently modified several times before being repealed in 1941. Act approved May 13, 1846, 1st Leg., R.S., § 109, 1846 Tex. Gen. Laws 363, 392, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1669, 1698 (Austin, Gammel Book Co. 1898), *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, *amended by* Act of Mar. 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66. The purpose of the 1939 act was to authorize the Supreme Court of Texas to promulgate rules of practice for the courts in the state. Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201. The amendment related to interim rulemaking authority of the supreme court for rules prior to the effective date of the act, September 1, 1941. Act of Mar. 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66. This particular restriction on the number of new trials that can be granted is presently found in Rule 326 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 326 (possessing the unambiguous title "Not More Than Two").

204. *Wright*, 104 Tex. at 442, 140 S.W. at 221.

205. *Id.* at 443, 140 S.W. at 222.

206. Wright v. Swayne, 104 Tex. 440, 443, 140 S.W. 221, 222 (1911) (orig. proceeding).

207. *Id.* at 444, 140 S.W. at 222.

action.[208] In this area, the trial court would have had only one way to act—to deny the motion.[209] In such a situation, mandamus would lie.[210] However, the supreme court found that the trial court's granting of a new trial was not in contravention of the statute, but involved a matter of discretion which was not subject to mandamus from the court.[211] The significance of this case for the future of mandamus jurisprudence involved the obiter dictum concerning the supreme court's opinion that if the trial court's order had been void, mandamus would have issued in this case.[212]

In 1919, shortly before Justice Cureton began to sit on the court, Justice Greenwood wrote an opinion outlining the parameters of what was meant by an adequate remedy. In *Gulf, Colorado & Santa Fe Railway Co. v. Muse*,[213] the court granted mandamus commanding an inferior court judge to enforce a final judgment that he had previously rendered.[214] In *Muse*, a verdict had been returned, but before a judgment was prepared and signed the trial court granted a new trial on the basis of a motion filed by the plaintiff.[215] The defendant filed a motion for rehearing and, at a later date, the trial court set aside its previous order granting a new

208. *See id.* (explaining that the Texas Supreme Court could issue mandamus to an inferior court only to compel performance of a ministerial act).

209. *See id.* (noting that mandamus would issue in the event that the trial court granted a void motion).

210. *Id.*

211. *Wright*, 104 Tex. at 443–47, 140 S.W. at 222–24. The basis for the court's holding was twofold. First, although the trial court's order was silent as to the basis for granting the motion for new trial, the supreme court asserted that the presumption should be that the court followed the law and would not have granted the motion improperly. *Id.* at 446–47, 140 S.W. at 224. Furthermore, the judge's response to the mandamus application satisfied the supreme court that the judge had not granted the motion for an impermissible reason. *Id.* at 447, 140 S.W. at 224.

212. *Id.* at 444, 140 S.W. at 222. The Texas Supreme Court has continued to hold that mandamus will issue in the case of the entry of a void order. For example, in *Buttery v. Betts*, 422 S.W.2d 149 (Tex. 1967) (orig. proceeding), the trial court granted a motion for a new trial after its plenary power had expired. *Id.* at 151. The supreme court conditionally issued a writ of mandamus holding that an appeal following a retrial on the merits would not be an adequate remedy because relators were entitled to a final judgment "without establishing that right after a needless retrial and an appeal." *Id.*; *see also In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998) (orig. proceeding) (holding that there is no adequate remedy by appeal when a court enters a new trial after its plenary power has expired).

213. Gulf, Colo. & Santa Fe Ry. Co. v. Muse, 109 Tex. 352, 207 S.W. 897 (1919) (orig. proceeding).

214. *Id.* at 362, 207 S.W. at 900.

215. *Id.* at 358, 207 S.W. at 897–98.

trial and finally entered a judgment on the original verdict.[216] The plaintiff then requested the case be set for trial.[217] When his request was denied, he sought mandamus relief from the court of appeals.[218] The court of appeals held that the order of the trial court setting aside the granting of the new trial was void and granted mandamus commanding the judge to proceed to trial in the cause.[219] The defendant then petitioned the supreme court for a writ of mandamus to compel the trial court to enforce his judgment and not to set the case for trial.[220] Although the supreme court held that the order of the trial court was not void,[221] the court still granted the mandamus.[222] The plaintiff argued that mandamus by the supreme court to enforce the reinstated judgment was not necessary since the defendant could appeal any adverse judgment following a retrial of the case.[223] The court rejected that argument forcefully:

> For it has been the law of Texas since Bradley v. McCrabb, Dallam, 507, that the writ of mandamus "will not only issue, in cases where the party having a specific legal right has no other legal operative remedy, but, where the other modes of redress are inadequate or tedious, the writ will be awarded." Not only would the remedy to defendant of appeal and writ of error, after another trial, be manifestly tedious, but such remedy would also be inadequate; for it is the very essence of defendant's right that it is entitled not to have to respond further to plaintiff's cause of action than by payment of his judgment.[224]

The court was clearly articulating that an adequate legal remedy was one that protected the very right that the party was legally

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216. *Id.* at 358–59, 207 S.W. at 898.

217. *Id.* at 359, 207 S.W. at 898.

218. *Muse*, 109 Tex. at 359, 207 S.W. at 898.

219. *Id.* at 359–60, 207 S.W. at 898. The court of appeals' opinion was not reported, but is briefly referred to in the court's opinion. *Id.* The court of appeals determined that the trial court's order vacating its previous order granting a new trial was void because it had been entered following the expiration of the trial court's jurisdiction over the case. *Id.*

220. *Id.*

221. Gulf, Colo. & Santa Fe Ry. Co. v. Muse, 109 Tex. 352, 361–62, 207 S.W. 897, 899 (1919) (orig. proceeding). The court was of the opinion that the order vacating the granting of the new trial was entered at a time when the trial court retained jurisdiction of the matter and therefore was not void. *Id.* at 361–62, 207 S.W. at 899.

222. *Id.* at 362, 207 S.W. at 899–900.

223. *Id.* at 362, 207 S.W. at 900.

224. *Id.*

entitled to have enforced, and that the party should not be required to undertake tedious methods to achieve its acknowledged legal right.[225] Accordingly, the defendant in *Muse* was entitled to have the judgment enforced.[226] The fact that upon a new trial he might win or lose, and in the case of losing could appeal, was not a relevant inquiry in determining whether to have the judgment rendered against him enforced.[227] Moreover, such remedies were not adequate under the *Muse* court's reasoning, for they did not give the party the effective relief of enforcement of his legal right.[228]

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225. *Muse*, 109 Tex. at 362, 207 S.W. at 900 (citing Bradley v. McCrabb, Dallam 504, 506 (Tex. 1843)).

226. *Id.* In a subsequent case involving the same railroad, the commission of appeals relied upon *Muse* in issuing a writ of mandamus to compel a trial court to enter a judgment on a verdict. Gulf, Colo. & Santa Fe Ry. Co. v. Canty, 115 Tex. 537, 543–45, 285 S.W. 296, 299–300 (1926) (orig. proceeding). In *Canty*, a verdict was returned finding a defendant "guiltless" on the only ground of negligence submitted by the court; however, the trial court granted a new trial claiming an irreconcilable conflict in the verdict. *Id.* at 545, 285 S.W. at 300. The commission of appeals held that there was no conflict, and therefore mandamus would issue to compel the judge to perform his ministerial function of entering a judgment on the verdict. *Id.* Citing *Muse*, the commission of appeals noted that the essence of relator's right could only be protected by the entry of a judgment in his favor. *Id.*; *see also* Cortimeglia v. Davis, 116 Tex. 412, 415–16, 292 S.W. 875, 876 (1927) (orig. proceeding) (holding that mandamus would issue to compel a trial court to enter a judgment on a verdict where the answers were not conflicting). These opinions rarely discussed the adequacy of the remedy of appeal for the simple reason that appeal was not available from the granting of a new trial because such order was an interlocutory order from which appeal was not authorized. In addition, the discretion of a trial court to grant a motion for new trial or to vacate verdicts was broad. *See, e.g.*, Anchor v. Martin, 116 Tex. 409, 411, 292 S.W. 877, 877 (1927) (orig. proceeding) (holding that the granting of a motion to set aside a verdict involved discretion and was not subject to mandamus). In *Johnson v. Court of Civil Appeals for the Seventh Supreme District of Texas*, 162 Tex. 613, 350 S.W.2d 330 (1961), the court stated that there had been only two instances where an appellate court of the state had issued a writ of mandamus to compel a trial court to set aside an order granting a motion for new trial:

> (1) When the trial court's order was wholly void as where it was not entered in the term in which the trial was had; and
> (2) Where the trial court has granted a new trial specifying in the written order the sole ground that the jury's answers to special issues were conflicting.

Id. at 615, 305 S.W.2d at 331; *see also* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding) (recognizing the two instances in which appellate courts in Texas had interfered with a trial court's granting of a new trial).

227. *See Muse*, 109 Tex. at 362, 207 S.W. at 900 (rejecting the argument advanced by plaintiff that a new trial and a possible subsequent appeal provided an adequate legal remedy).

228. *Id.* (expressing the defendant's right as the right "not to have to respond further to plaintiff's cause of action than by payment of his judgment").

Six years later, Chief Justice Cureton took his first opportunity to explain the parameters of what was meant by an adequate legal remedy. In *Yett v. Cook*,[229] the district court had, at the request of the plaintiff, entered a writ of mandamus compelling certain individuals in their official capacities to call an election "for the purpose of electing five councilmen, who [would] constitute the city council of the city of Austin."[230] On the same day that the judgment was entered in the mandamus proceeding, the plaintiff obtained a temporary injunction compelling obedience by the defendants to the mandamus.[231] The mandamus order was then duly appealed and properly superseded;[232] however, the injunction entered by the trial court had the effect of prohibiting the losing parties from exercising their rights to suspend the judgment through supersedeas bond pending appeal.[233] The losing parties then sought mandamus relief from the Texas Supreme Court to compel the trial court to stay the injunction pending a conclusion of their appeal.[234] In giving the opinion of the court, Chief Justice Cureton summarized the mandamus jurisprudence of Texas.[235] He first noted that mandamus relief was a method by which lower courts could be supervised by superior courts.[236] It was at this point that he quoted from a leading treatise of the day that outlined the general rules of mandamus jurisprudence as follows:

> While a writ of mandamus will not as a general rule issue to review an exercise of judicial discretion, it may be employed to compel an inferior tribunal to act or to exercise its discretion,

229. Yett v. Cook, 115 Tex. 175, 268 S.W. 715 (1925) (orig. proceeding).

230. *Id.* at 179, 268 S.W. at 716.

231. *Id.*

232. *Id.*

233. *Id.* at 189–90, 268 S.W. at 721 (stating that in its supervisory role the court has the power to compel a lower court to preserve the right of a party to appeal).

234. *Yett*, 115 Tex. at 178, 268 S.W. at 716.

235. *Id.* at 178–91, 268 S.W. at 716–21.

236. *Id.* at 185–87, 268 S.W. at 719 (citing examples from other states and leading American treatises on the use of the writ of mandamus to control the actions and judgments of lower courts). Chief Justice Cureton's reliance upon the authority of other states and leading American treatises was explained by his observation that the provisions relating to mandamus in the Texas Constitution and statutes were "but declaratory of and are to be construed in the light of the common law." *Id.* at 184, 268 S.W. at 718. The common law adopted in Texas was the "English common law as declared by the courts of the various states of the United States." S. Pac. Co. v. Porter, 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960).

> although the particular method of acting or the manner in which the discretion shall be exercised will not be controlled. But as a general rule it will not issue for this purpose where there is a remedy by appeal or other method of review. In some cases, however, mandamus may be employed to correct the errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right, and there is an absence of any other adequate remedy; *and it may also be employed to prevent an abuse of discretion, or an act outside of the exercise of discretion, or to correct an arbitrary action which does not amount to the exercise of discretion.*[237]

The chief justice also wrote that the writ could issue in cases where the other "modes of redress are inadequate or tedious."[238] He continued his discussion by listing the various situations where mandamus had been granted by the Texas Supreme Court during its long history.[239] His opinion for the court concluded that in this case, the court had the authority to issue mandamus because the relators had no effective remedy by appeal, as they were prevented by the injunction from the exercise of that remedy.[240] While the *Yett* decision was true to the existing Texas authorities, the dictum

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237. *Yett*, 115 Tex. at 185, 268 S.W. at 719 (emphasis added) (citing 26 CYCLOPEDIA OF LAW AND PROCEDURE 190 (William Mack ed., Am. Law Book Co. 1907)). However, at this time the court had not exercised its mandamus authority in situations of "abuse of discretion" or "arbitrary action." Earlier courts had by way of dictum implied that the court had such power, but as yet it had not been exercised. *See, e.g.*, Meyer v. Carolan, 9 Tex. 250, 255 (1852) (Wheeler, J., concurring) (opining that mandamus would issue in the case of a public officer committing a gross abuse of discretion when no other adequate remedy at law was available); Arberry v. Beavers, 6 Tex. 457, 472 (1851) (implying that in cases of gross abuse of discretion and no adequate remedy at law the court might issue a mandamus); *see also* Womack v. Berry, 156 Tex. 44, 51, 291 S.W.2d 677, 682–83 (1956) (orig. proceeding) (noting that as of 1956, there had been no cases where the writ had been issued by the court involving matters of discretion).

238. Yett v. Cook, 115 Tex. 175, 188, 268 S.W. 715, 720 (1925) (orig. proceeding) (citing Bradley v. McCrabb, Dallam 504, 507 (Tex. 1843)).

239. *Id.* at 186–88, 268 S.W. at 719–20. The opinion listed various cases in which mandamus had issued: to compel a court to proceed to trial and judgment; to enter a judgment on a valid verdict; to enforce a judgment which had not been properly superseded; to compel a judge to vacate a void order granting a new trial and to enforce the judgment; and to compel a court to perform a legal duty. *Id.* The opinion further noted that the supreme court possessed the authority to issue mandamus to vacate a district court's entry of a writ of mandamus where such was proper under the law. *Id.* at 189, 268 S.W. at 720–21.

240. *Id.* at 189–90, 268 S.W. at 721 (explaining that the court should exercise its discretion to issue the writ in this case to "prevent a failure of justice" (quoting 18 RULING CASE LAW *Mandamus* § 15 (William M. McKinney & Burdett A. Rich eds., 1917))).

concerning arbitrary action was only awaiting the right case for implementation into true precedent.

Having explained the state of mandamus jurisprudence in Texas, Chief Justice Cureton next undertook to expand the role of mandamus in supervising lower courts. *Cleveland v. Ward*[241] began as a simple suit filed in district court in Johnson County seeking "the cancellation of certain notes . . . [and] the deed of trust securing them," and to remove the cloud on the title to certain land.[242] This first suit was followed by a second suit filed by the defendants in district court in Dallas County seeking to recover on the very same notes and for foreclosure of the deed of trust.[243] What ensued thereafter was a tangle of various orders, injunctions, and competing applications for mandamus and prohibition in the Dallas and Fort Worth courts of appeal.[244] The immediate issue before the supreme court was the mandamus proceeding filed by the original plaintiffs in the Johnson County

241. Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063 (1926) (orig. proceeding), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding). While *Cleveland* is generally associated with its holding concerning the doctrine of dominant jurisdiction, the primary focus of this article will be on the mandamus aspect of the case. The court's holding in regard to the dominant jurisdiction aspect of the case is still the law. *See, e.g.*, *In re* SWEPI, L.P., 85 S.W.3d 800, 809 (Tex. 2002) (orig. proceeding) ("[M]andamus relief is appropriate when one court interferes with another court's [dominant] jurisdiction[over a case]."); Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding) (holding that when one court attempts to interfere with a prior filed action in another court, the supreme court is authorized to issue a mandamus to resolve the conflict of jurisdiction).

242. *Cleveland*, 116 Tex. at 8–9, 285 S.W. at 1066.

243. *Id.* at 9, 285 S.W. at 1066.

244. *Id.* at 8–16, 285 S.W. at 1066–69. The opinion of the court described the stalemate that existed as follows:

> The parties plaintiff in the Johnson county case cannot proceed in that case without violating an injunction issued by the district court of Dallas county; the judge cannot proceed without violating a writ of prohibition issued by the Court of Civil Appeals at Dallas, nor refuse to proceed without violating a mandamus issued by the Court of Civil Appeals at Fort Worth. The Dallas county district court cannot proceed to try that case, nor can the plaintiffs in the case proceed with it without violating an injunction of the district court of Johnson county; and the judge of the Dallas county district court cannot proceed without violating a writ of prohibition issued by the Fort Worth Court of Civil Appeals, nor refuse to proceed without violating a mandamus issued by the Court of Civil Appeals at Dallas. It is impossible for either of the trial courts or any litigant to do anything in the causes pending in the respective trial courts without being in danger of contempt, either of a trial court, of a Court of Civil Appeals, or both.

Id. at 15, 285 S.W. at 1069.

case to compel that district judge to proceed to trial.[245] The court began its discussion of the mandamus issue in the case by noting that it clearly had the authority to require a district judge to proceed to trial and judgment[246] subject to the "rule that mandamus does not *ordinarily* issue when an adequate remedy by appeal exists."[247] However, there was clearly no remedy from the judge's refusal to proceed to trial in Johnson County; the relators' ability to appeal from the order of the Dallas County district judge overruling relators' plea in abatement and injunction was "inadequate and not commensurate with the relief to which the relators here are entitled."[248] In explaining the type of relief that relators were entitled to, the court asserted that the remedy needed to provide "relief on the very subject-matter of the application, equally convenient, beneficial, and effective" as that of mandamus relief.[249] Then, to emphasize these obiter dicta, Justice Cureton cited extensively from an authoritative American treatise which he noted "correctly states the rule":

> In order that the existence of another remedy shall constitute a bar to relief by mandamus, such other remedy must not only be an adequate remedy in the general sense of the term, but it must be specific and appropriate to the circumstances of the particular case. It must be such a remedy as is calculated to afford relief upon the

245. *Id.* at 8, 285 S.W. at 1065.

246. *Cleveland*, 116 Tex. at 13, 285 S.W. at 1068 (citing Texas statutory as well as case law authority).

247. *Id.* at 14, 285 S.W. at 1068 (emphasis added).

248. *Id.* The court gave no explanation for this observation, although none was needed. Even if the relator had been successful on the various appeals, the initial trial court would have still been under writs of prohibition and mandamus not to proceed. Thus, the court concluded that mandamus should issue because the right of appeal was clearly inadequate. *Id.* As a practical matter, while the appellate court would have had jurisdiction to hear the appeal from the grant of the temporary injunction, it could not have heard the appeal concerning the plea in abatement until the final judgment in the case. *See* V.D. Anderson Co. v. Young, 128 Tex. 631, 638, 101 S.W.2d 798, 801 (1937) (orig. proceeding) (noting that the order on a plea in abatement is an interlocutory order not subject to appeal until entry of a final judgment in the case); McFarland v. Hammond, 106 Tex. 579, 580, 173 S.W. 645, 645 (1915) (recognizing the statutory authority to appeal from interlocutory orders granting temporary injunctions).

249. Cleveland v. Ward, 116 Tex. 1, 14, 285 S.W. 1063, 1068 (1926) (orig. proceeding), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding). Justice Cureton was clearly taking this opportunity to import the common law directly into this case, so that it might become precedent in the future. *See, e.g.*, The King v. Severn & Wye Ry. Co., 106 Eng. Rep. 501, 502 (K.B. 1819) (noting that the alternative specific and legal remedy had to be "equally convenient, beneficial, and effect[ive]").

> very subject of the controversy. For, if it is not adequate to afford the party aggrieved the particular right which the law accords him, mandamus will lie, notwithstanding the existence of such other remedy. . . .
>
> The remedy at law which will operate as a bar to mandamus must generally be such a remedy as will enforce a right or the performance of a duty. A remedy cannot be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended and actually compels a performance of the duty in question, and is not an adequate remedy within the meaning of the rule under consideration.[250]

In just a matter of lines, Chief Justice Cureton was able to incorporate the entire English common law "rule" concerning the nature of an adequate remedy—necessary to trump the issuance of mandamus relief—as understood in the United States into the jurisprudence of the State of Texas. What is of interest about the opinion is that none of this "new jurisprudence" (or, more correctly, incorporation of common law) was necessary for a resolution of the case, as the court had already held that an appeal was not an adequate remedy in this case.[251]

Notwithstanding the broad language in *Cleveland*, its obiter dicta were not used for several decades as a window for an expansion of mandamus authority.[252] However, prior to that

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250. *Cleveland*, 116 Tex. at 14–15, 285 S.W. at 1068 (quoting 2 THOMAS CARL SPELLING, A TREATISE ON EXTRAORDINARY RELIEF IN EQUITY AND AT LAW § 1375 (1893)).

251. *Id.* at 14, 285 S.W. at 1068 (noting the right to appeal from the two orders was "inadequate and not commensurate with the relief to which the relators here are entitled").

252. In fact, until *Crane v. Tunks*, 160 Tex. 182, 190, 328 S.W.2d 434, 439 (1959) (orig. proceeding), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding), no supreme court opinion had relied upon the more lenient test in *Cleveland*—that the other remedy had to be "equally convenient, beneficial, and effective as mandamus"—for the granting of mandamus relief. There was, however, one Texas Commission of Appeals decision whose opinion was adopted by the Texas Supreme Court that used this more lenient standard. *See* Way v. Coca Cola Bottling Co., 119 Tex. 419, 430, 29 S.W.2d 1067, 1072 (1930) (orig. proceeding) (noting that the *Cleveland* case was one of the outstanding opinions in Texas jurisprudence). During this thirty-plus year period of time, several mandamus cases came before the court. The court uniformly granted mandamus relief in those few cases where there was not an adequate or effective remedy by appeal. *See, e.g.*, City of Houston v. Adams, 154 Tex. 448, 456, 279 S.W.2d 308, 314 (1955) (orig. proceeding) (granting mandamus relief to compel a trial judge to set the amount of security in a condemnation case as required by statute); Stakes v. Rogers, 139 Tex. 650, 651–52, 165 S.W.2d 81, 82 (1942) (orig. proceeding) (granting mandamus relief to

time, the court did apply the dictum first announced in *Arberry*[253] and later in *Yett*[254] to expand mandamus jurisprudence to a new type of case. It had always been clear that in the proper case mandamus would apply when a court or official failed to perform a ministerial act,[255] but now the court began to apply it to situations referred to as abuses of discretion. While it was clearly understood that mandamus would issue to compel the exercise of discretion, this power was not viewed as including the power to compel the exercise of discretion one way or the other.[256]

Until 1956, in the case of *Womack v. Berry*,[257] the Texas Supreme Court had not issued a writ of mandamus to correct an

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compel a district judge to transfer a hearing to another county as required by law). In the same vein, the court uniformly denied mandamus relief when there was an effective remedy by way of appeal or other means. *See, e.g.*, Cobb v. Harrington, 144 Tex. 360, 367, 190 S.W.2d 709, 713 (1945) (denying mandamus relief in a case where a statute authorized the filing of suit to challenge certain tax payments); Manion v. Lockhart, 131 Tex. 175, 180, 114 S.W.2d 216, 219 (1938) (denying mandamus relief where the escheat statute provided for the filing of suit to recover escheated funds, and such remedy was complete and effective); Ben C. Jones & Co. v. Wheeler, 121 Tex. 128, 129–30, 45 S.W.2d 957, 958 (1932) (refusing mandamus when the relief sought could have been gained through an appeal of the trial court's judgment).

253. Arberry v. Beavers, 6 Tex. 457, 472 (1851) (implying that mandamus would issue to correct a gross abuse of discretion when there was no other adequate remedy at law).

254. Yett v. Cook, 115 Tex. 175, 185, 268 S.W. 715, 719 (1925) (orig. proceeding) (citing 26 CYCLOPEDIA OF LAW AND PROCEDURE 190 (William Mack ed., Am. Law Book Co. 1907)) (explaining that mandamus might issue in the case of an arbitrary action or an abuse of discretion).

255. *Arberry*, 6 Tex. at 464–65 (explaining that mandamus would issue to compel the performance of ministerial duties that left nothing to discretion); Comm'r of the Gen. Land Office v. Smith, 5 Tex. 471, 478 (1849) (stating that it was well settled that mandamus would not issue to a government official unless the duty to be performed was ministerial).

256. *See, e.g.*, *Yett*, 115 Tex. at 185, 268 S.W. at 719 (noting that mandamus would not lie to compel "the particular method of acting or the manner in which the discretion shall be exercised" (quoting 26 CYCLOPEDIA OF LAW AND PROCEDURE 190 (William Mack ed., Am. Law Book Co. 1907))); Aycock v. Clark, 94 Tex. 375, 376, 60 S.W. 665, 666 (1901) (orig. proceeding) (declaring that mandamus could compel a court to trial and judgment but could not dictate what judgment should be entered); *Arberry*, 6 Tex. at 472 (commenting that mandamus would not lie where an inferior tribunal has exercised its discretionary authority in rendering a decision). Although it was clear that mandamus would lie to compel ministerial duties and would not lie in those cases involving discretion, there was still the difficult task of determining whether a particular act or duty was ministerial or subject to discretion. *See Arberry*, 6 Tex. at 467 (defining an act or duty as ministerial if 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" (quoting *Comm'r of the Gen. Land Office*, 5 Tex. at 479)).

257. Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677 (1956) (orig. proceeding).

action of an official or court in the exercise of discretion.[258] In *Womack*, the relator filed suit claiming the right as the successor trustee to take possession of and manage the assets left in trust for three minors under a will.[259] The trust beneficiaries challenged the relator's right to possession of the assets.[260] One of the

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258. *Id.* at 51, 291 S.W. at 683. The court specifically stated that it found no Texas case in which a writ of mandamus had been issued to correct an act of discretion by a trial judge or official. *Id.* However, there had in fact been at least one earlier decision wherein a writ of mandamus was issued to compel a trial judge to modify a discovery order that was excessively broad and determined by the court to have been an abuse of discretion. S. Bag & Burlap Co. v. Boyd, 120 Tex. 418, 431, 38 S.W.2d 565, 570 (1931) (orig. proceeding). The *Womack* court noted that although the writ had never issued for this purpose, several cases had "recognize[d] the exception." *Womack*, 156 Tex. at 51, 291 S.W.2d at 683 (failing to allude to the fact that *Yett* had also recognized the exception). The various cases cited by the court stated the proposition in a complete form as follows: "A writ of mandamus will lie to correct the action of a trial judge where he acts in abuse of his discretion, or in violation of his clear duty under the law, and there is *no adequate remedy by appeal.*" City of Houston v. Adams, 154 Tex. 448, 456–57, 279 S.W.2d 308, 314 (1955) (orig. proceeding) (emphasis added) (quoting Stakes v. Rogers, 139 Tex. 650, 651–52, 165 S.W.2d 81, 82 (1942) (orig. proceeding)); *see also Arberry*, 6 Tex. at 472 (stating by way of dictum that mandamus might issue in a case of gross abuse of discretion "where there was no other adequate remedy provided by law"). It appears clear from these earlier cases that an abuse of discretion occurred when the facts and circumstances clearly established a legal right of the party to the performance of the duty by the court or the official, such that all discretion vanished and the performance became ministerial. *See., e.g.*, Terrell v. Greene, 88 Tex. 539, 547, 31 S.W. 631, 635 (1895) (orig. proceeding) (stating that if an official misapplied the law depriving a party "of an unquestioned legal right" and no other adequate remedy existed, then mandamus would issue). Thus, what starts off as an exercise of discretion can become a clear duty to act when the facts and circumstances come into play. *See id.* (describing the circumstances under which mandamus will issue to correct an abuse of discretion). Much later, the court in *Johnson v. Fourth Court of Appeals* put it in these terms:

> As we wrote in *Jones v. Strayhorn*: "When it is once decided that a trial judge exercising a 'discretionary' authority has but one course to follow and one way to decide then the discretionary power is effectually destroyed and the rule which purports to grant such power is effectively repealed."
>
> In order to find an abuse of discretion, the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter.

Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917–18 (Tex. 1985) (orig. proceeding) (quoting Jones v. Strayhorn, 159 Tex. 421, 428, 321 S.W.2d 290, 295 (1959)) (citation omitted). For a discussion on the development of the use of the writ of mandamus to supervise discretionary decisions by trial courts see David W. Holman & Byron C. Keeling, *Entering the Thicket? Mandamus Review of Texas District Court Witness Disclosure Orders*, 23 ST. MARY'S L.J. 365, 389–94 (1991). Holman and Keeling note that the *Womack* court's formulation of an abuse of discretion standard "signal[ed] a significant expansion in the availability of mandamus review." *Id.* at 393.

259. *Womack*, 156 Tex. at 46–49, 291 S.W.2d at 680–81.

260. *Id.* at 48–49, 291 S.W.2d at 681. Under the terms of the testamentary trust, the

beneficiaries, having recently volunteered to serve in the military, moved to stay the proceedings under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 until he had completed four years of service.[261] The relator responded, requesting that the stay be denied, or alternatively that the court order a separate trial on the claims of the beneficiary seeking the stay, and stay only those proceedings.[262] The trial court granted the stay as to all proceedings and denied the relator's motion for a separate trial.[263] Reviewing the facts and circumstances of the case,[264] the supreme court determined that the relator was entitled to the separate trial and that the trial court had a duty to order the separate trial, as there was no room for discretion in this matter.[265] In the words of the supreme court, the trial court's

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three beneficiaries would receive their portion of the trust assets when they reached the age of twenty-one. *Id.* at 46–47, 291 S.W.2d at 679. The oldest of the beneficiaries turned twenty-one the day the suit was filed. *Id.* at 46, 291 S.W.2d at 680.

261. *Id.* at 45, 48, 291 S.W.2d at 679, 681. The Soldiers' and Sailors' Civil Relief Act of 1940 provided that servicemen could under certain circumstances obtain a stay of litigation in which they were a party. Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, § 201, 54 Stat. 1178, 1181 (current version at 50 U.S.C. app. § 522 (Supp. IV 2004)). The beneficiary had filed a cross action against some of the other defendants seeking the recovery of certain property and damages from the relator. *Womack*, 156 Tex. at 47–48, 291 S.W.2d at 680–81.

262. Womack v. Berry, 156 Tex. 44, 49, 291 S.W.2d 677, 681 (1956) (orig. proceeding). Following the filing of the application for stay, the relator dismissed any claims he had against the beneficiary who had filed for the stay. *Id.* at 48, 291 S.W.2d at 681. However, that dismissal did not affect the beneficiary's claims against the relator. *See* TEX. R. CIV. P. 162 (stating that the nonsuit shall not prejudice an adverse party's claims against the party taking the nonsuit).

263. *Womack*, 156 Tex. at 49, 291 S.W.2d at 681. Relator requested a writ of mandamus from the court of appeals, but the court denied the application in an unpublished opinion. *Id.*

264. *Id.* at 45–52, 291 S.W.2d at 679–83. Based on the court's discussion, the most significant facts were evidently that the relator was not seeking any affirmative relief from the beneficiary, the beneficiary was not disputing the relator's right to be trustee, and none of the claims or issues of the beneficiary would be compromised or determined in the separate trial of the relator's action. *See id.* at 51–52, 291 S.W.2d at 683 (examining those facts in considering whether to grant mandamus).

265. *Id.* at 51, 291 S.W.2d at 683. The court put it in these words:

> When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial.

Womack, 156 Tex. at 51, 291 S.W.2d at 683. This rule concerning the ministerial duty to grant separate trials in certain situations remains the rule today. *See, e.g.*, *In re* Ethyl

refusal to grant a separate trial constituted "a clear abuse of discretion" and a "violation of a plain legal duty."[266] As if in passing, the court then noted that the wrong to the relator could not be remedied later by appeal.[267]

Womack clearly established the possibility of a new area of mandamus relief in situations where a trial court committed an abuse of discretion.[268] But consistent with historical precedent, mandamus would issue in such a case only if the remedy by appeal was inadequate.[269] The question of when an appeal was inadequate was left to later cases to explain. The *Womack* court clearly viewed the right and duty of the relator to administer the property left to the minors as a substantial right.[270] It was implicit in *Womack* that, absent mandamus relief, the relator's right would be lost.[271]

Shortly after *Womack*, in *Iley v. Hughes*,[272] the court—citing *Womack*—explained that mandamus "[i]nterference is justified only when parties stand to lose their substantial rights."[273] In *Iley*,

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Corp., 975 S.W.2d 606, 610 (Tex. 1998) (quoting *Womack*, 156 Tex. at 51, S.W.2d at 683, for the proposition that in certain instances a trial court possesses no discretion to deny a motion for separate trials).

266. *Womack*, 156 Tex. at 51, 291 S.W.2d at 683.

267. Womack v. Berry, 156 Tex. 44, 51, 291 S.W.2d 677, 683 (1956) (orig. proceeding). The court later explained that because the stay was for the four-year period of military service of the beneficiary, by the time the stay was lifted and the case tried, the two remaining minor beneficiaries would have reached majority and consequently the relator would be denied "a judicial determination of his right and duty to administer the property left in trust for the minors." *Id.* at 52, 291 S.W.2d at 683. The dissenting opinion, authored by Justice Griffin and joined by Justice Garwood, asserted that the action of the trial judge fell within the trial court's area of discretion, and thus mandamus relief should not have been granted. *Id.* at 54–55, 291 S.W.2d at 685 (Griffin, J., dissenting). However, the dissent was also of the opinion that if the action of the trial judge had involved fraud or was purely arbitrary or without reason, then the court would have had the authority to grant mandamus relief. *Id.* at 55, 291 S.W.2d at 685 (citing King v. Guerra, 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, writ ref'd)).

268. *See id.* at 51, 291 S.W.2d at 683 (majority opinion) (stating that mandamus will issue to remedy a clear abuse of discretion).

269. *See Womack*, 156 Tex. at 51, 291 S.W.2d at 683 (reasoning that mandamus will issue if it appears that injustice would result which cannot be remedied on appeal).

270. *See id.* at 52, 291 S.W.2d at 683 (noting that the relator's right to a judicial determination on the administration of the trust property would be lost without a separate trial).

271. *See id.* at 51, 291 S.W.2d at 683 (stating that mandamus relief will issue if injustice resulting from the court's abuse of discretion cannot be remedied on appeal).

272. Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958) (orig. proceeding).

273. *Id.* at 368, 311 S.W.2d at 652.

following a trial the jury returned an incomplete verdict by failing to answer three of the damage questions.[274] The defendant moved for a mistrial, but instead the trial court entered an interlocutory order on liability against the defendant and set a separate trial on damages.[275] The relator sought mandamus relief to compel the trial court to set aside the order for separate trial and to declare a mistrial in the underlying suit.[276] The supreme court held that the trial court had no authority under Rule 174(b) of the Texas Rules of Civil Procedure to order a separate trial of liability and damages issues in a personal injury case.[277] Furthermore, the court assumed under the facts of the case that since the jury verdict was incomplete in that the damages issues were left unanswered, the entry of a mistrial was a mere ministerial act.[278] However, the court noted that an appeal of the matter upon the conclusion of a separate trial and entry of a final judgment would be a "plain, adequate and complete remedy,"[279]

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274. *Id.* at 363–64, 311 S.W.2d at 649.

275. *Id.* at 363, 311 S.W.2d at 649.

276. *Id.* at 364, 311 S.W.2d at 649.

277. *Iley*, 158 Tex. at 366, 311 S.W.2d at 651. This is still the rule in Texas with at least one exception. *See* TEX. R. CIV. P. 174(b) (containing the same language as quoted and analyzed by the *Iley* court). The exception, as adopted by the court in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), permits bifurcated trials in the case of punitive damages. *Id.* at 30.

278. *Iley*, 158 Tex. at 367, 311 S.W.2d at 652. In discussing the issue, the court noted that it had found no case in which a writ of mandamus had issued to compel a court to order a mistrial after a jury had returned an incomplete verdict. *Id.* Of course, this was because the alternative to a mistrial would have been the entry of a judgment on the verdict, which would have to be corrected on appeal if erroneous. *Id.* The potential problem in *Iley* was that the entry of the final judgment would have to wait until after the trial of the damages issues. *Id.*

279. Iley v. Hughes, 158 Tex. 362, 367–68, 311 S.W.2d 648, 652 (1958) (orig. proceeding). The dissent, authored by Justice Smith, disagreed with the majority's conclusion that the "relator ha[d] an adequate remedy by appeal." *Id.* at 368–70, 311 S.W.2d at 652–54 (Smith, J., dissenting). His position was that the supreme court's constitutional authority to issue mandamus was independent of any analysis of whether there was a remedy by way of appeal. *Id.* at 370, 311 S.W.2d at 653–54 (stating that once the majority determined that the trial court lacked the authority to issue the severance, the "question of adequate remedy by appeal becomes immaterial"). Justice Smith based his determination in large part upon his misunderstanding of the *Womack* case. *See id.* at 369–70, 311 S.W.2d at 653 (interpreting *Womack* as an abandonment of the requirement of an inadequate legal remedy). He was of the opinion that *Womack* held that once the court determined that there had been an abuse of discretion by the trial court, mandamus relief would follow without a consideration of the availability of an appeal. *Id.* However, the *Womack* case clearly stated that the inadequacy of a legal remedy was one of the elements that made an action "subject to control by mandamus." Womack v. Berry, 156

even if the procedure involved some delay and additional costs.[280] The reason for this holding was simply that the relator's right would not be lost through the delay and trial of the damages issues.[281] Upon appeal, the case would be reversed because of the trial court's failure to grant a mistrial, thus the relator would be in the same position as if the mandamus had been granted—a retrial of the case.[282] Therefore, the remedy by appeal was adequate

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Tex. 44, 51, 291 S.W.2d 677, 683 (1956) (orig. proceeding).

Prior to the *Walker* decision, though, the court did occasionally become frustrated with a particular trial court's abuse of discretion and exercised its mandamus authority even in a case where there was an adequate remedy at law. *See, e.g.*, Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (orig. proceeding) (implying that the adequacy of a legal remedy was not an issue once an abuse of discretion was found). In these cases, the court sometimes asserted that because the interlocutory ruling by the trial court was not immediately appealable, mandamus would be available if the trial court abused its discretion. *See, e.g.*, Wallace v. Briggs, 162 Tex. 485, 491–92, 348 S.W.2d 523, 527 (1961) (orig. proceeding) (holding that the trial court's interlocutory order requiring a husband to pay the wife's attorney's fees during a divorce and before a final order was a clear abuse of discretion and mandamus was available). However, accepting this argument would mean that all interlocutory orders of a trial court prior to the final judgment would, under proper circumstances, become the subject of mandamus relief. *See Iley*, 158 Tex. at 368–70, 311 S.W.2d at 652–54 (asserting that mandamus should issue once a petitioner makes a mere showing of clear abuse of discretion). Likewise, the dissenting opinion of Justice Smith would clearly be troublesome if it had ever become the law in the state.

280. *Iley*, 158 Tex. at 368, 311 S.W.2d at 652 (majority opinion). The court put it in these words:

> That procedure [appeal following entry of a final judgment] will entail some delay and additional costs in correcting the error by appeal, but that there may be some delay in getting questions decided through the appellate process, or that court costs may thereby be increased, will not justify intervention by appellate courts through the extraordinary writ of mandamus.

Id. Since the *Iley* case, the court has continued to note that the mere costs and delay in pursuing an appeal do not render the appeal inadequate. *See, e.g.*, *In re* Kan. City S. Indus., Inc., 139 S.W.3d 669, 670 (Tex. 2004) (orig. proceeding) (noting that the court has repeatedly held that added cost or delay of an appeal does not render it an inadequate remedy). The court in *In re Kansas City* stated:

> KCSI argues that its remedy by appeal is inadequate because the trial court has improperly deprived it of the "valuable use" of its own money [still in the registry of the court pending resolution of an appeal]. That is not the permanent loss of substantial rights; it is really only a complaint that the normal appellate remedy is too slow. As we have repeatedly held, the cost or delay incident to pursuing an appeal does not make the remedy inadequate.

Id.; *see also* Bell Helicopter Textron, Inc. v. Walker, 787 S.W.2d 954, 955 (Tex. 1990) (orig. proceeding) (per curiam) ("Generally, the cost and delay of pursuing an appeal will not, in themselves, render an appeal an inadequate alternative to mandamus review.").

281. *Iley*, 158 Tex. at 368, 311 S.W.2d at 652.

282. *See, e.g.*, Powers v. Standard Accident Ins. Co., 144 Tex. 415, 418–19, 191 S.W.2d

because the relator would not lose any substantial rights through that procedure.[283] This holding is clearly consistent with traditional mandamus jurisprudence in that the remedy by appeal would achieve the very same thing as mandamus, albeit with a time delay and an added expense. The remedy by appeal was plainly an adequate, specific legal remedy.

The loosening of standards for the issuance of mandamus took root and developed into a perceived full-blown problem in the area of pre-trial discovery. It was there that the obiter dicta of the *Cleveland* opinion took firm hold in Texas mandamus jurisprudence.[284] The first case in the long line of decisions perceived as relaxing the standard for mandamus relief was *Crane v. Tunks*.[285] In *Crane*, the plaintiff filed suit to recover title to land.[286] During the course of the litigation, the plaintiff filed an application for a bill of discovery asking that the defendant produce certain books and records for examination.[287] Following a

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7, 9 (1945) (holding that when material issues in the charge are not answered, the verdict is incomplete and a mistrial should be granted if properly and timely requested).

283. *Iley*, 158 Tex. at 367–68, 311 S.W.2d at 652.

284. Cleveland v. Ward, 116 Tex. 1, 14, 285 S.W. 1063, 1068 (1926) (orig. proceeding) (noting that the available remedy to trump the issuance of mandamus relief had to be as "equally convenient, beneficial, and effective" as that of mandamus relief), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding).

285. Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959) (orig. proceeding), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding).

286. *Id.* at 184, 328 S.W.2d at 435–36. The plaintiff's pleadings were in the alternative. *Id.* at 185, 328 S.W.2d at 436. He alleged that the land in question had been conveyed under duress, or in the alternative, pled that the deed conveying the land was in fact a mortgage to secure a debt owed by the plaintiff to the defendant. *Id.* at 184–85, 328 S.W.2d at 436.

287. *Id.* at 185, 328 S.W.2d at 436. From adoption in 1940 until the time of its repeal, Rule 737 stated in part that the trial court was to grant discovery "in accordance with the usages of courts of equity." TEX. R. CIV. P. 737, 3 TEX. B.J. 639 (1940, repealed 1999). In general under the Texas cases, in order to be the subject of a bill of discovery, the facts or documents requested had to be material to the case. The court described a bill of discovery as follows:

> [A] bill of discovery is usually understood as a bill for the discovery of facts resting in the knowledge of an opposing party, or of deeds, writings, records, or other things in his custody or power, necessary for the proper prosecution or defense of a cause of action then pending, or about to be brought, seeking no relief in consequence of the discovery as regards the merits of the controversy, but seeking the discovery in aid of some other proceeding wherein the discovery is necessary.

Equitable Trust Co. v. Jackson, 129 Tex. 2, 4, 101 S.W.2d 552, 553 (1937). The court in *Equitable Trust* discussed the statutory predecessor to Rule 737, article 2002 of the Revised Statutes of 1925. *Id.* at 3, 101 S.W.2d at 552.

hearing on the relevancy and materiality of the requested documents, the trial court denied the bill in certain particulars, but ordered production of a tax return for the year 1950.[288] The court ordered this production without inspecting the requested document.[289] The defendant refused to produce the document, and the defendant's lawyer was held in contempt; however, the contempt order was stayed pending the defendant's attempt to test the order through a writ of mandamus to the Texas Supreme Court.[290]

Upon examination of the issue, the supreme court conditionally issued a writ of mandamus to prevent the inspection of the defendant's tax return until the judge had made an initial determination of relevancy and materiality.[291] In reaching its decision, the court rejected the argument that the relator had an adequate remedy by way of appeal.[292] Relying upon the *Cleveland* case, the court stated that an appeal following the production and the entry of a final judgment in the case did not provide effective relief.[293] Specifically, the court concluded that once the return was produced, the harm to the defendant's right of privacy would have occurred and appeal would be moot.[294] The subsequent appeal could not effectively remedy the problem as the harm could not be undone.[295] Having satisfied one of the requirements for the issuance of mandamus, the court then turned

288. *Crane*, 160 Tex. at 187–88, 328 S.W.2d at 437–38.

289. *Id.* at 188, 328 S.W.2d at 438.

290. *Id.* at 187–88, 328 S.W.2d at 438.

291. *Id.* at 192, 328 S.W.2d at 441.

292. *Id.* at 189, 328 S.W.2d at 439.

293. Crane v. Tunks, 160 Tex. 182, 189–90, 328 S.W.2d 434, 439 (1959) (orig. proceeding) (noting that an appeal would be ineffective to give the relief to which the relator was entitled), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding).

294. *Id.* at 189, 328 S.W.2d at 439. The court indicated that even though the tax return was not privileged, the party's right to privacy would be compromised by its production. *Id.* at 191–92, 328 S.W.2d at 440. Furthermore, once the tax return was produced, there would be no way to remedy the damage. *Id.* at 189, 328 S.W.2d at 439. At the time of *Crane*, discovery orders were considered interlocutory, and no appeal could be taken from a trial court's grant or denial of such order until final judgment in the underlying case. *See* Tex. Co. v. Honaker, 282 S.W. 879, 882 (Tex. Civ. App.—Ft. Worth 1926, writ ref'd) (stating that no appeals lie from interlocutory orders).

295. *See Crane*, 160 Tex. at 190, 328 S.W.2d at 439 (quoting the "equally convenient, beneficial, and effective" language from *Cleveland*, and concluding that the appeal in this case would have been "ineffective to afford the relief sought").

its attention to a determination of whether there had been a violation of a legal right.[296] Realizing that the action of the trial judge was not one that could be characterized as ministerial, the court, relying in part on *Womack*, turned to a consideration of whether the trial court had committed a clear abuse of discretion in ordering the production of the tax return.[297] The court concluded that the trial court had a duty to examine the document and to compel production of only those portions that were material and relevant to the case.[298] Furthermore, the trial judge's failure to comply with this duty amounted to an "abuse of discretion," and the court conditionally issued mandamus to compel the trial judge to perform his duty.[299]

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296. *Id.* at 191–92, 328 S.W.2d at 440–41.

297. *Id.* at 192, 328 S.W.2d at 440–41.

298. *Id.*

299. Crane v. Tunks, 160 Tex. 182, 192, 328 S.W.2d 434, 440–41 (1959) (orig. proceeding), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding). First, the court cited *Womack* as authority for proposition that "[mandamus] may issue in a proper case to correct a clear abuse of discretion." *Id.* at 192, 328 S.W.2d at 440 (citing Womack v. Berry, 156 Tex. 44, 51, 291 S.W.2d 677, 682 (1956) (orig. proceeding)). The court then held that the trial judge in this case "abused his discretion." *Id.* at 192, 328 S.W.2d at 440–41. Whether the *Crane* court was attempting to draw a distinction between the two phrases was unclear; however, from later cases it seems evident that the court used the phrase "abuse of discretion" interchangeably with the *Womack* court's "clear abuse of discretion." *See, e.g.*, Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) ("Since the 1950's . . . this Court has used the writ [of mandamus] to correct a 'clear abuse of discretion' committed by the trial court."); Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding) ("Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law."); State v. Sewell, 487 S.W.2d 716, 718 (Tex. 1972) (orig. proceeding) (equating clear abuse of discretion with gross abuse of discretion). Chief Justice Phillips explained the concept of abuse of discretion as follows:

> A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." This standard, however, has different applications in different circumstances.
>
> With respect to resolution of factual issues or matters committed to the trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable.
>
> On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no "discretion" in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.

The opinion in *Crane* was clearly congruous with the traditional mandamus jurisprudence of the day. Although *Crane* involved an incidental trial court ruling during the trial process, which generally did not justify interference by way of mandamus, the remedy by appeal was plainly inadequate, since whatever right the relator possessed in the privacy of the tax return would forever be lost once the return was produced for copying and review by the opposing party.[300] Hence, the opinion does not support an inference that the reference to the "equally convenient, beneficial, and effective" language from *Cleveland* was meant to dispense with or loosen the traditional mandamus requirement that the availability of an adequate remedy by appeal would defeat mandamus relief. Nonetheless, following the *Crane* case, a number of Texas Supreme Court cases determined that the trial court had committed a clear abuse of discretion and conditionally issued a writ of mandamus without any mention of the availability or adequacy of the remedy by way of appeal. While one could arguably view some of these cases as dispensing with or loosening the necessity of determining the second prong of mandamus relief,[301] in truth the opinions either reflected an awareness that no effective remedy existed in the particular case or constituted an oversight by the court.[302] In fact, there were two major areas

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Walker, 827 S.W.2d at 839–40 (citations omitted).

Justice Smith dissented in *Crane*, asserting that the trial court's action had not risen to the level of fraud or caprice nor was its decision "purely arbitrary . . . and without reason." *Crane*, 160 Tex. at 197, 328 S.W.2d at 444 (Smith, J., dissenting) (arguing that *Crane* was a dangerous precedent that would be used to "constantly attempt to halt" trials by bringing mandamus to correct discretionary actions by trial courts). Justice Smith was alluding to the stricter standard for abuse of discretion which was apparently abandoned in *Womack*. *See, e.g.*, King v. Guerra, 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, writ ref'd) (stating that a gross abuse of discretion is characterized by "fraud, caprice, or by a purely arbitrary decision").

300. *Crane*, 160 Tex. at 189, 328 S.W.2d at 439 (majority opinion).

301. *See, e.g.*, *Sewell*, 487 S.W.2d at 718 (implying that a gross abuse of discretion was sufficient for the issuance of a mandamus).

302. *See, e.g.*, Stewart v. McCain, 575 S.W.2d 509, 512 (Tex. 1978) (orig. proceeding) (granting mandamus conditionally to compel trial court to withdraw discovery order relating to documents that were absolutely privileged under state banking laws); Allen v. Humphreys, 559 S.W.2d 798, 804 (Tex. 1977) (orig. proceeding) (granting mandamus conditionally to compel trial court to vacate order denying discovery of matters necessary to show causation); Barker v. Dunham, 551 S.W.2d 41, 46 (Tex. 1977) (orig. proceeding) (granting mandamus conditionally to compel trial court to command witness to answer certain deposition questions); Houdaille Indus., Inc. v. Cunningham, 502 S.W.2d 544, 550 (Tex. 1973) (orig. proceeding) (granting mandamus conditionally to direct trial court to

where the court consistently exercised the authority to issue mandamus conditionally with little or no discussion of the availability of an adequate remedy by way of appeal or otherwise.

The first line of cases dealt with a trial court's unauthorized interference with administrative and regulatory enforcement of statutes designed for the public good. For example, in *State v. Ferguson*,[303] the Public Safety Commission sought a mandamus to compel a trial court to vacate a temporary injunction that interfered with the enforcement of certain sections of the penal code authorizing state officials to halt, detain, or weigh, without search or arrest warrants, trucks that might be violating statutory weight restrictions.[304] The Texas Supreme Court held that the trial court's order was void[305] and conditionally issued the mandamus to compel the trial judge to vacate that portion of the temporary injunction enjoining license and weight inspectors from performing their statutory duties.[306] The court granted

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vacate order compelling discovery of privileged information). It is unclear in these cases whether the failure to mention or discuss the issue of the inadequacy of the legal remedy was merely an oversight, or whether the court was actually dispensing with the requirement. However, in all but *Stewart*, the court cited *Crane* in support of the issuance of the mandamus, and *Crane* had held that the remedy by appeal was ineffective. *Crane*, 160 Tex. at 190, 328 S.W.2d at 439. *But cf. Walker*, 827 S.W.2d at 842 ("The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today."). The *Walker* court admitted that in both *Allen* and *Barker* the court conditionally granted mandamus relief without discussing the availability of an alternative remedy by appeal. *Id.* at 840–42 (disapproving those cases "to the extent they might be read as abolishing or relaxing this rule").

303. State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939) (orig. proceeding).

304. *Id.* at 62, 64–65, 125 S.W.2d at 273, 275.

305. *Id.* at 66, 125 S.W.2d at 276. Specifically, the court stated:

> As we view the law, a judge has no more power to direct and supervise an officer of the executive department of government in the manner and method of discharging his official duties than would a sheriff or other executive officer have to direct a judge in the manner and method of discharging his official duties. Were a sheriff to serve notice upon a judge to speed up the trial of his cases so that litigants might not be damaged by delay or should direct the judge to enter no judgment except one which he had good reason to believe was correct, no one would champion his right to do so. Our holding is that a judge has no more power to direct and supervise the manner and method employed by an officer of the executive branch in the discharge of his official duties than has a sheriff or other executive officer to direct and supervise a judge in the manner and method of discharging his official duties.

Id. at 68, 125 S.W.2d at 276.

306. *Id.* at 68, 125 S.W.2d at 277. The court cited the *Yett* case for the proposition that mandamus would lie to compel a trial court to vacate a void order. *Ferguson*, 133 Tex. at 63, 125 S.W.2d at 274 (citing Yett v. Cook, 115 Tex. 175, 268 S.W. 715 (1925) (orig.

mandamus relief in spite of the fact that the State of Texas had already appealed the trial court's order.[307] In discussing the question of the adequacy of the legal remedy, that court broke new ground in the following language:

> It is made to appear that relief is being sought in the Court of Civil Appeals by appeal in one of these causes. We do not think it necessary to consider whether these orders are temporary injunctions, as distinguished from restraining orders, or whether full relief could be granted by the Court of Civil Appeals, for this court's jurisdiction is not dependent upon a determination of those questions. This court has announced the rule that, owing to the great volume of business coming before it, it will not entertain jurisdiction of an original mandamus proceeding in a case where like jurisdiction is conferred upon a Court of Civil Appeals, unless it is made to appear that relief was first sought in that court. *That rule was announced to aid the court in the dispatch of its business and will not be followed in a case affecting the state as a whole and in which the orderly processes of government have been disturbed.*[308]

In effect, *Ferguson* held that when a trial court, without any authority, interfered with the established governmental procedures dealing with a particular issue, its actions would be void and mandamus would conditionally issue.[309] While the language used in the opinion stated clearly that the court's jurisdiction and authority to grant mandamus relief were not dependent upon whether full relief could be granted on appeal, the court's explanation of that "rule" dealt with the narrower issue of seeking a writ of mandamus in cases of concurrent jurisdiction.[310] The court's policy in such cases was that the applicant should first seek relief in the court of appeals prior to filing an application in the Texas Supreme Court.[311] Thus, notwithstanding the rather broad language, the *Ferguson* case has been chiefly cited and relied on

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proceeding)).

307. *Id.* at 63–64, 125 S.W.2d at 274.

308. *Id.* (emphasis added) (citation omitted).

309. *See id.* at 66–69, 125 S.W.2d at 276–77 (granting conditional mandamus to compel the trial court to permit inspectors to carry out their statutory obligations).

310. *Id.* at 63–64, 125 S.W.2d at 274 (analyzing whether a concurrent appeal affected the supreme court's jurisdiction to hear a mandamus petition).

311. State v. Ferguson, 133 Tex. 60, 64, 125 S.W.2d 272, 274 (1939) (orig. proceeding). Today the rule has been formalized. TEX. R. APP. P. 52.3(e) (stating that, absent compelling circumstances, in cases of concurrent jurisdiction application should first be made in the court of appeals).

with regard to questions of validity of a trial court's interference with the enforcement of penal statutes,[312] lawyer discipline,[313] or

312. *See, e.g.*, Crouch v. Craik, 369 S.W.2d 311, 314 (Tex. 1963) (orig. proceeding) (granting mandamus relief, without a discussion of the availability of a remedy by appeal, to compel trial judge to vacate injunction enjoining the enforcement of a valid penal statute); State v. Bush, 151 Tex. 606, 613, 253 S.W.2d 269, 273 (1952) (orig. proceeding) (granting mandamus relief, without a discussion of the availability of a remedy by appeal, to compel a trial judge to vacate injunction enjoining enforcement of penal provisions of the Texas Liquor Control Act).

313. *See, e.g.*, *In re* State Bar of Tex., 960 S.W.2d 651, 651–52 (Tex. 1997) (orig. proceeding) (per curiam) (granting mandamus conditionally to compel trial judge to vacate injunction interfering with attorney disciplinary proceedings on grounds of lack of jurisdiction); State Bar of Tex. v. Jefferson, 942 S.W.2d 575, 575–76 (Tex. 1997) (orig. proceeding) (per curiam) (granting mandamus relief upon holding that trial court was without jurisdiction to issue temporary restraining order to stay administrative grievance procedure); Bd. of Disciplinary Appeals v. McFall, 888 S.W.2d 471, 472–73 (Tex. 1994) (orig. proceeding) (per curiam) (granting mandamus conditionally because trial court had no jurisdiction, to compel trial judge to vacate injunction preventing board from suspending lawyer). Although the court in these lawyer discipline cases did not mention the adequacy of a remedy by appeal, this was in all likelihood because of the realization that the remedy was inadequate. However, at least one opinion in this area tried to infer that the availability of a remedy by appeal was not a relevant issue. In *State v. Sewell*, 487 S.W.2d 716 (Tex. 1972) (orig. proceeding), the court stated:

> "While it is the general rule that a mandamus will not issue to control the action of an inferior court . . . in a matter involving discretion, the writ may issue in a proper case to correct a clear abuse of discretion."
>
> In measuring the abuse of discretion, this court has looked with disfavor upon injunctive encroachments upon delegated administrative and executive powers which affect the state as a whole. In State v. Ferguson, the members of The Public Safety Commission of Texas asked for a writ of mandamus commanding a trial judge to set aside a temporary restraining order which interfered with the peace officers of Texas in the enforcement of certain provisions of the penal code. The court acknowledged that an adequate remedy in another court ordinarily is sufficient reason for the denial of a writ of mandamus. The court went on to say, however, that the rule "will not be followed in a case affecting the state as a whole and in which the orderly processes of government have been disturbed." The court then declared that the state's peace officers could proceed in the discharge of their official duties freed of the restraints of the writs issued by trial judges.

Id. at 718–19 (alteration in original) (quoting Crane v. Tunks, 160 Tex. 182, 192, 328 S.W.2d 434, 440 (1959) (orig. proceeding), *overruled by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding)) (citations omitted). The court's characterization of *Ferguson*, aided in large part by the way it edited the opinion, is not quite accurate, as the "rule" that the *Ferguson* court was referring to was the rule that, in cases of concurrent jurisdiction, one must generally apply for mandamus relief in the court of appeals before requesting such relief from the supreme court. *Ferguson*, 133 Tex. 60, 125 S.W.2d at 272. Again, today the rule has been formalized. TEX. R. APP. P. 52.3(e). Later, in *State Bar of Texas v. Heard*, 603 S.W.2d 829 (Tex. 1980) (orig. proceeding), the court clarified that *Ferguson* was a case where mandamus issued because the trial court failed to comply with a mandatory statutory provision, and there was an absence of another adequate remedy.

other administrative functions.[314] In each of these cases, if there was in fact an unauthorized action interfering with the administration of justice that could cause serious repercussions upon the process of justice in the State of Texas, mandamus would issue generally because the appellate remedy was deemed ineffective.

The second line of cases also dealt with void orders, but in these decisions the orders of the trial court were void because of untimeliness, in that the orders were entered after the plenary

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Id. at 834. Given this later statement by the court, it appears that the failure to discuss the adequacy of the remedy in lawyer discipline cases is because the remedy is inadequate, given the impact that the trial court's ruling has upon the orderly process of government and justice in the state.

Furthermore, in cases of only incidental interference with the jurisdiction of the disciplinary agencies, the court must find an inadequate remedy by appeal in order to grant mandamus relief. The court has recently stated it in the following terms:

> An exception to the general rule [that a party must have no adequate remedy at law] arises when one court renders an order that directly interferes with another court's jurisdiction. In such a situation, we have determined appellate relief inadequate. *In re SWEPI, L.P.*, 85 S.W.3d 800 (Tex. 2002); *Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001); *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985); *Curtis v. Gibbs*, 511 S.W.2d 263 (Tex. 1974). In *In re SWEPI*, the real party in interest argued that the relators were not entitled to mandamus relief for a probate court's ruling on a plea to the jurisdiction because an adequate appellate remedy existed. Although we recognized that pleas to the jurisdiction will not ordinarily be reviewed by mandamus, we granted mandamus relief because the probate court erroneously interfered with another court's jurisdiction: "[T]he probate court not only erroneously concluded that it had jurisdiction, but also actively interfered with the jurisdiction of the Harris County court." *In re SWEPI*, 85 S.W.3d at 809; see also *Curtis*, 511 S.W.2d at 268 (issuing mandamus relief because one district court order directly interfered with another district court's jurisdiction).
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> BODA likewise argues that appellate relief is inadequate here because the district court order interferes with BODA's continuing jurisdiction over Watson's suspension. TEX. R. DISCIPLINARY P. 2.20. Moreover, by allowing Watson to practice law after BODA revoked probation and suspended Watson's license, the district court's order "supersedes" BODA's judgment contrary to TRDP 2.20's express language. Accordingly, this case presents an analogous situation to the circumstances in *In re SWEPI* and the jurisdictional interference cases before it. Thus, we believe that BODA lacks an adequate appellate remedy and mandamus relief is proper.

In re State Bar of Tex., 113 S.W.3d 730, 734–35 (Tex. 2003) (orig. proceeding).

314. *See, e.g.*, *In re* Entergy Corp., 142 S.W.3d 316, 321, 324 (Tex. 2004) (orig. proceeding) (holding that mandamus would lie to compel a trial court to dismiss a shareholder's suit against a utility company where the Public Utility Commission had exclusive jurisdiction and finding the remedy by appeal inadequate); State Bd. of Ins. v. Betts, 158 Tex. 612, 614–15, 315 S.W.2d 279, 281 (1958) (orig. proceeding) (holding mandamus would lie to compel a trial judge to vacate his void order appointing a receiver for an insurance company in liquidation where the Commissioner of Insurance had exclusive jurisdiction).

power of the court had expired. For example, in *Fulton v. Finch*,[315] the trial court, after having lost jurisdiction, set aside an order granting a new trial and refused to go to trial in the case.[316] The supreme court held that the order purporting to set aside the order granting a new trial was void.[317] The respondent asserted that the relator had an adequate remedy at law in that he could immediately appeal from the void judgment that had been reinstated by the trial court.[318] The court rejected this argument, reasoning that the appeal would not give the relator the specific relief that he was entitled to—a directive to the trial judge to proceed to trial.[319] In effect, the court was following the time-

315. Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823 (1961) (orig. proceeding).

316. *Id.* at 354, 346 S.W.2d at 826. The judge refused to go to trial because he believed that the matter had been terminated by the entry of a final judgment. *Id.* at 354, 346 S.W.2d at 825. The supreme court interpreted then-Rule 329b(3) of the Texas Rules of Civil Procedure to mean that an order granting a motion for new trial must be set aside with in the forty-five day period mentioned in that section. *Id.* at 355, 346 S.W.2d at 827. Although the rules relating to new trials have been substantially revised, the law is still the same—a trial court cannot ungrant or vacate an order granting a new trial outside of its plenary power. *See* Porter v. Vick, 888 S.W.2d 789, 789–90 (Tex. 1994) (orig. proceeding) (per curiam) (stating that the rule of *Fulton* has not been substantively modified).

317. *Fulton*, 162 Tex. at 352, 346 S.W.2d at 825 (holding that an order setting aside the granting of a new trial that was signed after the plenary power over the original judgment had expired was void); *see also* Enis v. Smith, 883 S.W.2d 662, 663 (Tex. 1994) (orig. proceeding) (per curiam) (holding that mandamus would be granted conditionally to set aside a turnover order to enforce a void foreign judgment that could have been appealed because "the incompatibility of the appellate timetables of Texas and its sister states may deprive litigants of the ability to file timely appeals of turnover orders in Texas").

318. *Fulton*, 162 Tex. at 355, 346 S.W.2d at 827. The court stated that an appeal could have been taken, but that it was not necessary as the void order vacating the granting of the new trial would not be a hindrance to the trial court's retrying the case. *Id.* at 355–56, 346 S.W.2d at 827.

319. *Id.* at 356, 346 S.W.2d at 827 (stating that the court was not aware of any cases holding that mandamus relief was unavailable because a void judgment could be remedied on appeal). The court noted that the relator was not required to accept less than the mandamus statutes provided—compelling the trial court to trial. *Id.* at 356–57, 346 S.W.2d at 827–28 (holding that when a judge refused to proceed to trial in reliance upon a void order, mandamus would lie). Later in the opinion, the court made the following classic analysis of the problem:

> An order which proclaims its voidness upon its face needs no appellate action to proclaim its invalidity. It is one thing to say that a void order *may* be appealed from but it is another thing to say that it *must* be appealed from for it would be anomalous to say that an order void upon its face must be appealed from before it can be treated as a nullity and disregarded. An order which must be appealed from before it is ignored can hardly be characterized as "void" and binding on no one.

Id. at 360, 346 S.W.2d at 830.

honored mandamus principle that the alternative remedy must be as effective as mandamus.[320] Thus, the court concluded that because the "relators have applied for a writ of mandamus in accordance with a statute which is plain in wording," the writ would be conditionally granted.[321]

Prior to the *Fulton* case, the court had conditionally issued mandamus to direct a trial court to set aside a void order in situations that did not fall under its direct statutory authorization to compel trial courts to proceed to trial and judgment. In *McEwen v. Harrison*,[322] the trial court had entered a default judgment against the defendant.[323] Long after the trial court's plenary jurisdiction had expired, Texaco filed a motion to vacate the default judgment in the trial court on grounds that the default judgment against it was void because the citation had not been served on any person or entity designated by law to be Texaco's agent.[324] The trial court agreed and vacated the default judgment.[325] The plaintiff-relator sought mandamus from the supreme court claiming that the trial court's order vacating its judgment was void.[326] The supreme court held that the judgment of the trial court in vacating the default judgment was void, due to the expiration of plenary power of the trial court, and conditionally granted the mandamus.[327] There was no discussion

320. *See* Fulton v. Finch, 162 Tex. 351, 359–60, 346 S.W.2d 823, 829 (1961) (orig. proceeding) (stating that mandamus will issue when the other remedies are inadequate, and thus not as effective as mandamus). The court put it in these words: "[W]hen considering the question of the adequacy of an appeal, it is necessary to examine the particular situation somewhat more closely." *Id.* In terms of traditional mandamus jurisprudence, the court was attempting to determine whether the appeal would be as effective as mandamus. *Id.* at 359–60, 346 S.W.2d 829–30. Thus, the question presented to the court was not whether an appeal was available, but whether the appeal would achieve the same result as mandamus for the relator. *Id.* at 359, 346 S.W.2d at 829.

321. *Id.* at 360, 346 S.W.2d at 830 (referring to the statutory grant of jurisdiction to the court to compel trial courts to trial and judgment).

322. McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706 (1961) (orig. proceeding).

323. *Id.* at 127, 345 S.W.2d at 707.

324. *Id.*

325. *Id.*

326. *Id.*

327. *McEwen*, 162 Tex. at 133, 345 S.W.2d at 711. The court held that in those situations where the trial court had jurisdictional power over the case (including a case alleging that the default judgment entered was void for want of service), the provisions of then-Rule 329b (now Rule 329b(f) of the Texas Rules of Civil Procedure) were applicable, and the trial court had no authority to grant a "motion to vacate" after the expiration of the court's plenary power. *Id.* at 131, 345 S.W.2d at 710.

or mention of the inadequacy of the legal remedy.[328] Notwithstanding some later decisions of the court[329]—as well as the voices of some commentators suggesting that perhaps the inadequacy of a legal remedy was not an issue in these cases[330]—the legal remedy available by way of appeal in these cases was clearly inadequate, and the failure to discuss it should not lead one to think that it was waived in these cases of mandamus relief from void judgments entered by trial courts after their plenary power

328. *Id.* at 126–33, 345 S.W.2d at 707–11. Subsequently, the court followed *McEwen* in *Deen v. Kirk*, 508 S.W.2d 70 (Tex. 1974) (orig. proceeding). In *Deen*, a conditional mandamus was granted directing a trial court to vacate an order signed after its plenary power had expired. *Id.* at 72. The order signed by the trial judge had set aside an alleged void judgment. *Id.* The court held that the trial judge had jurisdictional power to enter the original judgment and therefore the trial court had no authority to attempt to set it aside after its jurisdiction over the case had expired. *Id.* Once again, there was no mention of the inadequacy of the legal remedy. *Id.* at 70–72.

However, in other cases the court has addressed the issue. For example, in *Buttery v. Betts*, 422 S.W.2d 149 (Tex. 1967) (orig. proceeding), the court, citing *Fulton* as authority, held that to require a party to retry the case after the trial court signed a void order granting a new trial would not be an adequate remedy at law. *Id.* at 151. The court stated that the relators were presently entitled to their final judgment, not after retrial and appeal. *Id.* In *Dikeman v. Snell*, 490 S.W.2d 183 (Tex. 1973) (orig. proceeding), the court, citing only *Fulton*, *McEwen*, and *Muse*, stated: "In view of our policy for at least a decade of accepting and exercising our mandamus jurisdiction in cases involving void or invalid judgments of district courts, Relator had every reason to expect relief from the void judgment in this case without first attempting an appeal." *Id.* at 186.

In *Dikeman*, the court had entered a nunc pro tunc judgment after its plenary power had expired. *Id.* at 184–85. The supreme court determined that the signing of the nunc pro tunc judgment was improper, as it was correcting a judicial, not a clerical, error. *Id.* at 186. Notwithstanding that an appeal could have been taken from the entry of the order immediately, the court concluded that a conditional writ of mandamus would issue to compel the court to set aside the nunc pro tunc judgment. *Id.* The policy that the court referred to was that an appeal need not be pursued if it would not provide a specific and effective remedy. *Dikeman*, 490 S.W.2d at 186. In such a case, the remedy by appeal would not be an adequate remedy. *See id.* (issuing mandamus after rejecting contentions that the petitioner had an adequate remedy by appeal); Gulf, Colo. & Santa Fe Ry. Co. v. Muse, 109 Tex. 352, 362, 207 S.W. 897, 900 (1919) (orig. proceeding) (holding that mandamus relief was available where the appellate remedy was inadequate).

329. *See, e.g.*, Geary v. Peavy, 878 S.W.2d 602, 603 (Tex. 1994) (orig. proceeding) (per curiam) (viewing the *Dikeman* case as one where the relator was not required to establish the inadequacy of the remedy by appeal); Faulkner v. Culver, 851 S.W.2d 187, 189 (Tex. 1993) (orig. proceeding) (per curiam) (granting mandamus relief to compel trial court to vacate a void order without mentioning the adequacy of the remedy).

330. *See e.g.*, Charles W. "Rocky" Rhodes, *Demystifying the Extraordinary Writ: Substantive and Procedural Requirements for the Issuance of Mandamus*, 29 ST. MARY'S L.J. 525, 572–73 (1998) (claiming that *Dikeman* and its progeny held that mandamus relief was available to vacate void orders entered by trial courts without regard to the availability of a remedy by way of appeal).

had expired.[331] Rather, the failure to mention or discuss the adequacy of the legal remedy should be viewed as an implied understanding by the court that such a remedy, if available, was ineffective in giving the relator the specific remedy to which he

331. *See, e.g., In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998) (orig. proceeding) (per curiam) (holding that since the retrial of a case after the trial court had granted a new trial after its plenary power had expired would be a nullity, the relator has no adequate remedy at law). However, in the area of recusal of judges, the court is more explicit about the fact that its mandamus authority is available in the proper case without regard to the availability of a remedy by way of appeal. The issue involved in recusal cases is complicated by the fact that the void rulings or orders that are issued come after the judge ignores the requirement to recuse himself. Since these subsequent orders are void, one might argue that the remedy by appeal is clearly inadequate; however, the supreme court has gone further and stated that it is not a relevant inquiry. In *In re Union Pacific Resources Co.*, 969 S.W.2d 427 (Tex. 1998) (orig. proceeding), the court outlined the law in the area rather succinctly:

> Judges may be removed from a particular case either because they are constitutionally disqualified, TEX. CONST. art. V, § 11, because they are subject to a statutory strike, TEX. GOV'T CODE § 74.053(d), or because they are recused under rules promulgated by this Court. TEX. R. CIV. P. 18a, 18b; TEX. R. APP. P. 16. The grounds and procedures for each type of removal are fundamentally different. *See generally* Kilgarlin & Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986). When a judge continues to sit in violation of a constitutional proscription, mandamus is available to compel the judge's mandatory disqualification *without a showing that the relator lacks an adequate remedy by appeal. Cf. Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1997) (addressing the mandatory disqualification of assigned judges under TEX. GOV'T CODE § 74.053(d)). This makes sense, because any orders or judgments rendered by a judge who is constitutionally disqualified are void and without effect. *See, e.g., Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221 (1947). Likewise, on timely objection, the disqualification of an assigned judge who is not a retired judge is mandatory under section 74.053(d) of the Texas Government Code and any orders entered by a trial judge in a case in which he is disqualified are void. *See Mitchell Energy Corp.*, 943 S.W.2d at 440–441; *Fry*, 202 S.W.2d at 221. Therefore, the objecting party is also entitled to mandamus relief without a showing that there is no adequate remedy by appeal. *See Dunn v. Street*, 938 S.W.2d 33, 34–35 (Tex. 1997); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996).

Id. at 428 (emphasis added); *see also In re* O'Connor, 92 S.W.3d 446, 450 (Tex. 2002) (orig. proceeding) (per curiam) (holding that mandamus relief was available to compel trial judge to disqualify himself under Rule 18b(1)(a) of the Texas Rules of Civil Procedure without a showing that the relator lacked an adequate remedy by appeal); *In re* Perritt, 992 S.W.2d 444, 446–47 (Tex. 1999) (orig. proceeding) (per curiam) (holding that mandamus relief was available to compel a judge designated to hear a recusal motion to disqualify himself under section 74.053(b) of the Texas Government Code). The supreme court has made a distinction in the case of an erroneous denial of a recusal motion. *Union Pacific*, 969 S.W.2d at 428. In that situation, as the judge's rulings would not be void, an appeal following the entry of a final judgment in the underlying case would be an adequate remedy. *Id.* (stating that mandamus relief would be denied because the Texas Rules of Civil Procedure provide for appellate review of the denial of a recusal motion).

was entitled, as has been understood from the earliest times in Texas.[332]

During this same period of time, however, the court in several cases acknowledged the importance of the principle that mandamus would not issue if there were an adequate remedy, but undertook no analysis of the issue, in large part because previous cases had already determined that in similar factual circumstances the remedy by appeal was inadequate.[333] However, two decisions

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332. *See, e.g.*, *Muse*, 109 Tex. at 362, 207 S.W. at 900 (explaining that mandamus may issue in the face of an ineffective remedy). The court said:

> It is no sound objection to the award of the mandamus that the defendant might finally secure a review of an adverse judgment following a retrial, by means of appeal to the Court of Civil Appeals and writ of error to the Supreme Court. For it has been the law of Texas since Bradley v. McCrabb, Dallam, 507, that the writ of mandamus "will not only issue, in cases where the party having a specific legal right has no other legal operative remedy, but, where the other modes of redress are inadequate or tedious, the writ will be awarded." Not only would the remedy to defendant of appeal and writ of error, after another trial, be manifestly tedious, but such remedy would also be inadequate; for it is the very essence of defendant's right that it is entitled not to have to respond further to plaintiff's cause of action than by payment of his judgment.

Id. Thus, where the court vacated a default judgment, as in *McEwen*, the remedy by appeal is inadequate as well as tedious, for it would come only after a second trial—and like *Muse*, the very essence of the plaintiff's right is to stand on his judgment. *Id.* That is the right that mandamus protects in *Muse* and *McEwen* that an appeal cannot. The court has succinctly articulated this position as follows:

> Mandamus is appropriate to set aside an order for new trial that is granted after the court's plenary power expires and that is, therefore, void. Because the trial court had no power to grant the new trial, any subsequent retrial would be a nullity. Under these circumstances, [relator] does not have an adequate remedy by appeal and is entitled to mandamus relief.

Dickason, 987 S.W.2d at 571 (footnote omitted). However, a year later, the court, citing only *Dickason*, held that because an order setting aside a venue transfer order after the plenary power had expired was void, "the relator need not show it did not have an adequate appellate remedy, and mandamus relief is appropriate." *In re* Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam). This rather broad statement leads to confusion. Is the court asserting that mandamus will issue without regard to the availability of remedy by appeal (most likely), or is it merely acknowledging the fact that in the case of the entry of a void order the remedy by appeal is clearly inadequate? By being ambiguous, the court only adds to the confusion in this area.

333. *See, e.g.*, Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558, 559 (Tex. 1992) (orig. proceeding) (per curiam) (holding that an appeal would not be an adequate remedy for the erroneous order to produce tax returns); Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917–18 (Tex. 1985) (orig. proceeding) (stating that writs of mandamus would not issue to correct mere errors in judgment that could be corrected on appeal following final judgment); State Bar of Tex. v. Heard, 603 S.W.2d 829, 834 (Tex. 1980) (orig. proceeding) (holding that because a trial court's order refusing to comply with a statute

decided on the same day contained detailed discussions of the court's understanding of this requirement for the issuance of mandamus. In the first, *TransAmerican Natural Gas Corp. v. Powell*,[334] the court granted mandamus relief to a party whose pleadings had been struck, whose action seeking affirmative relief had been dismissed, and against whose counterclaim the trial court had granted interlocutory default judgment, leaving only the amount of damages left for the trial.[335] The court held that sanctions imposed by the trial court "were manifestly unjust in violation of Rule 215"[336] in not considering the availability of lesser sanctions before imposing death penalty sanctions.[337] In discussing whether the relator had an adequate remedy by way of appeal, the court stated:

> Specifically, in this case TransAmerican does not have an adequate remedy by appeal because it must suffer a trial limited to the damages claimed by Toma. The entire conduct of the litigation is skewed by the removal of the merits of TransAmerican's position from consideration and the risk that the trial court's sanctions will not be set aside on appeal. Resolution of matters in dispute between the parties will be influenced, if not dictated, by the trial court's determination of the conduct of the parties during discovery. Some award of damages on Toma's counterclaim is likely, leaving TransAmerican with an appeal, not on whether it should have been liable for those damages, but on whether it should have been

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requiring the suspension of an attorney was interlocutory, mandamus would conditionally issue as no appeal was available); *see also* Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (orig. proceeding) (granting mandamus conditionally to compel trial court to vacate order requiring production of tax return); Wallace v. Briggs, 162 Tex. 485, 491, 348 S.W.2d 523, 527 (1961) (orig. proceeding) (concluding that the trial court committed a clear abuse of discretion by requiring husband to pay wife's attorneys' fees before a final divorce decree, and holding that mandamus was available as there was no remedy since no appeal could be taken from the interlocutory order).

334. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991) (orig. proceeding).

335. *Id.* at 914.

336. *Id.* at 919; *see* TEX. R. CIV. P. 215.2(b) (stating in relevant part that if "a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery the court . . . may, after notice and hearing, make such orders in regard to the failure as are just"). According to the court, the measurement of what would be a just sanction has to include two standards: first there has to be a direct relationship "between the offensive conduct and the sanction"; and "the sanctions must not be excessive." *TransAmerican*, 811 S.W.2d at 917.

337. *TransAmerican*, 811 S.W.2d at 918–19.

sanctioned for discovery abuse. This is not an effective appeal.[338]

Thus, following traditional analysis, an appellate remedy that did not achieve the same protection of a party's legal right as mandamus was not an "effective" or adequate remedy sufficient to replace mandamus relief. In *TransAmerican*, the relator would have been unable to raise the liability issue on appeal, and if he were to have lost the sanction issue on appeal, he would have been left with the appellate court reviewing only the damages issue. The court correctly held that this was an inadequate appeal.

Then, in *Braden v. Downey*,[339] the trial court ordered discovery sanctions that, required plaintiff's attorney to perform community service before the trial concluded and required the plaintiff to pay the defendant $10,000 in attorneys' fees.[340] The supreme court noted that as the attorney was compelled to perform the community service before a final judgment was rendered in the underlying case, the appeal following the final judgment was inadequate because, even if successful, the appellate court could not "restore his time or make him whole."[341] The court held that

338. *Id.* at 919 (acknowledging concern that the trial court's sanction order had the effect of adjudicating the dispute without rendering a final judgment); *see also* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 853 (Tex. 1992) (orig. proceeding) (granting mandamus conditionally to compel trial judge to vacate a sanction order striking the defendants' pleadings and entering an interlocutory default judgment on liability). Where an immediate appeal to challenge the justness of the death penalty sanctions is available, mandamus relief is unavailable. *See, e.g.*, Cire v. Cummings, 134 S.W.3d 835, 845 (Tex. 2004) (upholding on appeal the use of death penalty sanctions against a plaintiff and the entry of a take nothing judgment); GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 732 (Tex. 1993) (orig. proceeding) (explaining that an appeal from death penalty sanctions was inadequate unless there was the right of immediate appeal).

339. Braden v. Downey, 811 S.W.2d 922 (Tex. 1991) (orig. proceeding).

340. *Id.* at 926 (Tex. 1991).

341. *Id.* at 930. The court stated:

> Braden's attorney argues that if he is compelled to perform community service before an appealable judgment is rendered in the case, no relief on appeal can ever restore his time or make him whole. We agree. Time spent is different from money paid; recovery of the latter may be problematic, but recovery of the former is impossible. Nor can Braden's attorney recover damages for service the district court may have erred in requiring him to perform.

Id. Since the recovery of the time was impossible, arguably the remedy by appeal was not effective in protecting that right. The court's reference to recovering damages was based upon a long, recognized history of absolute immunity for judges acting within their jurisdictional power. *See* Turner v. Pruitt, 161 Tex. 532, 534–35, 342 S.W.2d 422, 423 (1961) (holding that a judge is immune from suit for actions taken in judicial proceedings in which the court has jurisdiction); *see also* Stump v. Sparkman, 435 U.S. 349, 356–57

"if the community service [the plaintiff's] attorney is ordered to perform must be completed before he is able to obtain review of that order by appeal, his appellate remedy is plainly inadequate."[342] The court thus held that the trial court abused its discretion and that it needed to modify its order to require that the community service be performed after the judgment in the case was final on appeal.[343] This approach to adequacy was consistent with the traditional approach in that the right to be enforced—review of the sanctions orders—could not be protected by ordinary appeal because the right would have already been compromised and lost.

In the area of the assessment of attorneys' fees against the party, the court continued to abide by traditional notions of mandamus.[344] The party was ordered to pay $10,000 in attorneys' fees as discovery sanctions. There was no evidence to support an award of this amount, nor had the opposing party sought more than $500.[345] The court was of the opinion that the amount of the

(1978) ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'"). If the court was implying that a suit for damages, if available, would have been an adequate remedy for services that he would have been improperly required to perform, the court is straying far afield from Texas precedent. A damage award for Braden would not have provided the specific adequate remedy in this case that mandamus would. Mandamus would have given him the opportunity to appeal the sanction award before performing the service. *See* Terrell v. Green, 88 Tex. 539, 31, 545, S.W. 631, 634 (1895) (orig. proceeding) (holding that the availability of a damage award would not be an adequate remedy for being refused the right to discharge one's public duties).

342. *Braden*, 811 S.W.2d at 930. However, the court stated that "[i]f ... the community service imposed ... was not to be performed until the judgment in the case was final," the attorney had an adequate remedy by appeal. *Id.*; *see* TEX. R. CIV. P. 215.3 (providing that sanctions for abusing the discovery process are reviewable on appeal from the final judgment).

343. *Braden*, 811 S.W.2d at 930.

344. *Id.* at 928. The court previously held that the right to appeal following final judgment was an adequate remedy of the assessment of attorneys' fees against a party as discovery sanctions. Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986) (orig. proceeding); Street v. Second Court of Appeals, 715 S.W.2d 638, 639–40 (Tex. 1986) (orig. proceeding). Like *Braden*, the attorneys' fees in both *Street* and *Stringer* were to be paid prior to the final judgment; but unlike *Braden*, the amounts of attorneys' fees were reasonable. In *Street,* the court rejected an argument that an appeal was inadequate because even if the sanctions were reversed, recovery of the fees already paid was questionable. *Street*, 715 S.W.2d at 639–40 ("The uncertainty of recovering the money on appeal ... is simply not a sufficient reason for the appellate court's interference with the pre-trial stages of this action.").

345. *Braden*, 811 S.W.2d at 929.

sanction award and the fact that it had to be paid before a final judgment created an environment that might inhibit a party's willingness to continue the case.[346] To avoid what it perceived to be an inequitable situation, the court held that the requirement to pay the monetary sanctions before the rendition of a final "judgment denied [Braden] an adequate remedy by appeal."[347] Again, this opinion was consistent with traditional analysis. Although neither *TransAmerican* nor *Braden* referred to *Iley*, it was implicit in the courts' decisions that the respective appeals were inadequate because the court was of the opinion that substantial rights of the parties would be lost.

D. Walker v. Packer *and Its Progeny: The Traditional Mandamus Standards*

Walker[348] involved several discovery disputes that arose during

346. *Id.* The court acknowledged that sanctions that terminated or inhibited the presentation of a case were authorized by Rule 215 of the Texas Rules of Civil Procedure. However, those types of sanctions were to be reserved for "circumstances in which a party has so abused the rules of procedure, despite imposition of lesser sanctions, that the party's position can be presumed to lack merit and it would be unjust to permit the party to present the substance of that position before the court." *Id.* (orig. proceeding) (citing TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991)).

347. Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991) (orig. proceeding). Although the court stated that monetary sanctions should never be used to terminate litigation, there was no indication that the payment of the sanctions would have forced Braden to discontinue the litigation. *Id.* at 929. However, in order to ensure that monetary damages for discovery abuse would not lead to the termination of litigation in future cases, the court proposed that trial courts comply with the following procedures:

> [I]f a litigant contends that a monetary sanction award precludes access to the court, the district judge must either (1) provide that the sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation; or (2) make[] express written findings, after a prompt hearing, as to why the award does not have such a preclusive effect.

Id.

348. Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding). Chief Justice Philips, the author of the *Walker* court's majority opinion, remarked that the dissenters in the case were upset about "strict adherence to traditional mandamus standards." *Id.* However, Justice Doggett, one of the dissenters, eloquently characterized the majority's opinion as one that was jettisoning precedent:

> It is only after fifteen years of repeated judicial reliance upon *Barker* and *Allen* in the issuance of numerous opinions that we learn these precedents of our court are not good law. This is all the more strange in that we had explicitly refused to overrule them. When that very request was urged in *Jampole* our answer was unmistakable: "We decline to do so." But the majority's new answer is simple: "Line them up

litigation brought by the parents of a baby born with brain damage against the obstetrician and other defendants.[349] The dispute that gave rise to the court's discussion of the adequacy of legal remedy involved the plaintiffs' "attempt to secure documentary evidence to impeach one of the defendants' expert witnesses."[350] The trial court denied certain discovery relating to the documents based upon its understanding and legal interpretation of the supreme court's precedent on the subject.[351] Although the supreme court held that the trial court's erroneous interpretation of the law was "a clear abuse of discretion,"[352] it also held that mandamus was inappropriate because the plaintiffs "ha[d] an adequate remedy by appeal."[353] The court noted that this requirement for the issuance of mandamus was "well-settled,"[354] but in the area of applying mandamus to discovery orders, the court noted its failure to focus on this requirement.[355] However, the court reaffirmed this "fundamental tenet" of mandamus law and noted the requirement was sound, stating, "we reaffirm it today .... [and] disapprove of ... any other authorities to the extent they might be read as abolishing or relaxing this rule."[356] The court also disapproved

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against the wall." What does it matter that a dozen or more Texas Supreme Court cases and countless decisions of the courts of appeals are to the contrary? They can be disposed of in a mass execution of precedent. Today's firing squad announces that it is only answering the command of Jim Sales and two law students who separately criticized the court during the period 1977–79. It thereby rationalizes constructing so distorted a standard on the corpses of so many prior authorities.

Id. at 851 (Doggett, J., dissenting) (citations and footnote omitted). Although eloquent, Justice Doggett preferred to jettison 150 years of precedent to preserve a distorted vision of mandamus jurisprudence in Texas.

349. *Id.* at 835–36 (majority opinion).

350. *Id.* at 837.

351. *Walker*, 827 S.W.2d at 838.

352. *Id.* at 840. The dispute centered upon the reach of the court's opinion in *Russell v. Young*, 452 S.W.2d 434 (Tex. 1970), where the court had conditionally granted mandamus to vacate a trial court's order authorizing extensive discovery from a non-party expert witness. The trial court in *Walker* viewed the opinion as a blanket prohibition from obtaining information for impeachment purposes only from witnesses who were not parties. *Walker*, 827 S.W.2d at 838. However, the supreme court noted that, in *Walker*, unlike in *Russell*, the credibility of the expert was in question and the requested information was limited in scope. Thus, the trial court abused its discretion in incorrectly applying controlling legal principles. *Id.* at 838–40.

353. *Walker*, 827 S.W.2d at 844.

354. Walker v. Packer, 827 S.W.2d 833, 840 & n.8 (Tex. 1992) (orig. proceeding) (citing over twenty cases from 1890 to 1991 supporting this statement).

355. *Id.* at 840–41.

356. *Id.* at 842. The court specifically disapproved *Barker v. Dunham*, 551 S.W.2d 41

authorities relying upon the language in *Cleveland*—that the alternative remedy had to "be equally 'convenient, beneficial, and effective as mandamus'"—to the limited extent that these authorities "impl[ied] that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus."[357] The court concluded that mandamus "[i]nterference is justified only when parties stand to lose their substantial rights."[358] The court noted that there might be several situations where a party to a clearly erroneous ruling on an interlocutory discovery order would "not have an adequate appellate remedy" and that in those situations mandamus would be the appropriate remedy.[359] The court's alleged adherence to the traditional

(Tex. 1977) (orig. proceeding), *Allen v. Humphreys*, 559 S.W.2d 798 (Tex. 1977) (orig. proceeding), "and any other authorities to the extent they might be read as abolishing or relaxing" the fundamental tenet—"[t]he requirement that mandamus issue only where there is no adequate remedy by appeal." *Walker*, 827 S.W.2d at 842.

357. *Walker*, 827 S.W.2d at 842. It is a shame that the court besmirched *Cleveland*. It is clear to anyone who reads that case that mandamus did not issue because of the additional cost or delay attributed to any appeal. The same is true for *Crane*. Furthermore, the concept that the appellate remedy must "be equally 'convenient, beneficial, and effective as mandamus'" was steeped in common law long ago. *See, e.g.*, The King v. Severn & Wye Ry. Co., 106 Eng. Rep. 501, 502 (Q.B. 1819) (claiming that an indictment and related fine were not as "equally convenient, beneficial, and effectual as a mandamus").

358. *Walker*, 827 S.W.2d at 842 (quoting Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648, 652 (1958) (orig. proceeding) (disapproving Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063 (1926) (orig. proceeding), Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959) (orig. proceeding), Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984) (orig. proceeding), and "other authorities to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus")). The court explained its disapproval by stating that the loosened standard initiated in *Cleveland*—that the remedy by appeal must "be 'equally convenient, beneficial and effective' as mandamus"—could be used to justify mandamus review whenever an appeal would involve more cost or delay than mandamus. *Id.* None of the cases cited by the court conditionally granted mandamus because the appeal would involve more cost or delay than mandamus. Chief Justice Phillips was in large part concerned that the language, as articulated in *Cleveland*, might lead to such an argument.

359. Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding). In the discovery context, the court gave three different examples in which an appeal following a trial would not be an adequate remedy: (1) an erroneous order requiring "the disclosure of privileged information"; (2) the denial of discovery materials necessary for a party "to present a viable claim or defense"; and (3) those situations where the material would not be in the record so that there would be no ability for an appellate court to determine if error had occurred in not requiring the material to be produced. *Id.* *Walker* has consistently been followed in these three areas involving discovery. *See, e.g.*, Thompson v. Davis, 901 S.W.2d 939, 940 (Tex. 1995) (orig. proceeding) (acknowledging the inadequacy of an appeal when the trial court denies "discovery [that] goes to the heart of" the case);

mandamus standards received mixed reviews from commentators.[360] In any event, *Walker* should not be read as rejecting the *Cleveland* language, only its liberal application. The alternative remedy must, under Texas precedent, be so effective as to place the relator in as good a position as mandamus could place him[361] and not be so tedious as to be inadequate.[362]

Notwithstanding *Walker*'s strong statement concerning the soundness of the fundamental tenet of mandamus law, the court has continued its past practice of discussing the adequacy of a legal remedy only when it supported the decision the court wanted to make and downplayed this tenet when it interfered with the decision the court desired to make. Two weeks after *Walker*, the court issued an opinion—conditionally granting mandamus—holding that the trial court did not abuse its discretion in ordering

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Global Servs., Inc. v. Bianchi, 901 S.W.2d 934, 939 (Tex. 1995) (orig. proceeding) (noting that a reviewing court would be "unable to evaluate the effect of the trial court's" denial of discovery when such information did not get in the record); Chapa v. Garcia, 848 S.W.2d 667, 668 (Tex. 1993) (orig. proceeding) (holding that an appeal would be inadequate because the denial of discovery vitiated the ability to bring a valid claim). The dissenting opinion by Justice Doggett (joined by Justice Mauzy) wanted to emasculate centuries of legal precedent and permit mandamus review in the event of "arbitrary and capricious rulings by trial judges" without the necessity of showing an inadequate remedy. *Walker*, 827 S.W.2d at 846 (Doggett, J., dissenting). Later in his opinion, Justice Doggett indicated that any abuse of discretion would justify mandamus relief. *Id.* at 855. Justice Doggett was vociferous in his complaints of the court's disregard of alleged precedent of a mere fifteen years, while simply ignoring over 300 years of mandamus jurisprudence which had become part of Texas's law. *Id.* at 851. Justice Gamage also dissented, arguing that mandamus should be readily available in every instance of a wrongful denial of discovery. *Id.* at 857 (Gammage, J., dissenting).

360. *Compare* Sharon N. Freytag & Michelle E. McCoy, *Appellate Practice and Procedure*, 46 SMU L. REV. 893, 894 (1993) (describing *Walker* as "an important departure from earlier opinions"), *and* W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1080 (1993) (stating that *Walker* had tightened mandamus parameters), *with* Ernest E. Figari, Jr., A. Erin Dwyer & Donald Colleluori, *Texas Civil Procedure*, 46 SMU L. REV. 1055, 1081 (1993) (calling *Walker* a reaffirmation of "the strict standard for obtaining mandamus relief").

361. *See, e.g.*, Terrell v. Greene, 88 Tex. 539, 545, 31 S.W. 631, 634 (1895) (orig. proceeding) (stating that a damage remedy was insufficient to give the petitioner the specific relief to which he was legally entitled).

362. *See* Gulf, Colo. & Santa Fe Ry. Co. v. Muse, 109 Tex. 352, 362, 207 S.W. 897, 900 (1919) (orig. proceeding) (stating that mandamus will issue where "other modes of redress are inadequate or tedious"); Bradley v. McCrabb, Dallam 504, 506 (Tex. 1843) (noting that the writ of mandamus will issue where other modes of redress are inadequate or tedious); *see also* WILLIAM BLACKSTONE, 3 COMMENTARIES *110 (acknowledging that mandamus might issue even in cases where there is another remedy, if such remedy is tedious).

the production of certain documents, and therefore, the issuance of the writ of mandamus by the court of appeals ordering the trial court to vacate its order requiring production was improper.[363] In that case, the trial court ordered discovery of investigations of an accident in spite of an argument by the defendant that such items were privileged from discovery as they were conducted in anticipation of litigation.[364] The court of appeals granted mandamus relief reversing the trial court order, and the plaintiff sought relief from the Texas Supreme Court.[365] Upon reviewing the evidence, the court determined that the trial court had not abused its discretion in ordering the production of the

363. Scott v. Twelfth Court of Appeals, 843 S.W.2d 439, 440 (Tex. 1992) (orig. proceeding). This was the second mandamus opinion issued by the court following *Walker*. The first was *Dawkins v. Meyers*, 825 S.W.2d 444 (Tex. 1992) (orig. proceeding), which was issued the week following *Walker*. *Dawkins* involved an individual who had been declared ineligible to be a candidate for the Texas House of Representatives by the chairman of the Republican Party under the chairman's interpretation of the limitation on eligibility for office contained in article III, section 19 of the Texas constitution. *Dawkins*, 825 S.W.2d at 445–46 (noting that the constitution prohibits certain elected and appointed officials from being candidates for the Texas legislature). The court agreed with the determination of the disqualification and therefore denied the petition for mandamus on grounds that no duty to the relator had been breached. *Id.* In the absence of a finding of an abuse of discretion or breach of legal duty owing to the relator there was no need to address the inadequacy of the legal remedy. *See, e.g.*, Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 310 (Tex. 1994) (orig. proceeding) (Hecht, J., dissenting) (stating that it is unnecessary to consider the adequacy of the remedy if the trial court has not abused its discretion) *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)).

364. *Scott*, 843 S.W.2d at 440. At the time of the *Scott* case, the *Flores* test applied to the determination of whether an investigation was conducted in anticipation of litigation for purposes of a discovery exemption. *Id.* *See* Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 40–41 (Tex. 1989) (orig. proceeding) (establishing a two prong analysis to determine whether "an investigation is done in anticipation of litigation"). Former Rule 166(b)(3) of the Texas Rules of Civil Procedure protected most party communications made in anticipation of litigation from discovery. TEX. R. CIV. P. 166(b)(3) (Vernon 1987, repealed 1999); *see* TEX. R. CIV. P. 192.5(a)(2), 192.5(b)(2) (giving the current rule). Under *Flores*, party communications and investigations conducted following an incident were considered prepared in anticipation of litigation if a reasonable person would have concluded from all the circumstances that there was a substantial chance of litigation, and the party resisting discovery had a good faith belief that litigation was imminent. *Flores*, 777 S.W.2d at 40–41. The court in *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993) (orig. proceeding), modified *Flores* by eliminating the requirement that the party needed to have conducted the investigation when litigation was imminent.

365. *Scott*, 843 S.W.2d at 439.

investigation.[366] The court conditionally granted mandamus relief to vacate the appellate court's action and to reinstate the trial court's order compelling production of the disputed documents, only briefly mentioning the requirement that mandamus would not issue absent an inadequate remedy by appeal.[367] Justice Hecht dissented, chastising the court for not requiring the relator to establish that his remedy by appeal was inadequate.[368] Justice

366. *Id.* at 440.

367. *Id.* (citing Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)). The failure of the court to mention *Walker* is troublesome. First, it was *Walker,* not *Johnson*, that had just announced that "[t]he requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a 'fundamental tenet' of mandamus practice." Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *see also In re* Tex. Dep't of Family & Protective Servs., 210 S.W.3d 609, 612 (Tex. 2006) (orig. proceeding) ("The issuance of mandamus by the court of appeals is improper ... if the record fails to demonstrate the lack of an adequate remedy on appeal."); *Wittig*, 876 S.W.2d at 305 (stating unequivocally that "the burden of showing ... the inadequacy of a remedy by appeal is placed on the relator"). Second, it was *Walker*, not *Johnson*, that identified and explained when an appeal would be inadequate in discovery disputes. *Walker*, 827 S.W.2d at 843–44.

368. *Scott*, 843 S.W.2d at 442 (Hecht, J., dissenting). Justice Hecht's dissenting opinion is extremely critical of the majority's failure to cite *Walker* and, more importantly, to adhere to its teachings. *Id.* On these two points he expressed his dissatisfaction with the majority opinion in the following words:

> [R]elators have failed to show an inadequate appellate remedy. There is, of course, no appeal to this Court from the judgment of an appellate court granting mandamus relief in an original proceeding; such judgments can be reviewed by this Court only on application for mandamus against the court of appeals, as relators have filed in this case. Nevertheless, when the court of appeals grants mandamus relief against a trial court, it directs that court to take action which may be reviewable on appeal from the final judgment rendered in the case. That is the situation here, where the court of appeals has directed the trial court to rescind its order allowing discovery. When the trial court complies, its ruling may be appealed after final judgment, should relators choose to do so. Hence, relators unquestionably have *a* remedy by appeal in these circumstances.
>
> The question is whether relators have demonstrated that their appellate remedy is inadequate. If the trial court, like the court of appeals, had ruled contrary to relators that is, if it had denied discovery instead of allowing it, relators could not obtain mandamus relief without demonstrating either that they fall within one of the situations described in *Walker* when appeal may be inadequate, or that appeal is inadequate for some other reason. Relators have done neither. Without this showing, mandamus should issue only if the inadequate remedy by appeal requirement does not apply when mandamus is sought against a court of appeals, or if the right to appeal is always inadequate in these circumstances. Neither *Walker* nor any other decision by this Court limits application of this requirement to decisions of trial courts, and there is no rational basis for doing so. There is no reason to think that appeal is somehow less adequate because the last ruling was by the court of appeals rather than the trial court. The issue, adequate redress, is the same in either case.

Hecht concluded his opinion by noting that although the court acknowledged the requirement, it refused to enforce the requirement, as it has become "but a meaningless one-sentence liturgy before the benediction."[369]

Over the next thirteen years, the court never rejected the "litany" required for the issuance of mandamus, but it continued its "tradition" prior to *Walker* of infrequently analyzing the issue, doing so only when it was convenient for the desired result. However, during this period of time dissenting opinions continued to remind the court and the Bar that there was more to the extraordinary remedy than simple rhetoric.[370] In a relatively few number of cases, the court actually analyzed the adequacy issue. For example, in *Anglin Co. v. Tipps*,[371] the court conditionally issued a writ of mandamus to direct a trial court to order the claims in dispute to proceed to arbitration under the Federal Arbitration Act.[372] In *Anglin*, a contractor moved to compel arbitration pursuant to a contractual provision that provided for arbitration of all matters arising under the contract that could be subjected to arbitration.[373] Notwithstanding the contractual provision, the trial court denied arbitration of the Deceptive Trade Practices Act (DTPA) claims in the case.[374] Following the appellate court's overruling of the contractor's motion for leave to file a petition for writ of mandamus, the contractor filed for leave to file a writ of mandamus in the supreme court.[375] After initially

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> Thus, relators must meet the second requirement for mandamus directed to the court of appeals in the same way as for mandamus directed to the trial court. Here, they have not shown that they can.

Scott, 843 S.W.2d at 442 (citations omitted).

369. *Id.*

370. *See., e.g.*, *In re* Masonite Corp., 997 S.W.2d 194, 202 (Tex. 1999) (orig. proceeding) (Baker, J., dissenting) (lamenting the court's return to the more lenient standard of requiring the appellate remedy to be as "equally convenient, beneficial, and effective as mandamus"); *In re* D.A.S., 973 S.W.2d 296, 300 (Tex. 1998) (orig. proceeding) (Baker, J., dissenting) (observing that the court was only "paying lip service about the lack of an adequate appellate remedy"); Travelers Indem. Co. of Conn. v. Mayfield, 923 S.W.2d 500, 594 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting) (asserting that more was required for mandamus than a determination that the trial court abused its discretion and that a quick fix was desired).

371. Anglin Co. v. Tipps, 842 S.W.2d 266 (Tex. 1992) (orig. proceeding).

372. *Id.* at 273.

373. *Id.* at 267.

374. *Id.* at 268.

375. *Id.*

determining that the trial court had abused its discretion in failing to apply the Federal Arbitration Act (FAA) to the DTPA claim,[376] the court turned its attention to a determination of whether there was an adequate remedy by appeal.[377] The court acknowledged that both the Texas and federal arbitration statutes provided for interlocutory appeals from orders granting or denying requests to compel arbitration under each respective statute.[378] However, as "federal procedure [did] not apply in Texas" when applying the FAA,[379] there was no right to an interlocutory appeal from a state court's order denying a motion to compel arbitration under the FAA.[380] Thus, absent the availability of mandamus relief, the party would have to wait for a judgment in the underlying litigation, and then raise the arbitration issue on appeal from that final judgment. The court, obviously having already made up its mind, did not consider this possibility in its phrasing of the issue: "When a Texas court enforces or refuses to enforce an arbitration agreement pursuant to the Federal Act, we must determine whether that decision should be reviewed by interlocutory appeal or mandamus."[381] Then the court observed that an interlocutory appeal of this order was not available under

376. *Anglin*, 842 S.W.2d at 271. Initially, the court observed that the FAA applied to all contractual disputes involving interstate commerce, and then determined that the evidence presented to the trial court clearly established that the contract in question involved interstate commerce. *Id.* at 269–70 & n.6. Then, noting that the FAA preempted state laws in order to achieve its goal of creating an expedited and less expensive means to resolve disputes, the court held that the DTPA claims were subject to arbitration under the FAA. *Id.* at 271.

377. *Id.* (citing *Walker* for the proposition that mandamus would not issue when the trial court's abuse of discretion could be corrected by appeal).

378. *Id.* at 271–72 (citing both the federal and states statutes). Thus, when a decision was entered following a hearing under the FAA, an interlocutory appeal was available; likewise when an order was entered following a hearing under the state arbitration statute, an interlocutory appeal was available from that decision.

379. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding).

380. *Id.* The court acknowledged that other than limited statutory exceptions in the case of some interlocutory orders, appeals in Texas were available only from final orders or judgments. *Id.* While there was a statutory exception for the trial court's denial of a motion to arbitrate under the state statute, there was no such exception for a trial court's denial of a motion to arbitrate under the federal statute. *Id.* at n.10. (citing Article 238-2(a) of the then Texas Revised Civil Statutes, presently codified at section 171.098 of the Texas Civil Practice and Remedies Code).

381. *Id.* at 272 & n.11. (listing various state courts of appeals opinions that permitted either interlocutory appeal or mandamus when trial courts had denied applications to compel arbitration).

the Texas law,[382] and thus, the "only" recourse would be to permit mandamus relief.[383]

Referring to the time honored principle, the court stated that mere expense and time delays caused by appeal would not support the issuance of mandamus, but if the subject matter of the appeal were "vitiated" and rendered "illusory," mandamus would be available.[384] The court concluded that, absent mandamus relief, the relator "would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated."[385] In making such a pronouncement the court cited no authority. However, it is clear from the opinion that the decision was based upon policy considerations, not mandamus jurisprudence. While giving lip service to the *Walker* tenet, the court's decision to permit "mandamus to fill th[e] gap in appellate jurisdiction"[386] was probably motivated by the court's awareness that the United States Supreme Court would review any decision

382. *Anglin*, 842 S.W.2d at n.12. (stating that under federal law district courts have the power to certify interlocutory appeals).

383. *Id.* at 272. The court acknowledged the cumbersome remedy that parties would have in cases where the trial court denied their application to compel arbitration. *Id.* They would be required to pursue "an interlocutory appeal of the trial court's denial under" state law as well as "mandamus from the denial under the Federal Act." *Id.*

384. *Id.* Two years later, in *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994) (orig. proceeding), the court held that "a party who is compelled to arbitrate [under the FAA] without having [contractually] agreed to do so" could obtain mandamus relief. The court explained that, just as in *Anglin*, when the party "ha[d] lost its bargained-for right to arbitrat[e]" by being required to resolve the dispute through litigation, the relator in *Freis* had lost his right to have the matter resolved by litigation, and thus "ha[d] no adequate remedy by appeal." *Id. But see In re* Palacios, 221 S.W.3d 564, 565 (Tex. 2006) (orig. proceeding) (holding that, absent satisfying a heavy burden, the FAA precludes mandamus review of orders compelling arbitration if the underlying case was not dismissed).

385. Anglin Co.v. Tipps, 842 S.W.2d 266, 272–73 (Tex. 1992) (orig. proceeding). The court has continued to follow *Anglin*, permitting mandamus relief in cases where the motion to arbitrate under the FAA has been denied. *In re* Weekley Homes, L.P., 180 S.W.3d 127, 130 & n.7 (Tex. 2005) (orig. proceeding); *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69–70 (Tex. 2005) (orig. proceeding); *In re* AdvancePCS Health, L.P., 172 S.W.3d 603, 608–09 (Tex. 2005) (orig. proceeding); *In re* Wood, 140 S.W.3d 367, 370 (Tex. 2004) (orig. proceeding); *In re* L & L Kempwood Assocs., L.P., 9 S.W.3d 125, 128 & n.18. (Tex. 1999) (orig. proceeding). The Texas Supreme Court has also held that when a party is denied the right to arbitrate under the laws of another state, he is entitled to mandamus relief. *In re* J.D. Edwards World Solutions Co., 87 S.W.3d 546, 551 (Tex. 2002) (orig. proceeding).

386. *Anglin*, 842 S.W.2d at 272.

denying the contractual right to arbitrate under the FAA because to allow state court litigation to "run its course would defeat the core purpose of a contract to arbitrate."[387] In fact, Chief Justice Phillips observed in a later opinion that the Texas Supreme Court viewed the United States Supreme Court's *Southland* case "as a mandate from our nation's highest court to provide an extraordinary remedy."[388]

The court should have taken the opportunity to place these statements in concert with its earlier precedent, that an appeal is inadequate if it involves the loss of substantial legal rights. Or perhaps assert that in this case an appeal would have been tedious and ineffective as the party would have been forced to litigate his claim, lose, and then win an appeal on the issue of arbitration in order to effectuate his right. While alluding to these arguments in the opinion, the court refused to cite its earlier precedent and clearly chose to place the issue of arbitration rights under the federal protective policy. Such an approach is ineffective in trying to develop a coherent body of rational judgments in the area of mandamus. Furthermore, absent another compelling federal policy, the court's failure makes it harder to rely upon this case as precedent in the future.

Although taking the opportunity to examine the adequacy of the legal remedy, the court took further liberties with mandamus jurisprudence in the case of *Canadian Helicopters Ltd. v. Wittig*,[389] where the court denied mandamus relief to a foreign corporation whose special appearance had been denied.[390] The court stated that "the requirement that relator lack an adequate remedy by

387. *Id.* at 273 n.14 (citing Southland Corp. v. Keating, 465 U.S. 1, 7–8 (1984)).

388. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 142 (Tex. 2004) (orig. proceeding) (Phillips, C.J., dissenting) (citing three factors influencing the mandamus remedy in FAA cases).

389. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304 (Tex. 1994) (orig. proceeding).

390. *Id.* at 310 (denying mandamus relief because the relator had failed to establish the inadequacy of the remedy by appeal), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)). Chief Justice Philips, the author of *Walker*, writing for the majority, stated that the court's opinion would focus on whether or not this defendant who was denied a special appearance lacked an adequate remedy by appeal. *Id.* at 305–06 (reciting that mandamus is an extraordinary remedy and that a heavy burden is placed on a relator to show the inadequacy of a remedy by appeal).

[way of] appeal . . . [was] met only when parties are in danger of permanently losing substantial rights."[391] Initially, the court rejected the relator's argument that it would be time consuming and inconvenient to be forced to try the case before being able to obtain review of the trial court's order on appeal.[392] The court then briefly distinguished two generally recognized exceptions to

391. *Id.* (citing no authority but noting that mere expense or delay would not satisfy this requirement). This phrase, without the word "permanently," first became a lynchpin of mandamus jurisprudence in Texas in *Iley v. Hughes*, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958) (orig. proceeding) (citing Womack v. Berry, 156 Tex. 44, 51–52, 291 S.W.2d 677, 683 (1956) (orig. proceeding)) (holding that interference by way of mandamus "is justified only when parties st[ood] to lose their substantial rights"). The *Womack* court put it in these words:

> The express purpose of the rule is to further convenience and avoid prejudice, and thus promote the ends of justice. When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial. While the refusal to grant a separate trial under such circumstances is usually termed a clear abuse of discretion, it is nevertheless a violation of a plain legal duty. If it also appears that the injustice resulting from such refusal cannot later be remedied on appeal, the action of the court is subject to control by mandamus.

Womack, 291 S.W.2d at 683. The *Walker* court also stated that an appellate remedy is inadequate "when parties stand to lose their substantial rights." Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (citing *Iley*, 311 S.W.2d at 652). The three examples given in *Walker* in the discovery context all involved a permanent loss that could not be remedied by appeal. *Id.* at 843–44 (referring to an erroneous order requiring "the disclosure of privileged information," the denial of discovery materials necessary for a party to present a claim or defense, or those situations where the material would not be in the record so that there would be no ability for an appellate court to determine if error had occurred in not requiring the material to be produced). The court has continued to hold that an appeal is not an adequate remedy if it occurs too late to prevent the permanent loss of a substantial right. *See, e.g.*, *In re* Kansas City S. Indus., Inc., 139 S.W.3d 669, 670 (Tex. 2004) (orig. proceeding) (stating that "[a]n appeal is inadequate when it comes too late to correct the court's error without the loss of substantial rights to the complaining party"); *see also* Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 659 (Tex. 1996) (orig. proceeding) (granting conditional mandamus relief to abate appeal pending enforcement of settlement agreement as a lot of the settlement's benefit would be lost if relator were "required to expend time and resources in prosecuting the appeal"); Anglin Co. v. Tipps, 842 S.W.2d 266, 272–73 (Tex. 1992) (orig. proceeding) (granting conditional mandamus relief to enforce a contractual arbitration agreement to prevent the loss of a bargained for right).

392. *Wittig*, 876 S.W.2d at 306 (stating that these "factors alone can never justify mandamus relief"). The court stated that mandamus was not permitted in the case of erroneous refusal to dismiss a case on subject matter grounds, and it could not distinguish that position from an erroneous refusal to dismiss on grounds of personal jurisdiction. *Id.*

the rule that mandamus would not lie to remedy an erroneous trial court decision on a special appearance,[393] rejected relator's

393. *Id.* at 306–07. The court had in an earlier opinion recognized a comity exception. United Mexican States v. Ashley, 556 S.W.2d 784, 787 (Tex. 1977) (orig. proceeding). In *Ashley* the court authorized mandamus following a trial court's overruling of a special appearance filed by Mexico because of concerns with comity and foreign affairs involved with the issues of Mexico's sovereign immunity. *Id.* (instructing the trial court to vacate its order overruling Mexico's special appearance). The *Wittig* court noted that those principles were not in play in this case. *Wittig*, 876 S.W.2d at 306–07. The comity exception to the general prohibition of mandamus review of denials of special appearance was more fully explained by the court in *K.D.F. v. Rex*, 878 S.W.2d 589, 593 (Tex. 1994) (orig. proceeding), which held that an appeal is not an adequate remedy when issues of sovereign immunity and comity are involved because of "the risk of harm to interstate and international relations likely to occur if a Texas trial court erroneously exercises jurisdiction over another sovereign." *Id.*

The second exception to the general rule involved child custody cases where the court observed "that the remedy by appeal is frequently inadequate to protect the rights of children and parents." *Wittig*, 876 S.W.2d at 307. The *Wittig* court cites its earlier opinion in *Proffer v. Yates*, 734 S.W.2d 671 (Tex. 1987) (orig. proceeding), which granted conditional mandamus relief because of the failure of the trial court to transfer a custody dispute to the required venue in spite of the availability of an appeal because "[j]ustice demands a speedy resolution of child custody" cases. *Proffer*, 734 S.W.2d at 673. The court has continued to give special treatment to cases involving children in custodial matters. *See, e.g.*, Geary v. Peavy, 878 S.W.2d 602, 603–04 (Tex. 1994) (orig. proceeding) (holding that mandamus is an appropriate remedy to resolve a jurisdictional dispute involving child custody matters). In *Geary*, the trial court denied a motion to dismiss the child custody case even though a Minnesota court had acquired jurisdiction of the matter first. *Id.* at 603. While the relator could have clearly appealed the order denying the motion to vacate the custody case, the court granted mandamus relief without discussing the inadequacy of the remedy and referring only to "the unique and compelling circumstances." *Id.* (giving no citations to support its position). However, more recently the court denied mandamus relief in a case involving the trial court's refusal to dismiss a termination suit. The mandamus was denied because the court felt that the statutory accelerated appeal provided an adequate remedy. *See In re* Tex. Dep't of Family & Protective Servs., 210 S.W.3d 609, 613–14 (Tex. 2006) (orig. proceeding) ("[A]n accelerated appeal provided an adequate remedy."). The court noted:

> We do not hold that a party complaining of a trial court's failure to dismiss a SAPCR within the statutory deadline could never be entitled to mandamus relief, but under the facts of this case, we cannot conclude that an accelerated appeal was not an adequate remedy. Impending transfer of physical possession of the children or a trial court's unreasonable delay in entering a final decree might alter this conclusion, but this record raises neither concern. In fact, because the trial court entered the final decree on August 13, 2004, Ludwig and Higdon could have initiated an accelerated appeal under section 263.403 of the Texas Family Code at worst two days after they filed their petitions for writ of mandamus.

Id. at 614. *But see In re* Francis 186 S.W.3d 534, 538, 543 (Tex. 2006) (orig. proceeding) (granting mandamus conditionally in a non-child custody case because the statutory expedited appeal was inadequate in that it could not be completed before the issue in question became moot).

federal due process argument,[394] and dismissed the relator's assertion that its defense would be severely compromised absent mandamus relief.[395] The court then opened Pandora's Box by asserting by way of dictum that mandamus might lie in the case of "truly extraordinary circumstances":

> We do not foreclose the possibility that a trial court, in denying a special appearance, may act with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay. In such a situation, a defendant's remedy by appeal may be inadequate and mandamus therefore appropriate. However, regardless of whether or not the trial court in this instance erred, this is not the type of extraordinary situation where mandamus should be considered.[396]

Thus, the court was asserting that an appeal following a trial in which the court denied a special appearance might be inadequate in those situations where the trial court acted in an arbitrary fashion causing the defendant irreparable harm. Although not clear, given the court's earlier rulings, this irreparable harm was probably meant to be similar to the loss of substantial rights. Unfortunately, the court gave no examples of what it meant by extraordinary circumstances and left it to later decisions to explain more fully when such situations would occur. Justice Hecht's

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394. *Wittig*, 876 S.W.2d at 307–08.

395. *Id.* at 308. In *Walker* the court used the phrase "waste of judicial resources" in discussing a party's inability to present a viable claim in a case in which the court had denied discovery. Walker, 827 S.W.2d at 843. The relator obviously latched on to this language and asserted that having to try a case which would result in an obvious reversal would be a waste of judicial resources. The court rejected this argument on the basis of *Walker*. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 308 n.11 (Tex. 1994) (orig proceeding), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)).

396. *Wittig*, 876 S.W.2d at 308–09. Clearly recognizing the lack of authority for such bold obiter dictum, the court attempted to bolster its position by arguing that it was merely following the trend of some other states by authorizing mandamus review of special appearances in cases of extraordinary circumstances, but the majority of the cases cited authorized the issuance of a writ of prohibition (not a mandamus). *Id.* at 309. Instead of analyzing the differences between the various states' writs or their respective jurisdictional authority for authorizing the issuance of such writs, the court merely cites American Jurisprudence for the proposition that "substantially identical principles control the" two writs. *Id.* at 309 n.12. While acknowledging that mandamus relief in such cases was not the consensus nationwide, the court then noted that some states provided for interlocutory appeals in these cases. *Id.* at 309 n.13.

dissenting opinion in *Wittig* called the majority to ask for confusing mandamus jurisprudence.[397] He was especially critical of the dictum in the case involving "a super-clear abuse of discretion [that made an] appeal an inadequate remedy" in cases of special appearance.[398] He noted that, until this opinion, the two fundamental tenets of mandamus had worked independently—a finding of an abuse of discretion did not lead to the authority to issue a mandamus unless there was also a finding of an inadequate remedy by appeal.[399] Now, according to Justice Hecht, in special appearance cases, unless this "extraordinary situations" language has broader application,[400] all that was necessary for the court to have the authority to issue a mandamus was to find extraordinary circumstances.[401] Although Justice Hecht was correct to be critical of the opinion of the court, the dictum stated that in extraordinary situations the appellate remedy might be inadequate, apparently implying that the court would still have to initiate an evaluation of the appellate remedy before granting mandamus relief.[402] However, as later cases would establish, Justice Hecht's premonition was more than accurate.

Following *Wittig*, the court began to grant mandamus relief in cases where the trial courts had denied special appearances to nonresidents based upon the "extraordinary situations" dictum in *Wittig*. All the court did was locate exceptional circumstances in the record, rely upon the *Wittig* dictum, and issue the conditional

397. *Wittig*, 876 S.W.2d at 310–11 (Hecht, J., dissenting) (arguing that the opinion lacked not only clarity but also consistency with other opinions of the court). He chided the majority for what he viewed as its inconsistency in finding an adequate remedy in the case of a denial of a special appearance, but finding the remedy inadequate in the case of a denial of a right to arbitrate under the FAA. *Id.* at 311.

398. *Id.* at 310.

399. *Id.* (explaining that until this decision the determination of whether an appellate remedy was adequate had never depended on whether the ruling was "arguably wrong, or probably wrong, or even blatantly wrong").

400. *Id.* (observing that the court did not say whether this exception was only for cases of erroneous denials of special appearance or was to have broader application).

401. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 310–11 (Tex. 1994) (orig. proceeding) (noting that it would have been helpful had the court given some guidance in the difference between the various types of abuse of discretion), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)).

402. *Id.* at 308–09 (majority opinion).

writ of mandamus. In *National Industrial Sand Ass'n v. Gibson*,[403] the court granted mandamus relief upon a finding that the trial court was clearly erroneous in overruling the defendant's special appearance on grounds that irreparable harm would befall the defendant if the error was not corrected until after a trial on the merits.[404] The court briefly reviewed the record and concluded that there was no evidence to support either general or specific jurisdiction over the nonresident defendant.[405] Thus, "the 'total and inarguable absence of jurisdiction' justifies extraordinary relief."[406] The majority apparently read *Wittig* to mean that if the extraordinary circumstances existed, then the appeal was inadequate without any showing.[407] The dissent asserted that this case was not one of the two recognized exceptions that the court had identified in *Wittig* in which an appeal might be inadequate,[408] and thus, the defendant needed to establish that the appeal was indeed inadequate. The dissent stated that not only had the defendant failed to establish that appeal would be inadequate,[409]

403. Nat'l Indus. Sand Ass'n. v. Gibson, 897 S.W.2d 769 (1995) (orig. proceeding).

404. *Id.* at 771 (asserting that this case fell within the *Wittig* exception because the exercise of jurisdiction in this case was "with such disregard for guiding principles of law that the harm to the defendant becomes irreparable").

405. *Id.* at 774–76.

406. *Id.* at 776 (citing *Wittig*, 876 S.W.2d at 309) (asserting that other states granted relief in special appearance cases where there were extraordinary circumstances). The *Wittig* court was in turn quoting *Barnes v. Thomas*, 635 P.2d 135, 136 (Wash. 1981). However, unlike *Gibson* or *Wittig*, *Barnes* involved a lack of subject matter jurisdiction and a writ of prohibition. *Id.* at 136–37.

407. *Gibson*, 897 S.W.2d at 771, 776. Initially, the majority recited the general rule that an appeal was an adequate remedy to the "denial of a special appearance." *Id.* at 771. It then stated that the *Wittig* rule made an exception in the case where the denial of the special appearance was in total disregard of the law. *Id.* It then found that the *Wittig* exception applied to this case, and in one sentence concluded that an appeal would be inadequate because of the irreparable harm "caused by the trial court's denial of the special appearance." *Id.* at 776. *Wittig*, of course, had stated in its infamous dictum that in the case of extraordinary circumstances an appeal may be inadequate. *Wittig*, 876 S.W.2d at 308–09. From the wording, one would assume that the relator would still have to carry his burden of showing the inadequacy. The *Gibson* majority clearly felt this was not necessary. *Gibson*, 897 S.W.2d at 771.

408. Nat'l Indus. Sand Ass'n. v. Gibson, 897 S.W.2d 769, 777 (Tex. 1995) (orig. proceeding) (Cornyn, J., dissenting) (referring to parent-child relationship cases and those involving matters of comity).

409. *Id.* The dissent noted that the defendant "makes no argument that it will suffer any particular harm as a result of being put to an appeal other than that being put to trial will violate its right to due process." *Id.* Of course, *Walker* had held that the relator had to establish that the appellate remedy was inadequate. Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

but also that the court had given no explanation of how the appeal would be inadequate.[410] The dissent correctly understood the dictum in *Wittig* to require a showing that the remedy was inadequate even in the case of extraordinary situations.[411]

Shortly thereafter, the court granted another mandamus in a special appearance case. In *CSR Ltd. v. Link*,[412] the court held that the problems inherent in mass tort cases gave rise to extraordinary circumstances that made an appeal from a clearly erroneous special appearance decision inadequate.[413] The court identified three factors that made the appeal inadequate and which supported the court's conditional issuance of mandamus in the case. First, there was the large number of additional lawsuits to which the nonresident defendant might become exposed as the case was progressing through the litigation process.[414] Second, the court stated that defendants in mass tort cases were under severe financial strains, causing significant pressure to settle cases notwithstanding the underlying merits of the cases.[415] A speedy resolution that the nonresident defendant was not amenable to process in Texas would extricate the defendant from many of these claims. The final factor that the court considered was "[t]he most efficient use of the state's judicial resources."[416] The time spent,

410. *Gibson*, 897 S.W.2d at 777 (Cornyn, J., dissenting) ("If the Court is free to ignore that tenet [inadequate remedy by appeal as a fundamental tenet of mandamus practice] in this case, it may as well begin issuing extraordinary writs to correct denials of summary judgments.").

411. *Id.* (stating that the *Wittig* dictum did not "dispense with the required showing of inadequate appellate remedy").

412. CSR Ltd. v. Link, 925 S.W.2d 591 (Tex. 1996) (orig. proceeding).

413. *Id.* at 596. The court clearly recognized that even in the case of extraordinary circumstances the appeal still needed to be inadequate to justify mandamus relief.

414. *Id.* at 596 (stating that the potentially large number of lawsuits to which the relator might be exposed was a significant factor in the court's determination that appeal was inadequate in this case).

415. *Id.*

416. *Link*, 925 S.W.2d at 596–97 (arguing that "[b]ecause of the size and complexity of the asbestos litigation, the most prudent use of judicial resources" was to permit a writ of mandamus to be used to decide the question of jurisdiction). The court relied upon *Walker* to support the argument that this matter could "overtax the state's judicial resources." *Id.* at 597. This reference to *Walker* is misplaced as the only discussion in *Walker* on waste of judicial resources concerned the waste in trying a case without being able to present an adequate defense or claim because the court had denied discovery. Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding). *Walker* was not referring to wasted resources in trying cases that would ultimately be reversed, as was the case in *Link*. In fact, the court had rejected the very same argument in *Wittig*, albeit

the cost to the state, and the use of judicial resources, would all be for naught as the case would ultimately be reversed because of the improper determination made on the special appearance. Thus, the court held that the circumstances of the case justified granting mandamus relief to resolve the personal jurisdiction issue.[417] Justice Baker dissented and pointed out that the court's new standard in cases of special appearances was not supported by precedent.[418] He suggested that, given the perceived problems in the area of special appearance, either Rule 120a be amended to permit interlocutory appeals in cases of denials of special appearance,[419] or the legislature enact a provision that would allow for interlocutory appeals in special appearance cases.[420]

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involving only one lawsuit. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 308 n.11 (Tex. 1994) (orig. proceeding), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)). In any event, apparently the waste of judicial resources argument has survived to become a standard approach in these cases of exceptional circumstances under the *Wittig* rule. For example, the court used the same logic in finding an inadequate remedy by appeal because of the time and expense involved in *In re* E.I. DuPont de Nemours & Co., 92 S.W.3d 517, 523–24 (Tex. 2002) (orig. proceeding). The court conditionally granted a writ of mandamus to compel the trial courts to vacate their orders denying a motion to dismiss under the statutory forum non conveniens, finding the remedy by appeal inadequate because the defendant faced more than 8,000 plaintiffs in litigation that had already lasted six years and could last many more. *Id.* at 524.

417. *Link*, 925 S.W.2d at 597 (noting again the concerns of judicial efficiency in mass torts and the magnitude of potential risk for the defendant). As in *Wittig*, the court noted that permitting mandamus relief from the denial of special appearance in extraordinary circumstances was in accord with other jurisdictions. In support of this statement it cited some of the same cases that it had relied on in *Wittig*. In his dissenting opinion, Justice Baker tried to distinguish all of the state cases. *Id.* at 602–03 (Baker, J., dissenting) (listing his analysis under the heading "The Court's Authorities Are Flawed").

418. *Id.* at 603–04. Justice Baker chastised the court for ignoring precedent and paying lip service to the doctrine of stare decisis. *Id.* He concluded by asserting that "[m]andamus should not issue simply because we disagree with a trial court's ruling." *Id.* at 604.

419. CSR Ltd. v. Link, 925 S.W.2d 591, 601 (explaining that the court itself had already provided for interlocutory appeals from orders sealing court records through Texas Rule of Civil Procedure 76(a)(8)).

420. *Id.* at 601–02. The court noted that the legislature had already authorized interlocutory appeals in other pre-trial matters. Asserting that under his reading of 120a of the Texas Rules of Civil Procedure, appeal following final judgment was the remedy when a special appearance was denied, and absent legislative authorization for an interlocutory appeal; there was no interlocutory remedy available. *Id.* at 601. The legislature responded and in 1997 enacted legislation authorizing interlocutory appeals from the denial of a special appearance. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(7) (Vernon 1997 & Supp. 2006).

The court continued to apply the *Wittig* extraordinary situations approach in later cases, but, in an attempt to placate the criticism of some of the earlier dissenting opinions, began to address the availability of an alternative legal remedy. However, its decisions uniformly found that in those cases of exceptional circumstances, the remedy by appeal was just not as effective as mandamus. Furthermore, the court expanded its extraordinary situations cases beyond the area of special appearance. For example, in the 1999 case *In re Masonite Corp.*,[421] the court applied the exception to a trial court's order transferring venue.[422] In *Masonite*, hundreds of homeowners had filed suit in Jim Hogg and Duval counties alleging that defective materials had been used in the building of their homes.[423] In the large majority of suits, the counties in which the suits were filed were not counties of proper venue because the alleged defective building materials were not installed in the counties of suit insofar as the homeowners' residences were located in other counties.[424] The defendant filed a motion to transfer venue to the county of its principal place of business.[425] The plaintiffs then sought to have the court sever their claims and transfer the cases to the various counties of residence of the plaintiffs.[426] The trial court overruled all motions and "'on its own motion,' severed the claims of the non-resident homeowners and transferred them to the counties of their respective residences," which would have been counties of proper venue if the individual plaintiffs had originally filed suit there.[427] The

421. *In re* Masonite Corp., 997 S.W.2d 194 (Tex. 1999) (orig. proceeding).

422. *Id.* at 198–99.

423. *Id.* at 195–96.

424. *Id.* at 196. The plaintiffs asserted venue under a portion of the general venue rule that provided that the plaintiff could bring his suit "in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred." TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1) (Vernon 2002).

425. *In re Masonite Corp.*, 997 S.W.2d at 196. The general venue rule also provides that venue may be proper "in the county of the defendant's principal office in this state, if the defendant is not a natural person." TEX. CIV. PRAC. & REM. CODE § 15.002 (a)(3) (Vernon 2002).

426. *In re Masonite Corp.*, 997 S.W.2d at 196.

427. *Id.* Proper venue means a county of mandatory venue, or if not applicable, a county provided by the general rule or the permissive venue provisions. TEX. CIV. PRAC. & REM. CODE § 15.001(b) (Vernon 2002). As no mandatory provision applied, had the plaintiffs filed under the general venue rule in the counties where all or a substantial part of the events took place, those counties would have been counties of proper venue. However, since a large portion of the homeowners acknowledged that venue was not

defendant, asserting that the claims of the nonresident plaintiffs should have been transferred to the county of its principal place of business, sought mandamus relief. After being denied mandamus relief in the court of appeals, the relator sought mandamus relief in the supreme court.[428] The court initially held that the trial court decision "was a clear abuse of discretion."[429] The majority opinion held that this case was one of exceptional circumstances where appeal presents an inadequate remedy.[430] The exceptional circumstances were identified as the strains this suit would place on the parties and the judicial resources of the state because, as the court put the matter: "[C]laims of hundreds of plaintiffs, instead of being tried in a proper forum, are now being tried in multiple improper forums—all trials with automatic reversible error. There is no reason for the resources of Texas courts and the parties to be so strained."[431]

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proper in the county of suit, and the defendant had offered prima facie proof that Dallas was a county of proper venue, the cases should have been transferred to Dallas. *In re Masonite Corp.*, 997 S.W.2d at 197. Instead, the court improperly severed the various claims and, on its own, transferred the cases to the respective counties of residence of the various defendants. The supreme court held that the court had no discretion but to transfer the nonresident plaintiffs' cases to the county specified in the defendant's motion to transfer venue as it had offered prima facie proof that that county was a county of proper venue. *Id.* at 197–98.

428. *In re* Masonite Corp., 997 S.W.2d 194, 196 (Tex. 1999) (orig. proceeding) (stating that the court of appeals had denied relief because of the remedy by appeal). In both the court of appeals and the supreme court, the relator argued that the order of the trial court was void; therefore, the relator was entitled to the mandamus relief without regard to whether it had an adequate remedy at law. *Id.* at 198. The supreme court did not address this issue because it determined that the order, although contrary to the statute, was not void, but erroneous. *Id.* at 198–99.

429. *Id.* at 197–98. The clear abuse of discretion was apparent to the court because the trial court transferred the cases on its own motion, without any authority, to counties other than those established at the hearing to be counties of proper venue.

430. *Id.* at 198–99 (citing *Wittig* in support of the proposition that truly extraordinary circumstances would render a remedy by appeal inadequate).

431. *In re Masonite Corp.*, 997 S.W.2d at 198. The court cited the *Link* case in support of this proposition. In *Link*, the court stated that the use of the state's judicial resources in an efficient manner was a factor in determining whether an appeal was adequate. CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding) (citing *Walker* and concluding that under the circumstances of the case, a trial on the merits and appeal, would "overtax" the judicial resources). This reference to *Walker* is misplaced, as the only discussion in *Walker* on "wasted resources" concerned the waste in trying a case without being able to present an adequate defense or claim because the court had denied discovery. Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding). *Walker* was not referring to wasted resources in trying cases that would ultimately be reversed, as was the case in *Masonite*.

The court distinguished the *Masonite* situation from the normal situation where a court denied a motion to transfer venue and the effects were only on one court and the respective parties,[432] whereas in this case the effects would have been felt in fourteen different counties.[433] The dissent decried the court's failure to adhere to precedent and noted that there were none of the "exceptional circumstances" that the court found in *Link*,[434] nor was the built-in reversible error a sufficient exceptional circumstance.[435] The dissent was apparently concerned with the court expanding review of preliminary matters determined by the trial court without legislative authorization.[436] Not being a special

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432. *In re Masonite Corp.*, 997 S.W.2d at 199 & n.31 (noting that in such a case, even in the case of reversible error, mandamus would not issue) (citing Polaris Inv. Mgmt. Corp. v. Abascal, 892 S.W.2d 860, 862 (Tex. 1995)).

433. The court went on to explain that in this case, the burden would involve "fourteen other counties, hundreds of potential jurors [and large amounts of taxpayers' money]." *Id.* The focus on judicial resources rather than the impact upon the defendant to arrive at the *Wittig* exceptional circumstances exception was belittled by the dissent in this case. Justice Baker chided the majority:

> The majority asserts it does not retreat from *Walker*'s requirement that there be no adequate appellate remedy before mandamus will issue. But the majority then focuses on preserving judicial and public resources instead of the parties' rights. The majority does not explain why mandamus relief should not be granted in each case where reversible error exists, because doing so would certainly preserve judicial and public resources. Additionally, the majority expresses discomfort to being an "accomplice to sixteen trials that will amount to little more than a fiction." What if, instead of sixteen trials, there were just ten? Five? How much "waste of judicial and public resources" should be tolerated before a Court grants mandamus relief? The fallacy in the majority's decision is that the Court no longer has, nor does it provide, guidance on this issue for future cases.

Id. at 200–01 (Baker, J., dissenting).

434. *Id.* at 201. Justice Baker distinguished the court's reliance on the *Link* case by pointing out that in *Masonite* the number of potential plaintiffs was fixed, and not being a mass tort case, there was no inherent pressure to settle the case irrespective of the merits.

435. *See id.* at 201–02 (arguing that determining built-in reversible error as an exceptional circumstance is directly contrary to the findings in *Wittig* and *Walker*).

436. *In re Masonite Corp.*, 997 S.W.2d at 202 (arguing that as both the venue statute and the rules of procedure prohibit interlocutory appeals from a trial court's determination of a venue matter, the granting of mandamus relief in this case would circumvent this policy). Since the interlocutory appeal of trial court venue determinations had been repealed in 1983, the court had been consistent prior to this decision in denying mandamus relief from trial court venue determinations, as they were viewed as incidental rulings correctable on appeal. *See, e.g.*, Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals, 929 S.W.2d 440, 441 (Tex. 1996) (orig. proceeding) ("[V]enue determinations [were] incidental trial rulings that [were] correctable on appeal."); Montalvo v. Fourth Court of Appeals, 917 S.W.2d 1, 2 (Tex. 1995) (orig. proceeding) (holding that no appeal was available from a trial court's venue determination). However, the court had on rare

appearance case, the *Masonite* opinion was clearly an impermissible extension of the *Wittig* dictum and its progeny. The *Masonite* decision, however, represents the court's growing intolerance with the unwillingness of trial courts to interpret and apply the law correctly to the matters before them. While one can empathize with the court's frustration, the result is a growing body of law in the area of mandamus that is inconsistent and incoherent.

This frustration of the court became more apparent just before the *Prudential* decision, as the court uniformly began to grant mandamus relief in cases of clear abuses of discretion by the trial court and would dispense with the *Walker* requirement that the relator establish an inadequacy of the remedy by appeal. For example, the court's holding in *In re Ford Motor, Co.*[437] ordered Ford to pay the plaintiffs, as sanctions, $10,000,000 within ten days, and $25,000 in the event Ford sought a mandamus to challenge the various sanctions that were imposed on Ford as a result of discovery abuse.[438] The court of appeals granted Ford's petition

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occasion issued a mandamus to correct a trial court's improper application of venue procedures without considering whether there was an adequate remedy at law. *See* Union Carbide Corp. v. Moye, 798 S.W.2d 792, 792–93 (Tex. 1990) (orig. proceeding) (holding that the court had mandamus authority to compel a trial court to give a relator a reasonable time to supplement a venue record prior to the venue determination in a case involving a "motion to transfer venue on the ground that an impartial trial could not be had" within the county of suit under Texas Rule of Civil Procedure 257); Henderson v. O'Neill, 797 S.W.2d 905, 905 (Tex.1990) (orig. proceeding) (holding that the court had mandamus authority to compel a trial court to give the required days notice before the venue hearing); Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (holding that the mandatory venue provision of the Family Code in a child custody matter could be enforced by mandamus). Since *Masonite*, the court has held that mandamus was proper when a trial court attempted to set aside an order granting a motion to transfer venue after its plenary power had expired. *See In re* Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (holding that mandamus was proper when a trial court signed an order vacating an order to transfer venue after its jurisdictional power of the case expired).

In 1995, the legislature added a provision permitting mandamus as a statutory remedy to enforce a mandatory venue provision. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon 2002). The court construed this provision to authorize mandamus, even without a showing of an inadequate remedy at law. *See In re* Mo. Pac. R.R. Co., 998 S.W.2d 212, 216 (Tex. 1999) (orig. proceeding) (holding that under this section of the venue statute it was not necessary to show an inadequate remedy by appeal).

437. *In re* Ford Motor Co., 988 S.W.2d 714 (Tex. 1998) (orig. proceeding).

438. *Id.* at 718. The sanction order also required Ford to pay the plaintiffs $10,000,000 within ten days. *Id.* The court of appeals issued a mandamus compelling "the trial court to vacate the $10,000,000 sanction," but held that the attorneys' fees matter "could be remedied [by] appeal." *Id.*

for mandamus, directing the trial court to vacate "the $10,000,000 sanction [as] an arbitrary fine not authorized" under the Rules of Civil Procedure, but left undisturbed the sanctions in the event Ford sought mandamus relief.[439] Ford then sought relief from the supreme court. Although no date was specified for the payment of this sum, the court held that the trial court had clearly abused its discretion in requiring that the money be paid regardless of the outcome of the mandamus proceeding.[440] The court asserted that such an order would have a chilling effect on the exercise of the rights of a party to seek mandamus relief.[441] While this proposition might be true in the abstract, the record in this case clearly established that there was no chilling effect. The majority also argued that a penalty imposed for the exercise of a prospective right would require an assessment on the part of the defendant as to whether it desired to continue the litigation.[442] Again, the evidence conclusively established that the sanctions did not "skew" the case such as to make an appeal inadequate.[443] Thus, totally ignoring the circumstances of the case before it, the court held that an appeal was inadequate whenever "a court imposes a monetary penalty on a party's prospective exercise of its

439. Ford Motor Co. v. Tyson, 943 S.W.2d 527, 532 (Tex. App.—Dallas 1997) (orig. proceeding), *mand. granted in part*, *In re* Ford Motor Co., 988 S.W.2d 714 (Tex. 1998) (orig. proceeding) (holding that although the amount was immaterial the sanction was an unauthorized arbitrary fine from which there was "no adequate remedy [by] appeal to correct the unauthorized divestiture of . . . ownership rights").

440. *In re Ford Motor Co.*, 988 S.W.2d at 721 (holding that the trial court abused its discretion when it awarded appellate/mandamus attorneys' fees that were not conditioned on the outcome of the proceeding).

441. *Id.* at 722.

442. *Id.* at 722–23 (relying by analogy on *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991), where the court had held "that [an] appeal is not an adequate remedy for monetary sanctions for discovery abuse ordered to be paid before final judgment if the party's continuation of the litigation is threatened"). Again, there is nothing in the record to reflect that Ford was in any way hindered by the sanction order. *Id.*

443. *See In re Ford Motor Co.*, 988 S.W.2d at 724 (Enoch, J., concurring in part and dissenting in part) (observing that the sanction had not prevented Ford from seeking a mandamus); *id.* at 726 (Baker, J., concurring in part and dissenting in part) (reciting that the record was clear that Ford could even pay the $10,000,000 and continue the case). The majority opinion relied upon earlier precedent for the proposition that sanctions cannot be permitted to skew the "procedural dynamics of the case." *Id.* at 722 (majority opinion) (citing Travelers Indem. Co. of Conn. v. Mayfield, 923 S.W.2d 590, 595 (1996)) (holding that a trial court's order requiring an insurance company to pay other party's attorneys' fees so skewed the trial process that "remedy by appeal was inadequate").

legal rights."[444] The two dissenting opinions both argued that neither Ford nor the court had established the inadequacy of the remedy by appeal in this case.[445] The opinion of the court was just another example of the growing frustration of the Texas Supreme Court with the incidental rulings of trial courts in the state. While the granting of mandamus relief has always been case specific, the court no longer seems bound by this limitation, and will grant such relief whenever it is of the opinion that the trial

444. *Id.* at 723. The court gratuitously observed that the right to try to seek relief by way of mandamus without penalty was forever lost, even if the money is recovered. It is unclear if the court was attempting to equate the loss of this right to the loss of a substantial right, which might justify mandamus relief in the proper case, or whether the relator was trying to state what the compelling circumstances were for the issuance of the writ. *See, e.g.*, Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (stating that an appellate remedy was inadequate "when parties stand to lose their substantial rights"); Anglin Co. v. Tipps, 842 S.W.2d 266, 272–73 (Tex. 1992) (orig. proceeding) (granting conditional mandamus relief to enforce a contractual arbitration agreement to prevent the loss of a bargained for right). At the time of the *Ford* case, the rules of appellate procedure required the applicant for the writ to state the compelling reasons for the issuance of the writ. *See* TEX. R. APP. P. 121(a)(2)(D), 60 TEX. B.J. 876, 930 cmt. (Tex. 1986, repealed 1997) (the petition for mandamus "shall state the relief sought and the basis for the relief, as well as the compelling circumstances which establish the necessity for the writ to issue"). The present rule no longer contains this requirement except in cases of concurrent jurisdiction between the courts of appeal and the supreme court. In cases of concurrent jurisdiction, the rule requires that the writ must first be presented to the lower court "unless there is a compelling reason not to do so," and the petition in such a case "must state the compelling reason why the petition was not first presented to the court of appeals." TEX. R. APP. P. 52.3(e); *see also* Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding) (noting that *Walker* and *Wittig*, as well as the rules of appellate procedure, require the presentation of compelling circumstances for mandamus to issue). From time to time, the court has referred to compelling circumstances as being necessary for the issuance of mandamus—although it is unclear whether it was referring to the requirement of the rule, or was referring to the extraordinary circumstance announced in *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 309 (Tex. 1994) (orig. proceeding), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)); *In re* TXU Electric Co., 67 S.W.3d 130, 132 (Tex. 2001) (orig. proceeding) (Phillips, C.J., concurring) (stating that mandamus would not issue absent compelling circumstances); Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 93–94 (Tex. 1997) (citing Geary v. Peavy, 878 S.W.2d 602 (Tex. 1994) (stating that the compelling circumstances of the case justified the exercise of mandamus jurisdiction); Geary v. Peavy, 878 S.W.2d 602, 603 (Tex. 1994) (orig. proceeding) (holding that "the unique and compelling circumstances" in a child custody case justified the exercise of mandamus jurisdiction).

445. *In re Ford Motor Co.*, 988 S.W.2d at 723 (Tex. 1998) (orig. proceeding) (Enoch, J., concurring in part and dissenting in part); *id.* at 726 (Baker, J., concurring in part and dissenting in part).

court's ruling is arbitrary, capricious, or without legal justification. In such cases, the court will find the appeal inadequate in the abstract, and grant mandamus relief without examining the actual facts and circumstances of the case before it.

Within weeks following *Ford*, the court conditionally granted a petition for writ of mandamus in another case of a clear abuse of discretion. The *In re Allstate County Mutual Insurance Co.*[446] court held that the trial court had abused its discretion by incorrectly characterizing a valid appraisal clause contained in an automobile insurance liability policy as an unenforceable arbitration provision.[447] The court, acknowledging that a finding of an abuse of discretion alone did not justify mandamus relief without a finding of an inadequate remedy by appeal, turned to that issue.[448] In a brief and cursory fashion, the court concluded that the trial court's conclusion would deny the defendant the development of proof going to the heart of the case and would severely impact the defendant's ability to establish its defenses to the plaintiff's claims.[449] It is clear from a reading of the majority's opinion that it was deeply troubled and frustrated with the trial court's inability or unwillingness to apply the law correctly to this case—a law that had been laid down in 1888.[450] Given this fact, it

446. *In re* Allstate County Mut. Ins. Co., 85 S.W.3d 193 (Tex. 2002) (orig. proceeding).

447. *Id.* at 196. The case involved a suit claiming that the insurance company had violated statutory and common law duties in connection with valuation of the insured's property damage under an automobile liability insurance policy. *Id.* at 195. The policy contained an appraisal provision that governed the resolution of disputes concerning the insured's vehicle's value. *Id.* After suit was filed, the insurance company filed a motion to abate the proceedings and invoked the appraisal clause. *Id.* Denying the motion, the trial court found the clause was an unenforceable arbitration agreement. *Id.* The supreme court held this decision to be "[a] clear failure by the trial court to analyze or apply the law correctly" and "constitute[d] an abuse of discretion." *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d at 195.

448. *Id.* at 196.

449. *Id.* The court, by way of analogy, used the rule articulated in *Walker*, which provided "that denial of discovery 'going to the heart of a party's case may render the appellate remedy inadequate.'" *Id.*

450. *In re* Allstate County Mut. Ins. Co., 85 S.W.3d 193, 195 & n.1 (Tex. 2002) (orig. proceeding) (noting that in *Scottish Union & National Insurance Co. v. Clancy*, 71 Tex. 5, 8 S.W. 630, 631 (1888), the court had clearly "distinguished between appraisal and arbitration clauses"); *see also id.* at 196 (reciting again that the courts in Texas have been correctly "distinguish[ing] between appraisal and arbitration over a hundred years," during which time "they have enforced appraisal provisions"). Justice Baker, in obvious displeasure with the court, asserted in his dissent that the court's real purpose in this case

was going to issue the mandamus, but—to avoid substantial criticism—took the time to address the inadequacy of the remedy. However, Justice Baker in his dissent cogently pointed out that the relator failed to establish that the trial court's order would hinder it in making its defenses such that the trial would be a waste of judicial resources.[451] He pointed out that the basis of the plaintiffs' claims dealt with allegations of fraud in the initial valuation process and not on the appraisal provision of the insurance contract.[452] He further asserted that there were other methods for the relator to acquire the information to which the trial court's ruling had limited its access.[453] Once again the court, out of noticeable frustration, merely substituted its opinion for that of the trial court on an incidental preliminary matter while paying lip service to the requirement of a finding of an inadequate remedy by appeal.[454]

On the same day the court issued its decision in *Prudential*,[455] the court issued two additional opinions involving mandamus relief. The first was a per curiam opinion in the case of *In re Van Waters & Rogers, Inc.*,[456] in which the court presented a rather

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was "to avoid making the parties go through the time and expense of a trial" and appeal. *Id.* at 200 (Baker, J., dissenting). The costs and delays caused by trial and appeal of a case that would probably ultimately be reversed were not a sufficient basis for the exercise of mandamus authority. *See, e.g.*, Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (disapproving of previous "authorities to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus").

451. *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d at 199 (Baker, J., dissenting) (referring to the court's opinion as wholly advisory). Justice Baker agreed with the majority that if the trial court's order had in fact deprived the insurer of putting on a defense, the court should exercise its mandamus authority. *Id.* at 198. But he asserted "the relator must 'establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources.'" *Id.* at 198 (citing *Walker*, 827 S.W.2d at 843). Absent such a showing, Justice Baker claimed that the relator had failed to establish "that no adequate appellate remedy exist[ed]." *Id.*

452. *In re* Allstate County Mut. Ins. Co., 85 S.W.3d 193, 197 (Tex. 2002) (orig. proceeding). Justice Baker observed that the court was unable to find any authority "that the appraisal process' outcome is entirely dispositive of the breach of contract claim." *Id.* at 199.

453. *Id.* at 198–99.

454. *Id.* at 200 (asserting that the court was careful not to suggest that it was returning to the more lenient standard stated in *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063, 1068 (1926), that the appellate remedy needed to "be 'equally convenient, beneficial, and effective as mandamus'").

455. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

456. *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203 (Tex. 2004) (orig. proceeding).

detailed discussion of the inadequacy of the appeal, giving the appearance that the court was unaware that its discussion would be rendered somewhat "meaningless" by the *Prudential* decision.[457] In *Van Waters*, over four hundred former employees of a manufacturing company claimed injuries as a result of exposure to various chemicals manufactured or distributed by over fifty defendants.[458] The "court consolidated the claims of twenty of the plaintiffs and set those claims down for trial."[459] Following the consolidation order, several of the defendants sought mandamus from the court of appeals and, after being denied, applied for relief from the supreme court.[460] After reviewing the record, the court held "that the trial court abused its discretion in consolidating" the various workplace tort claims of multiple plaintiffs against multiple defendants, in clear contravention of two earlier supreme court cases.[461] Without mentioning the balancing test laid out in *Prudential*,[462] the court then addressed whether the defendants had an adequate remedy by way of appeal.[463] It stated:

> Absent extraordinary circumstances, mandamus will not issue unless defendants lack an adequate appellate remedy. An appeal is inadequate when parties are in danger of permanently losing substantial rights. Such a danger arises when the appellate court would not be able to cure the error, when the party's ability to present a viable claim or defense is vitiated, or when the error

457. *Id.* at 210–11.

458. *Id.* at 206.

459. *Id.*

460. *Id.* at 206–07.

461. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d at 210 (stating that the case as consolidated would create "significant jury confusion and undue prejudice"). The twenty different plaintiffs had all worked for the same company, but at different times and in different positions, and were not exposed to the same chemicals nor did they suffer from the same injuries. *Id.* at 209–10. The court concluded that the trial court had abused its discretion in the consolidation orders upon two previous rulings in the area of mass torts alleging exposure in a workplace. *Id.* at 207–08 (citing *In re* Ethyl Corp., 975 S.W.2d 606, 611 (Tex. 1998) (orig. proceeding); *In re* Bristol-Myers Squibb, 975 S.W.2d 601, 603 (Tex. 1998) (orig. proceeding)).

462. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (stating that the appellate court must determine the adequacy of the remedy only in cases where the court makes the initial determination that the benefits to mandamus review outweigh the detriments to such review).

463. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d at 210–11 (Tex. 2004) (orig. proceeding).

cannot be made part of the appellate record.[464]

In this case the court noted that the unrelated claims of the plaintiffs, the exposure of the plaintiffs to different defendants' products, and the different defensive theories of the various defendants, would lead to jury confusion and prejudice to the defendants, which "would be impossible for an appellate court to untangle" on appeal; thus, mandamus should issue.[465]

Given the fact that *Van Waters* was issued the same day, but after *Prudential*, the court's references to exceptional circumstances making an ordinary appeal inadequate[466] and further statements that an appeal was inadequate when there was a danger of losing substantial rights[467] were strange because the court made

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464. *Id.*

465. *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding).

466. *Id.* at 210–11. The court cited *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) for this proposition which was clearly wrong, as *Walker* does not mention extraordinary circumstances. That test was announced in *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 309 (Tex. 1994) (orig. proceeding) (stating that in extraordinary situations the remedy of appeal may be inadequate), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)). There have been a few cases where the court has held that extraordinary circumstances make the remedy by appeal inadequate. *See, e.g.*, *In re* Masonite Corp., 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding) (holding that the "'exceptional circumstances' make appeal an inadequate remedy"); CSR Ltd. v. Link, 925 S.W.2d 951, 597 (Tex. 1996) (orig. proceeding) (stating that extraordinary circumstances in the case arising from the denial of a special appearance could not be adequately remedied on appeal); Nat'l Indus. Sand Ass'n. v. Gibson, 897 S.W.2d 769, 771, 776 (Tex. 1995) (finding an appeal inadequate because of the exceptional circumstances arising from the denial of a special appearance); Wittig, 876 S.W.2d at 308–09 (stating that extraordinary circumstances might make an appeal from an erroneous denial of a special appearance inadequate). There are of course a few other situations where the court held that an appeal was inadequate because of special circumstances. *See, e.g.*, K.D.F. v. Rex, 878 S.W.2d 589, 593 (Tex. 1994) (orig. proceeding) (holding that an appeal is not an adequate remedy when issues of sovereign immunity and comity are involved); Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (granting mandamus relief because of the trial court's failure to transfer a custody dispute to the required venue in spite of the availability of an appeal because "[j]ustice demands a speedy resolution of child custody . . . issues").

467. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d at 211 (citing *Wittig* correctly for this proposition). In *Wittig* the court used this language to note that a party could establish that he does not have an adequate remedy at law by showing that he is "in danger of permanently losing substantial rights." *Wittig*, 876 S.W.2d at 306; *see also Walker*, 827 S.W.2d at 842 (noting that a remedy is inadequate "when parties stand to lose their substantial rights"). There does not appear to be any difference from the articulation of the principle in terms of permanently losing a substantial right, or losing a substantial

no reference to the *Prudential* balancing test.[468] Interesting, however, is the fact that *Van Waters* was probably truer to traditional mandamus jurisprudence than the majority of court opinions since *Walker*. The reasons given for the inadequacy of the appeal are consistent with the concept that an adequate remedy by appeal needs to give the same relief that could be had by mandamus in order to protect the legal right of the relator. In effect, the appellate remedy in *Van Waters* was not as "equally convenient, beneficial and effective as mandamus" relief.[469]

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right. *Compare Prudential*, 148 S.W.3d at 142 (Phillips C.J., dissenting) (mentioning "permanent deprivation of a substantial right"), *and Van Waters*, 145 S.W.3d at 211 ("An appeal is inadequate when parties are in danger of permanently losing substantial rights."), *with* Iley v. Hughes, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958) (orig. proceeding) ("Interference [by mandamus] is justified only when parties stand to lose their substantial rights."). The first articulation of this principle was in the *Iley* decision where the court determined that an appeal would be an adequate remedy for the erroneous decision of the trial court to conduct a separate trial on damages in a personal injury case. *Iley*, 158 Tex. at 368, 311 S.W.2d at 653. *Iley* cited *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677 (1956) (orig. proceeding), for this proposition, but with no page reference. The closest reference in *Womack* to a loss of a right is the following language, where the court indicated that mandamus must issue to compel a separate trial: "In practical effect, therefore, the action of the trial court denied relator a judicial determination of his right and duty to administer the property left in trust for the minors." *Womack*, 156 Tex. at 52, 291 S.W.2d at 683. Under the facts of *Womack*, absent mandamus relief, the relator would permanently lose this right. *Id.* (noting that by the time the stay of the proceedings required under the Soldiers and Sailors Civil Relief Act was lifted, the trust beneficiaries would no longer be minors and the trustee would never have been able to exercise his right to administer the minors' property). The same was true in the examples given in *Walker* relating to discovery orders. *See* Walker v. Packer, 827 S.W.2d 833, 842–43 (Tex. 1992) (orig. proceeding) (stating that a trial court's erroneous order requiring the disclosure of privileged information, denying the discovery materials necessary for a party to present a claim or defense, or disallowing discovery so that it does not appear on the appellate record, could not be remedied by appeal). In *Van Waters*, the characterization of the problem as articulated by the court would also result in a permanent loss of the right to a fair trial. *See Van Waters*, 145 S.W.3d at 211 (stating that the appellate court would not be able "to untangle the confusion or prejudice on appeal").

468. Prudential, 148 S.W.3d at 136 (stating that the appellate court must determine the adequacy of the remedy by appeal only in cases where the court initially determines that the "benefits to mandamus review are outweighed by the detriments"). *Van Waters* has not been cited once by the supreme court since its issuance on any aspect of its discussion concerning the availability of an alternative remedy.

469. *See, e.g.*, Cleveland v. Ward, 116 Tex. 1, 14, 285 S.W. 1063, 1068 (Tex. 1926) (orig. proceeding) (using the language, "convenient, beneficial, and effective" to describe mandamus). *Walker* disapproved of *Cleveland* to the extent that this language was understood to imply that delay and costs associated with appeal do not make it inadequate, but the concept that the remedy by appeal needs to be as "convenient, beneficial, and as effective as mandamus," is a time honored principle both in Texas and at common law. *See, e.g.*, The King v. Severn & Wye Ry. Co., 106 Eng. Rep. 501, 502 (Q.B.

The second case was decided by the same 5-4 split as in *Prudential*.[470] *In re AIU Insurance Co.*[471] involved a forum selection clause in an insurance policy.[472] The policy covered the parent company as well as all of its subsidiaries located in other states.[473] "A few months after the policy issued, [one of the insured's subsidiaries] merged with [another company that] had wells and a pipeline gathering system in [Texas.]"[474] The other company had been party to litigation for over three years prior to the effective date of the insurance policy.[475] The subsidiary sought liability coverage under the disputed policy, and the carrier undertook the defense under a reservation of rights.[476] The subsidiary sued the carrier in Texas asserting various contractual breaches and insurance code violations, as well as seeking a declaratory judgment that the claims be covered against it.[477] The carrier moved to dismiss the suit claiming that the forum selection clause required the suit be brought in New York.[478] Following the trial court denial of the motion, the carrier sought mandamus relief from the court of appeals, which was denied, and then sought the relief from the supreme court.[479] The court initially held that the forum selection clause was enforceable and that the trial court had abused its discretion in not enforcing it.[480] Then, without reference to the *Prudential* balancing test,[481] the court turned its attention to whether the carrier had an adequate remedy at law.

1819) (claiming that an indictment and related fine was not as "equally convenient, beneficial and effectual as a mandamus").

470. *See In re* AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004) (orig. proceeding) (holding 5-4 that mandamus was available to enforce the forum-selection clause).

471. *In re* AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004) (orig. proceeding).

472. *Id.* at 110.

473. *Id.* at 110–11.

474. *Id.* at 111.

475. *Id.*

476. *In re AIU Ins. Co.*, 148 S.W.3d at 111.

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.* at 111–15 (relying primarily upon federal precedent establishing that "absent 'fraud, undue influence, or overweening bargaining power,'" forum selection clauses should be enforced).

481. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (stating that the appellate court must determine the adequacy of the remedy by appeal only in cases where the court makes the initial determination that "the benefits [to mandamus review] outweigh the detriments").

Relying upon its earlier holding in *Anglin* that mandamus would lie to enforce an arbitration agreement, the court held that, just as in *Anglin*, the failure to enforce the contractual provision "would 'vitiate and render illusory the subject matter of an appeal.'"[482] The court also stated that subjecting a party to trial and possible appeal in a forum other than as contractually agreed is harassment,[483] "adding a layer of expense that would otherwise not exist,"[484] and harmful error that would be reversed on appeal, leading to "a meaningless waste of judicial resources."[485] Finally, noting that other states have used mandamus to enforce forum selection clauses,[486] the court concluded that AIU did not have an adequate remedy by appeal.[487] The dissent simply noted that the insured had other remedies to achieve the benefit of its bargain, and had failed to show that any of those remedies were inadequate.[488] The dissent also correctly noted that there were important differences between arbitration and forum selection clauses.[489] The court's equation of the forum selection clause to

482. *In re* AIU Ins. Co., 148 S.W.3d 109, 116 (Tex. 2004) (orig. proceeding) (relying upon Anglin Co., Inc. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding)). The court saw no meaningful distinctions between an arbitration clause and the forum selection clause at issue in this case regarding the availability of an alternative remedy. *Id.* at 116. The court explained that, in *Anglin*, the fact that the party might have won the litigation at trial, or that the party could have recovered damages for breach of contract, or that had the party lost the trial, it could have pursued its arbitration rights on appeal, did not deter the court from concluding that an appeal following the trial would be inadequate. *Id.* at 115–16.

483. *Id.* at 117.

484. *Id.* at 118 (citing Travelers Indem. Co. of Conn. v. Mayfield, 923 S.W.2d 590, 595 (Tex. 1996) and observing that the breaching party might prolong the proceedings to extract a favorable settlement).

485. *In re AIU Ins. Co.*, 148 S.W.3d at 118 (citing *In re* Masonite Corp., 997 S.W.2d 194, 198–99 (Tex. 1999) (orig. proceeding) as an example of mandamus being granted to prevent a waste of judicial resources).

486. *Id.* at 119–20. The court recognized that the United States Supreme Court had not reviewed the denial of motions to dismiss based on forum selection clauses on interlocutory appeal because that particular "contractual right . . . was not '*important enough.*'" *Id.* at 120 (citing Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 502 (1976) (Scalia, J., concurring)).

487. *Id.* at 121.

488. *Id.* at 124 (arguing that a party's rights under a forum selection clause are not lost if "vindication is postponed until a final, appealable judgment is rendered in the case") (citing *Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring)).

489. *In re* AIU Ins. Co., 148 S.W.3d 109, 124 (Tex. 2004) (orig. proceeding) (Phillips, J., dissenting) (stating that there was a long history of public policy support for arbitration clauses while forum selection clauses have only recently been looked upon with favor). The dissent also noted that other than in the case of arbitration clauses, there are no

the arbitration clause was in fact a poor analogy given the significant federal and Texas policies favoring arbitration of disputes,[490] and the Supreme Court's *Southland* decision, which held that the Court would intervene if a state did not grant immediate relief in cases denying the contractual right to arbitrate under the FAA.[491] However, the court's reliance on *Anglin* gives support to the proposition that the ultimate basis of the court's decision was its perception that the contractual forum selection clause was a substantial right that would be lost absent mandamus, rendering the appellate remedy inadequate.[492] However, it would have helped the consistency and coherence of mandamus jurisprudence in the state to have made the issue of lost rights explicit, rather than implicit. This view of the case is given additional credence by the fact that another contractual provision was enforced by mandamus on the very same day. Apparently, the court was equating the loss of contractual rights to the loss of substantial rights, thus making a remedy by appeal inadequate.

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precedents for using mandamus relief to enforce contractual provisions. *Id.*

490. *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 (1985) (noting that the FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate"); Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992) (orig. proceeding) (noting that Texas courts are favorably disposed toward arbitration agreements).

491. Southland Corp. v. Keating, 465 U.S. 1, 7–8 (1984) (holding that the Court would review any decision denying the contractual right to arbitrate under the FAA because to allow a state court proceeding to "run its course would defeat the core purpose of the contract" to arbitrate).

492. In *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994) (orig. proceeding) (per curiam), the court characterized *Anglin* as a case where "the party, being required to resolve its dispute by litigation, has lost its bargained-for right to arbitration" and thus "has no adequate remedy by appeal." The *AIU* court explained that in *Anglin* the fact that the party might have won the litigation at trial, or that the party could have recovered damages for breach of contract, or that had the party lost the trial it could have pursued its arbitration rights on appeal, did not deter the court "from concluding that an appeal following a trial would be an inadequate remedy." *AIU*, 148 S.W.3d at 115–16. The *AIU* court asserted that the same "considerations are present when there is an agreement to pursue litigation in a forum other than Texas." *Id.* at 116. Although *AIU* cited no support for either proposition, the only valid reason for these conclusions is that the contractual right to arbitrate and the contractual right to pursue litigation outside of Texas would have been lost; therefore, there was no adequate remedy by appeal. *See, e.g.*, Canadian Helicopters, Ltd. v. Wittig, 876 S.W.2d 304, 306 (Tex. 1994) (orig. proceeding) (holding that the lack of an adequate remedy by way of appeal "is met only when parties are in danger of permanently losing substantial rights"), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)).

IV. THE BALANCING TEST

A. *The* Prudential Insurance Co. *Case*

In a 5-4 decision on September 3, 2004, the Texas Supreme Court conditionally granted a petition for writ of mandamus in the case *In re Prudential Insurance Co. of America*.[493] The case involved a simple suit to rescind a lease agreement and to recover damages.[494] The issue presented to the court involved the validity of the jury waiver provision that was contained in the lease.[495] Nine months into the lease, the lessee sued Prudential, seeking termination of the lease on grounds of a persistent sewage odor.[496] After the tenant filed a proper demand for a jury trial, "Prudential moved to quash the jury demand, based on the [contractual] waiver in the lease."[497] Following a hearing, the court denied Prudential's motion.[498] After having its mandamus relief denied by the court of appeals,[499] Prudential then petitioned for mandamus relief from the Texas Supreme Court.[500] The court

493. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

494. *Id.* at 127. The lease agreement that was the subject matter of the litigation had been actively negotiated for over six months. *Id.* The tenant's lawyers had in fact "successfully insisted on a number of changes in" the originally proposed lease agreement. *Id.* The guaranty agreement was also negotiated between the parties and several changes were successfully made to it. *Id.* The lease agreement was guaranteed by the principals of the limited partnership that executed the lease as tenant. *In re Prudential*, 148 S.W.3d at 127. The guaranty did not contain a waiver of jury trial provision, but did provide for a performance guaranty of all of tenant's obligations under the lease in the event of the tenant's default. *Id.* at 128.

495. *See id.* at 127–28 (stating that the lease contained the following provision: "Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions").

496. *Id.* at 128. The leased premises were being used for a restaurant and the sewage odor made the premises uninhabitable for their intended use. Not surprisingly, Prudential counterclaimed against both the lessee and the guarantor for unpaid rent. *Id.*

497. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 128 (Tex. 2004) (orig. proceeding).

498. *Id.* The tenant and the guarantor raised various state constitutional arguments as well as policy arguments against the waiver. *Id.* at 128–29. The guarantors pointed out that the jury waiver was not contained in the guarantee. *Id.* at 129. The trial court denied Prudential's motion to quash the jury demand without any explanation. *Id.*

499. *In re* Prudential Ins. Co. of Am., No. 05-02-01104-CV, 2002 WL 1608233 (Tex. App.—Dallas, July 22, 2002) (mem. op., not designated for publication).

500. *In re* Prudential Ins. Co. of Am., No. 02-0690, 46 Tex. Sup. Ct. J. 394 (Jan. 16,

concluded that the contractual waiver provision was enforceable,[501] and that "the trial court's refusal to enforce . . . [it] was a clear abuse of discretion."[502] Turning to the question of whether Prudential had an adequate remedy by way of appeal, the court began its discussion by boldly stating that:

> The operative word, "adequate," has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.[503]

2003). After the judge who had originally denied Prudential's motion to quash left office, the matter was abated so that the new judge could reconsider the original motion. *In re* Prudential Ins. Co. of Am., No. 02-0690, 46 Tex. Sup. Ct. J. 546 (Apr. 3, 2003) (relying on Rule 7.2(b) of the Texas Rules of Appellate Procedure). Upon reconsideration, the new judge denied the motion, and upon the filing of the order in the supreme court, the court reactivated the case to the active docket. *In re* Prudential Ins. Co. of Am., No. 02-0690, 46 Tex. Sup. Ct. J. 794 (June 19, 2003).

501. *In re Prudential*, 148 S.W.3d at 135. The court also held "that the guaranty incorporated the jury waiver [found] in the lease." *Id.*

502. *Id.* (stating that trial courts have no discretion in ascertaining the law or in applying the law to the factual situation).

503. *Id.* at 136. As this principle is stated at the end of the paragraph, one is logically led to believe that the detriments of mandamus review are: undue interference with trial courts, distractions to the appellate courts, delay, and expense of mandamus review of incidental rulings; while the benefits of mandamus review are: to prevent the loss of substantive and procedural rights, give direction to the law, and prevent time and expense being wasted from an eventual reversal. This new test was not mentioned in the other two mandamus cases handed down the same day as *Prudential*; the court in those opinions

The court rejected what it called rigid, or simple, rules, as they were inconsistent with the flexibility that the court claimed to be the remedy's principle virtue.[504] The court then proceeded to give examples of three exceptional cases where the flexibility of mandamus led the court to the determination, from the facts and circumstances of the case, that the appellate remedy was inadequate, in large part, because of the expenses and time delay to be incurred by the parties and the judicial system.[505] The court then noted that increased mandamus relief was in its opinion preferable to enlargement of interlocutory appeals by the legislature,[506] as interlocutory appeals lie as a matter of right and

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applied the more rigid and simple rules of traditional mandamus jurisprudence. *See In re* AIU Ins. Co., 148 S.W.3d 109, 118 (Tex. 2004) (orig. proceeding) (acknowledging *Prudential* merely for the proposition that a contractual waiver of a jury trial was enforceable by mandamus); *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding) (omitting any reference to *Prudential* and stating "[a]n appeal is inadequate when parties are in danger of permanently losing substantial rights"). *But see* W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 65 (2006) (noting that *AIU* and *Prudential* signal that mandamus will receive a warmer reception in the court than under the *Walker* decision).

504. *In re Prudential*, 148 S.W.3d at 136–37. The idea that flexibility is the principle virtue of the extraordinary remedy of mandamus is consistent with the court's desire to use the remedy on an ad hoc basis. Yet, to assert that flexibility is the principal virtue of the law is to misunderstand the interrelationship between virtue and that of law and justice in a society. Years ago, Lon Fuller argued that some of the principal virtues of the rule of law were that like cases would be treated alike, that the law was relatively stable in that changes in the law were reasonably predictable, and that this stability and predictability benefited the resolution of disputes. LON FULLER, THE MORALITY OF LAW 33–94 (1964). More recently, a contemporary philosopher writing about the Aristotelian link between law and virtue noted: "To be just is to give each person what each deserves; and the social presuppositions of the flourishing of the virtue of justice in a community are therefore twofold: that there are rational criteria of desert and that there is a socially established agreement as to what those criteria are." ALASDAIR MACINTYRE, AFTER VIRTUE 152 (2d ed. 1984).

505. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136–37 (Tex. 2004) (orig. proceeding) (recognizing that an appellate remedy would not be inadequate merely because of expense or time delays). The three cases were: *In re E.I. DuPont de Nemours & Co.*, 92 S.W.3d 517, 523–24 (Tex. 2002) (orig. proceeding) (finding the remedy by appeal inadequate because of time and expenses to be incurred by the defendant who faced more than 8,000 plaintiffs in litigation that had lasted six years already and could last many more), *In re Masonite Corp.*, 997 S.W.2d 194, 199 (Tex. 1999) (orig. proceeding) (referring to a strapping of state and party resources unless mandamus relief were granted), and *Travelers Indemnity Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 595 (Tex. 1996) (orig. proceeding) (holding that a trial court's order requiring insurance company to pay other party's attorneys' fees so skewed the trial process that remedy by appeal was inadequate).

506. *In re Prudential*, 148 S.W.3d at 137–38 (asserting that the expanding nature of

must be decided, while mandamus issues as a matter of discretion.[507] Instead of applying its new balancing test, the court then entered into a brief discussion of the adequacy of the remedy by appeal in this case and concluded, rather simply, that appeal would not provide an adequate remedy in this case because the contractual right to have a non-jury trial would be lost in whole or in part "by having been subject to the procedure it agreed to waive."[508] Like *AIU* and *Anglin*, the court was once again holding that the loss of a contractual right was the loss of a substantial right that made the remedy by appeal inadequate. The court concluded its opinion with the observation that other courts, including a lower Texas court, had used mandamus to enforce contractual jury waivers.[509] Interspersed through the court's

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interlocutory appeals was a result of the unavailability of mandamus relief).

507. *Id.* at 138. *But see* Scott v. Twelfth Court of Appeals, 843 S.W.2d 439, 442–43 (Tex. 1992) (orig. proceeding) (explaining that while the decision to grant mandamus is considered discretionary, "the court's discretion lies in deciding whether the prerequisites for mandamus relief have been met, not in deciding whether to grant relief irrespective of such prerequisites").

508. *In re Prudential*, 148 S.W.3d at 138 (using the identical argument that it had accepted in *AIU* that, if the relator received a favorable jury verdict, the right would be lost forever; whereas if the relator lost at trial and lost on appeal, the right would be gone forever; and finally, if the relator lost at trial, and the appeal was successful, it would have lost a part of its right by being forced to undergo a jury trial in the first place). It was at this point in the opinion that the court referred to arbitration by way of analogy. *Id.* The court observed that it had granted mandamus relief to compel arbitration because, even if the error in compelling arbitration were reversed on appeal, the relator would have been deprived of the benefits of his contracted clause. *In re Prudential*, 148 S.W.3d at 138. Obviously from the majority's opinion, a similar loss of a contractual right would occur here without mandamus. *Id.* at 139. The court entered into this discussion of the availability of a remedy because, although it announced a new test, it still applied the traditional test in this case. *Id.* at 143 (Phillips, C.J., dissenting). In his dissenting opinion, Chief Justice Phillips distinguished the granting of mandamus relief to compel contractual arbitration, which had been denied by the trial court, from the denial of jury waiver provision. *Id.* He explained that the enforcement of arbitration agreements through mandamus was influenced by strong public policies favoring arbitration: the anomaly of interlocutory appeals under state arbitration statutes, but not under the federal statute in a state court; and the "Supreme Court's pronouncement that appellate delays defeat[] the 'core purpose' of contracts to arbitrate." *Id.* at 142.

509. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 139 (Tex. 2004) (orig. proceeding) (stating that the court was unaware "of a published decision denying [the] relief"). Interestingly enough, the Seventh Circuit Court of Appeals had been on record for nearly twenty years denying such relief in the proper case. *See, e.g.*, First Nat'l Bank of Waukesha v. FDIC, 796 F.2d 999, 1006 (7th Cir. 1986) (holding mandamus inappropriate because it was not a case of necessity as the petitioner could appeal the district court's order at the conclusion of the trial); *see also In re* Linee Aeree Italiane (Alitalia), 469 F.3d 638, 640 (7th Cir. 2006) (orig. proceeding) (stating that there was no irreparable harm in

rambling justification for jettisoning centuries of mandamus jurisprudence was most likely the true reason for the decision—wanting to expand its ability to supervise inferior courts through ad hoc decision making to remedy what it viewed to be the pressures from the final judgment rule and the state's limited interlocutory appeals.[510]

Chief Justice Phillips, writing the dissenting opinion joined by three other justices, lamented the court's retreat from *Walker*.[511] Following the court's earlier precedents, he stated that Prudential was not in jeopardy of permanently losing its contractual right to a non-jury case.[512] Chief Justice Phillips noted that the appellate remedy in this case was adequate—a reversal of the case upon appeal because of the erroneous denial of the motion to quash the jury waiver provision in the contract.[513] Presumably, in such a case, the retrial of the case would be a non-jury case as required by the contract. In such a situation, the dissent saw no permanent loss of any right, substantial or otherwise, merely a postponement.[514] Chief Justice Phillips concluded by repeating that

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being denied a statutory right to a non-jury trial). *See generally* Nathan A. Forrester, Comment, *Mandamus as a Remedy for the Denial of Jury Trial*, 58 U. CHI. L. REV. 769 (1991) (discussing the differences between the Seventh Circuit and the other federal courts on the issue of mandamus as a remedy for the denial of a jury trial).

510. Twice during the rambling exposition, the court referred to Charles Alan Wright's treatise on federal courts which opined that writs could "provide[] a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders." *In re Prudential*, 148 S.W.3d at 137 n.53, 139 (citing CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3934.1, at 572, 574 (1996)).

511. *Id.* at 141 (Phillips, J., dissenting).

512. *Id.* (citing *Wittig* and other cases for the traditional rule on the fundamental tenet requiring the relator to establish the existence of an inadequate remedy). Apparently, the dissent conceded that the contractual right to a non-jury case is a substantial right. *Id.*

513. *Id.* at 141–42 (noting that under the harmful error analysis the case would be reversed if there were a material fact issue in dispute).

514. *In re Prudential*, 148 S.W.3d at 161. As Chief Justice Philips addressed the issue:

> The Court suggests, however, that if we do not act immediately Prudential's contractual right will be lost forever. I disagree. The Court confuses the adequacy of Prudential's appellate remedy with the damages Prudential may suffer as a consequence of its tenant's breach of contract. The purpose of the appellate remedy is not to compensate Prudential for this contractual breach, but to correct the trial court's error. If Prudential has been otherwise damaged, it should seek damages directly from the breaching party as in any other contract case.

Id. This response did not directly address the possibility that the relator might win the

incidental trial court rulings are not to be the subject of mandamus relief unless there is a "permanent deprivation of a substantial right," which, in his opinion, was not the case here.[515]

Based upon over one hundred years of precedent, Chief Justice Phillips' observation concerning the deprivation of a right was clearly erroneous. The right to a non-jury trial would be lost in the event the case was tried to a jury, irrespective of the outcome of that case.[516] Furthermore, neither damages by way of breach of contract nor a non-jury retrial after successful appeal would revive the lost right.[517] The argument that should have been addressed by the dissenting opinion, here and in *AIU,* was that the contractual rights lost were not ones that Texas considered to be substantial, such that their loss would make a remedy by appeal inadequate. In Texas, the constitutional right to trial by jury can be waived by failure to act promptly.[518] If a trial court improperly denies a right to trial by jury, the decision is subject to appeal—not mandamus.[519] A trial court's erroneous decision concerning where venue is proper in a suit on a written contract to perform an obligation in a particular county is also not subject to mandamus.[520] Thus, valid arguments could have been made that

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jury trial, or that he might lose both the jury trial and the appeal.

515. *Id.* at 142.

516. *See generally* Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991) (orig. proceeding) (noting that time spent and lost could not be compensated for).

517. *See generally* Terrell v. Greene, 88 Tex. 539, 31 S.W. 631, 634–36 (1895) (orig. proceeding) (holding that damages did not satisfy the failure to perform or receive the specific duty to which one was entitled).

518. *See, e.g.*, Bradley Motors v. Mackey, 878 S.W.2d 140, 141 (Tex. 1994) (per curiam) (holding "that a party who fails to appear at trial after filing an answer," demanding a jury, and paying a jury fee "waives the right to a jury trial"). In order to be entitled to a jury trial in a civil suit in Texas, a person is required to timely request a jury and pay the required fee. TEX. R. CIV. P. 216.

519. *See, e.g.*, Halsell v. DeHoyos, 810 S.W.2d 371, 372 (Tex. 1991) (orig. proceeding) (holding that a refusal to grant a jury trial can, in the proper case, be reversed on appeal).

520. *See, e.g.*, Polaris Inv. Mgmt. Corp. v. Abascal, 829 S.W.2d 860, 861 (Tex. 1995) (noting that venue rulings are generally not reviewable by mandamus); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon 2002) (providing for mandamus relief when the trial court refuses to enforce a mandatory venue provision). Contractual provisions to perform an obligation in a particular county are governed by a permissive venue exception. TEX. CIV. PRAC. & REM. CODE ANN. § 15.035 (Vernon 2002). Contractual provisions establishing venue in a stated county are generally against public policy, and are considered void and unenforceable. *See* Leonard v. Paxson, 654 S.W.2d 440, 441 (Tex. 1983) ("[We] h[o]ld 'that the fixing of venue by contract, except in such instances as permitted [by the permissive venue exception for contracts] is invalid.'").

a contractual jury waiver clause or a forum selection clause does not rise to the level of a substantial right. Merely being in a contract does not make a right substantial. The majority's opinions in these two cases sidestep this issue for the obvious reason that the court did not want to be seen as placing contractual rights on the same plane as substantial rights, justifying the issuance of mandamus relief because the appeal was deemed inadequate. Thus, in these two cases, the court erroneously relied on *Anglin*, while failing to admit the fact that *Anglin* was decided on the basis of public policy, not mandamus jurisprudence. There is no public policy that would justify mandamus in the case of a forum selection clause or a jury waiver clause; thus, the court erroneously decided these two cases—unless it wanted to admit that these two contractual clauses rose to the level of substantial rights. That, it refused to do.

B. *The New Balancing Test in Practice*

Although the court purported to make a new test for determining the adequacy of the legal remedy by way of appeal, the court has been reluctant to deviate from the traditional mandamus jurisprudence.[521] In fact, in large part, the court has

521. In the following cases involving a party seeking mandamus relief from the Texas Supreme Court, the *Prudential* case was cited by the court merely for the general statement that mandamus was available only when there had been an abuse of discretion and there was no adequate remedy at law; there was absolutely no mention of the new balancing test. *See, e.g.*, *In re* Ford Motor Co., 211 S.W.3d 295, 298 (Tex. 2006) (orig. proceeding) (reciting the two fundamental principles of mandamus jurisprudence); *In re* Tex. Dep't of Family & Protective Servs., 210 S.W.3d 609, 612 (Tex. 2006) (orig. proceeding) (stating the two fundamental principles of mandamus jurisprudence); *In re* Francis, 186 S.W.3d 534, 538 (Tex. 2006); *In re* Living Ctrs. of Tex., Inc., 175 S.W.3d 253, 256 (Tex. 2005) (mentioning only the two fundamental principles of mandamus jurisprudence); *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005) (orig. proceeding) (accepting that mandamus was available only if the remedy by appeal was inadequate). On the other hand, some courts of appeal have applied the new *Prudential* balancing test. *See, e.g.*, *In re* Unitec Elevator Servs. Co., 178 S.W.3d 53, 66 (Tex. App.—Houston [1st Dist.] 2005 orig. proceeding) (noting that in this case the benefits of mandamus were outweighed by the detriments); *In re* State, 175 S.W.3d 532, 537 (Tex. App.—Tyler 2005 orig. proceeding) (concluding that under the facts and circumstances "the benefits of mandamus outweigh[ed] the detriments, rendering appeal an inadequate remedy for the State"); *see also In re* Foremost County Mut. Ins. Co., 172 S.W.3d 128, 135–36 (Tex. App.—Beaumont 2005 orig. proceeding) (reciting the balancing test but holding that the exceptional circumstances of the case justified the issuance of mandamus without weighing the benefits and detriments).

merely relied upon pre-*Prudential* precedent in reaching the decision concerning the adequacy of the legal remedy without any reference to the *Prudential* balancing test. For example, the court has continued to grant mandamus relief under the well-settled rule in order to prevent the production of confidential information or privileged documents, as there was clearly no adequate remedy in these cases;[522] has granted mandamus where trial courts have ignored their own orders granting a new trial;[523] and has granted mandamus where the trial court has erroneously disqualified counsel for one of the parties.[524] It appears from a review of the court's mandamus cases since *Prudential* that the test announced in *Prudential* was to apply only in cases where there was no directly comparable precedent that would fit the facts and circumstances of the case before it, and the court was dissatisfied with the decision of the trial court. In case after case, the court has merely relied upon the traditional statements espoused in *Walker*,or upon definitive holdings of pre-*Prudential* cases, in reaching its decision to grant or deny the conditional writ of mandamus.[525]

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522. *See In re Ford Motor Co.*, 211 S.W.3d at 297–98 (noting that it was a well-settled standard that mandamus was proper when "the trial court has abused its discretion" and where an appeal was inadequate).

523. *See In re* Burlington Coat Factory Warehouse of McAllen, Inc., 167 S.W.3d 827, 831 (Tex. 2005) (orig. proceeding) (compelling trial court to proceed to trial).

524. *See In re* Sanders, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (per curiam) (compelling trial court to vacate an order entered that had improperly disqualified counsel for one of the parties).

525. *See In re* Tex. Dep't of Trans., 218 S.W.3d 74, 79 (Tex. 2007) (orig. proceeding) (per curiam) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel application of mandatory venue); *In re* Disc. Rental, Inc., 216 S.W.3d 831, 832 (Tex. 2007) (orig. proceeding) (per curiam) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to vacate execution on a void judgment); *In re* Bank One, N.A., 216 S.W.3d 826, 826–27 (Tex. 2007) (orig. proceeding) (per curiam) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of contractual arbitration agreement); *In re Ford Motor Co.*, 211 S.W.3d at 297–98 (orig. proceeding) (per curiam) (citing *Prudential* and *Walker* for the two fundamental tenets of mandamus jurisprudence); *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 612 (orig. proceeding) (citing *Prudential* and *Walker* for the two fundamental tenets of mandamus jurisprudence); *In re* Graco Children's Prods., Inc., 210 S.W.3d 598, 600–01 (Tex. 2006) (orig. proceeding) (per curiam) (citing neither *Prudential* or *Walker*, but relying on pre-*Prudential* precedents to grant mandamus conditionally to compel trial court to vacate order requiring the production of documents); *In re* Carlisle, 209 S.W.3d 93, 95–96 (Tex. 2006) (orig. proceeding) (per curiam) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel

the performance of a duty imposed under the election code); *In re* Barnett, 207 S.W.3d 326, 328–29 (Tex. 2006) (orig. proceeding) (per curiam) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel the performance of a duty under the election code); *In re* Applied Chem. Magnesias Corp., 206 S.W.3d 114, 116–17 (Tex. 2006) (orig. proceeding) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel application of mandatory venue); *In re* D. Wilson Constr. Co., 196 S.W.3d 774, 780–81 (Tex. 2006) (orig. proceeding) (citing *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of a contractual arbitration agreement); *In re* Dallas Peterbilt Ltd., L.L.P., 196 S.W.3d 161, 163 (Tex. 2006) (orig. proceeding) (per curiam) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of a contractual arbitration agreement); *In re* Palm Harbor Homes, Inc., 195 S.W.3d 672, 679 (Tex. 2006) (orig. proceeding) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of contractual arbitration agreement); *In re* Lynd Co., 195 S.W.3d 682, 687 (Tex. 2006) (orig. proceeding) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel trial court to vacate its order withdrawing its order granting new trial); *In re* Smith, 192 S.W.3d 564, 569–70 (Tex. 2006) (orig. proceeding) (per curiam) (citing *Walker*, but denying mandamus relief because party had appealed trial court's sanction order; relying on pre-*Prudential* precedent to grant mandamus relief conditionally to compel trial court to comply with rules concerning net worth determinations for supersedeas bonds); *In re* Mayes-Hooper, 189 S.W.3d 777, 778 (Tex. 2006) (orig. proceeding) (per curiam) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel trial court "to vacate its order . . . granting grandparent possession"); *In re* Vesta Ins. Group, Inc., 192 S.W.3d 759, 764 (Tex. 2006) (orig. proceeding) (per curiam) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of contractual arbitration agreement); *In re* Dillard Dep't Store, 198 S.W.3d 778, 782 (Tex. 2006) (orig. proceeding) (per curiam) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of contractual arbitration agreement); *In re* Angelini, 186 S.W.3d 558, 560–61 (Tex. 2006) (orig. proceeding) (denying mandamus relief because appellate courts cannot deal with disputed fact issues in an original mandamus proceeding); *In re* Lumbermens Mut. Cas. Co., 184 S.W.3d 718, 729 (Tex. 2006) (orig. proceeding) (relying on pre-Prudential authorities to grant mandamus conditionally to compel intervention); *In re* Dillard Dep't Store, 186 S.W.3d 514, 515–16 (Tex. 2006) (orig. proceeding) (per curiam) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of contractual arbitration agreement); *In re* Sharp, 186 S.W.3d 556, 557 (Tex. 2006) (orig. proceeding) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel the performance of a duty imposed under the election code); *In re* Holcomb, 186 S.W.3d 553, 555 (Tex. 2006) (orig. proceeding) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel the performance of a duty imposed under the election code); *In re* Francis, 186 S.W.3d 534, 543 (Tex. 2006) (orig. proceeding) ("When a candidate has been denied a place on the ballot due to official error, we have generally granted mandamus relief."); *In re* Weekley Homes, L.P., 180 S.W.3d 127, 131, 135 (Tex. 2005) (orig. proceeding) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel trial court to order nonparties' claims to arbitration); *In re* Columbia/St. David's Healthcare Sys., L.P., 178 S.W.3d 781, 782 (Tex. 2005) (orig. proceeding) (per curiam) (relying on two post-*Prudential* cases that relied on pre-*Prudential* precedent to grant mandamus conditionally to compel a probate judge to comply with the venue provisions of the Texas Civil Practice and Remedies Code); *In re*

Living Ctrs. of Tex., Inc., 175 S.W.3d 253, 255–56, 262 (Tex. 2005) (orig. proceeding) (citing *Prudential* and *Walker* for the two fundamental tenets for mandamus jurisprudence, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel trial court to vacate order compelling production of privileged documents); *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69–70 (Tex. 2005) (orig. proceeding) (per curiam) (citing *Prudential* for the simple proposition that "[m]andamus relief is only available when a party has no adequate remedy at law," but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of contractual arbitration agreement); *In re* AdvancePCS Health, L.P., 172 S.W.3d 603, 608–09 (Tex. 2005) (orig. proceeding) (per curiam) (citing neither *Prudential* nor *Walker*, but relying on pre-*Prudential* precedent to grant mandamus conditionally to compel enforcement of contractual arbitration agreement); *In re* Tex. Ass'n of Sch. Bds., 169 S.W.3d 653, 660 (Tex. 2005) (orig. proceeding) (citing neither *Prudential* nor *Walker*, but in a case of first impression, refusing to grant mandamus on grounds that the transaction in question was not a major transaction under the mandatory provisions of the venue statute); *In re* Burlington Coat Factory Warehouse of McAllen, Inc., 167 S.W.3d 827, 831 (Tex. 2005) (orig. proceeding) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel trial court to comply with its own order granting new trial); *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 742 (Tex. 2005) (orig. proceeding) (relying on pre-*Prudential* precedent to grant mandamus conditionally to order the court of appeals to vacate its order compelling arbitration); Powell v. Stover, 165 S.W.3d 322, 324, 328–29 (Tex. 2005) (orig. proceeding) (relying on pre-*Prudential* precedent to grant mandamus conditionally to abate a child custody matter pending a resolution of the application of the jurisdictional requirements of the Texas Uniform Child Custody Jurisdiction and Enforcement Act); *In re* Ford Motor Co., 165 S.W.3d 315, 317, 321–22 (Tex. 2005) (orig. proceeding) (per curiam) (citing both *Walker* and *Prudential* for the fundamental principles of mandamus jurisprudence, but relying on both pre-*Prudential* precedent as well as policy considerations to grant mandamus conditionally to compel trial court to grant legislative continuance); *In re* Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 382–83 (Tex. 2005) (orig. proceeding) (per curiam) (citing *Walker* for the fundamental tenets of mandamus jurisprudence and relying upon a case decided after *Prudential* that relied solely on pre-*Prudential* precedent, to grant mandamus conditionally to compel trial court "to vacate its order disqualifying [one party's] counsel"); *In re* McKinney, 167 S.W.3d 833, 835 (Tex. 2005) (orig. proceeding) (per curiam) (relying on pre-*Prudential* precedent to conditionally grant mandamus to compel enforcement of contractual arbitration agreement); *In re* Reliant Energy, Inc., 159 S.W.3d 624, 626–27 (Tex. 2005) (orig. proceeding) (per curiam) (relying on two post-*Prudential* cases that relied solely on pre-*Prudential* precedent to grant mandamus conditionally to compel a probate judge to comply with the venue provisions of the Texas Civil Practice and Remedies Code); *In re* Omni Hotels Mgmt. Corp., 159 S.W.3d 627, 629 (Tex. 2005) (orig. proceeding) (per curiam) (relying solely on probate law authority to deny mandamus relief); *In re* Terex Corp., 159 S.W.3d 630, 631 (Tex. 2005) (orig. proceeding) (per curiam) (relying on two post-*Prudential* cases that relied solely on pre-*Prudential* precedent to conditionally grant mandamus to compel a probate judge to comply with the venue provisions of the Texas Civil Practice and Remedies Code); *In re* Wilson N. Jones Mem'l Hosp., 159 S.W.3d 629, 630 (Tex. 2005) (orig. proceeding) (per curiam) (relying on two post-*Prudential* cases that relied solely on pre-*Prudential* precedent to grant mandamus conditionally to compel a probate judge to comply with the venue provisions of the Texas Civil Practice and Remedies Code); *In re* U.S. Silica Co., 157 S.W.3d 434, 438–39 (Tex. 2005) (orig. proceeding) (per curiam) (relying on pre-*Prudential* precedent to grant mandamus relief conditionally "to resolve conflicting orders from two or more courts asserting jurisdiction

The court has actually appeared to apply the balancing test in only two cases since the court issued its *Prudential* decision.[526] In the first of these cases, *In re Ford Motor Co.*,[527] the court was faced with a trial court's denial of a motion for a legislative continuance filed on behalf of an attorney representing a defendant in a personal injury suit.[528] A petition for writ of mandamus was denied by the court of appeals, and a petition seeking such relief was then filed in the court.[529] The court, citing the *Prudential* balancing language, began its analysis by reviewing the law relating to legislative continuances to determine if the trial court was under a duty to grant the continuance in this case.[530] The court noted that if an attorney-legislator was retained more than thirty days before the trial setting, the trial court had no discretion to deny a properly requested motion for continuance unless there was a constitutional exception.[531] Specifically, the

over the same case"); *In re* Automated Collection Techs., Inc., 156 S.W.3d 557, 559–60 (Tex. 2004) (orig. proceeding) (per curiam) (relying on the *AIU* case to grant mandamus conditionally to compel enforcement of a valid forum-selection clause); *In re* Sanders, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (per curiam) (relying on pre-*Prudential* precedent to grant mandamus conditionally to compel trial court to vacate order disqualifying counsel for one of the parties); *In re* Newton, 146 S.W.3d 648, 652–53 (Tex. 2004) (orig. proceeding) (citing neither *Walker* nor *Prudential*, but relying on pre-*Prudential* authority to grant mandamus conditionally to compel trial court to vacate temporary restraining order in election funding case because there was no adequate remedy at law).

526. *See In re* Derzapf, 219 S.W.3d 327, 334 (Tex. 2007) (orig. proceeding) (per curiam) (applying the balancing test used in *Prudential*); *In re* Ford Motor Co., 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (per curiam) (same). The court has also relied on the underlying *Prudential* holding in another case involving a contractual jury waiver provision. *See In re* Gen. Elec. Capital Corp., 203 S.W.3d 314, 316 (Tex. 2006) (orig. proceeding) (per curiam) (noting that the court merely stated that, "[i]n *Prudential*, we concluded that mandamus was appropriate to enforce a valid contractual jury waiver").

527. *In re* Ford Motor Co., 165 S.W.3d 315 (Tex. 2005) (orig. proceeding) (per curiam).

528. *Id.* at 317. Section 30.003 of the Texas Civil Practice and Remedies Code generally provides a mandatory right to a continuance for an attorney representing a party who is a legislator attending a legislative session. *Id.* at 317–18.

529. *Id.* at 317.

530. *Id.* at 317–18.

531. *In re Ford Motor Co.*, 165 S.W.3d at 319. This exception was recognized by the court in *Waites v. Sondock*, 561 S.W.2d 772, 776 (Tex. 1977) (holding that a "'legislative continuance [was] mandatory except in those cases in which the party opposing continuance alleges that a substantial existing right will be defeated or abridged by delay'"). The court observed that several opinions of the Texas Court of Criminal Appeals and courts of appeals in Texas had written on the scope of this exception to the otherwise mandatory legislative continuance. *In re Ford Motor Co.*, 165 S.W.3d at 319.

court noted that if the party opposing the continuance could show at a hearing that a substantial existing right would be defeated by the delay, then the continuance should be denied.[532] After reviewing the record, the court determined that the plaintiff had not carried her burden of showing that she had a substantial existing right that was enforceable against Ford[533] that would be delayed or defeated by a continuance, thus the trial court had no discretion to deny the motion for continuance.[534] Then the court briefly stated what it believed to be the benefits that could be achieved by mandamus in this case; however, it did not attempt to evaluate the detriments. In outlining the various benefits of the legislative continuance, the court stated:

> Without [a mandatory legislative continuance], a lawyer-legislator could be forced to decide between fulfilling the duty owed to a client and the duty owed to constituents to participate in a legislative session. The consequences of that decision—possible nonparticipation in a legislative session—could not be remedied on appeal. To give full effect to the Legislature's policy decision regarding legislative continuances, we conclude that a party has no adequate remedy by appeal when a trial court abuses its discretion by denying a motion for legislative continuance.[535]

In effect, the court used one half of the balancing test to extol public policy to announce the decision that there would never be an adequate remedy by appeal once it is determined that the trial court erred in granting the continuance. While refusing to address the detriments of mandamus in this case, the court was implicitly using the language of the new test as justification for its ad hoc decision making.

In the second case purporting to use the balancing text, *In re Derzapf*,[536] the court conditionally issued a mandamus to compel

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532. *In re Ford Motor Co.*, 165 S.W.3d at 319.

533. The court noted that although relator might have a present right to access medical care, such right was not enforceable against Ford as "[h]er claims against Ford arise from alleged defects of a pick-up truck, not for improperly denying her access to medical care." *Id.* at 321.

534. *Id.* (noting that what is required to satisfy the *Waites* exception is a substantial impairment of a constitutional right).

535. *In re* Ford Motor Co., 165 S.W.3d 315, 322 (Tex. 2005) (orig. proceeding) (per curiam) (citing *Prudential* at pages where the balancing test was located).

536. *In re* Derzapf, 219 S.W.3d 327 (Tex. 2007).

a trial court to vacate a grandparent visitation order.[537] Following the death of his wife, the relator had permitted his mother-in-law and her second husband to care for his three children while he coped with his work schedule.[538] As time progressed, the relationship between the parties cooled, and eventually the grandmother and her husband sought visitation.[539] The trial court granted limited visitation rights and this mandamus proceeding followed after the court of appeals denied mandamus relief.[540] The court initially determined that the trial court abused its discretion in granting visitation, and then turned to the balancing test as set out in *Prudential*.[541] The court once again made no effort to perform the test, but merely recited that the trial court's visitation ruling would divest the parent of possession of his children without satisfying the statutory requirement of overcoming the presumption that being with the father was in the best interest of the children.[542] Claiming that such "divestiture [was] irremediable" the court concluded that mandamus relief was appropriate.[543] The court performed no balancing test, but merely recited the liturgy to achieve the result that it wanted in the case. Unlike *Prudential* or *AIU*, the right involved in this case had already been recognized as fundamental and substantial,[544] and the appellate remedy was inadequate because the right to make

537. *Id.* at 334–35.

538. *Id.* at 329.

539. *Id.* at 329–30. Initially the grandmother and her husband sought custody of the children, but later filed a motion for visitation. *Id.*

540. *In re* Derzapf, No. 2-06-235-CV, 2006 WL 2076529, *1 (Tex. App.—Fort Worth July 25, 2006 orig. proceeding).

541. *In re Derzapf*, 219 S.W.3d at 334 (holding that the grandparents had failed to satisfy their burden of showing "that [the] denial of access would '*significantly* impair' the children's physical health or emotional well-being" as required by the Texas Family Code).

542. *Id.*

543. *Id.* The court cited several cases; however, none were relevant to the issue of balancing the advantages and disadvantages of mandamus relief. *Id.* at 34–35. The cited cases dealt with the general rule that a parent was entitled to custody absent a finding of being unfit. *See, e.g., In re* Mays-Hooper, 189 S.W.3d 777, 778 (Tex. 2006) (orig. proceeding) (per curiam) (relying upon Troxel v. Granville, 530 U.S. 57 (2000) for the proposition that grandparent access could not be compelled by a court unless the parent was unfit or the child would suffer physical or emotional effects by failing to see the grandparent).

544. *See, e.g., Troxel*, 530 U.S. at 72–73 (stating that the U.S. Constitution "does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made").

the child-rearing decisions was going to be lost by permitting the grandparents' visitation rights. Unfortunately, even those justices that dissented in *Prudential*[545] joined in the per curiam decision. This case would have been a great one to place mandamus jurisprudence back on the traditional track by rejecting the balancing test as unnecessary and contrary to Texas mandamus jurisprudence.

Given the infrequency with which the court has relied upon this new test, it is unclear what its overall ramifications are for the future. However, it appears that, when necessary to reach the result it wants, the court will use the new test to take jurisdiction over cases and to supervise the incidental decisions of trial courts without any additional legislative authority.

V. CONCLUSION

Although the court has continued to mention the traditional requirements of mandamus jurisprudence since the *Prudential* decision, the *Prudential* balancing test is the current binding precedent for the determination of when an appellate court should exercise its mandamus authority upon a finding of a clear abuse of discretion.[546] The *Prudential* decision has in fact substantially

545. Only Chief Justice Jefferson and Justice O'Neill remained on the court at this time. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 141 (Tex. 2004) (orig. proceeding) (Phillips, J., dissenting).

546. The *Prudential* court clearly articulated a principle to be used in all cases in which a petition for writ of mandamus came before an appellate court. The court did not address the question of the continued validity of its earlier decisions. It would have been appropriate for the court to have stated in *Prudential* that it would continue to adhere to its earlier decisions concerning the adequacy or inadequacy of the remedy by appeal under certain factual scenarios. *See, e.g.*, Moser v. U.S. Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (acknowledging that the court would adhere to some of its earlier decisions concerning the nature of the surface estate although it had articulated a new test for the determination of what comprised the mineral estate). However, the court's continued recitation of the *Walker* principles, along with its decisions relying upon pre-*Prudential* precedent, strongly suggests that the new balancing test comes into play only when a new factual scenario comes before an appellate court. In all such cases the *Prudential* decision requires that the balancing test be applied. *See generally* Lubbock County v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 585 (Tex. 2002) (citations omitted) (asserting that "[i]t is not the function of a court of appeals to abrogate or modify established precedent" as "[t]hat function lies solely with [the Texas Supreme] Court"). The court in *Swilley v. McCain* put the doctrine of stare decisis briefly:

> As originally conceived and as generally applied, the doctrine of stare decisis governs only the determination of questions of law and its observance does not

altered one of the most time honored principles of mandamus jurisprudence, and replaced it with a newly articulated standard that leads to nothing short of ad hoc decision making. This change has not only muddied the waters concerning when mandamus will lie, but has also expanded the Texas Supreme Court's discretionary jurisdictional supervisory authority—and that of the courts of appeals—over inferior courts without the need for any legislative authorization.[547] These significant changes should be

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depend upon identity of parties. After a principle, rule or proposition of law has been squarely decided by the Supreme Court, or the highest court of the State having jurisdiction of the particular case, the decision is accepted as a binding precedent by the same court or other courts of lower rank when the very point is again presented in a subsequent suit between different parties. As a general rule the determination of a disputed issue of fact is not conclusive, under the doctrine of stare decisis, when the same issue later arises in another case between persons who are strangers to the record in the first suit.

Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964).

547. The Texas Supreme Court does not have jurisdiction in the absence of an express constitutional or legislative grant. Chenault v. Phillips, 914 S.W.2d 140, 141 (Tex. 1996) (orig. proceeding) (per curiam) (holding that the court has no authority to decide a case absent a grant of jurisdiction in the constitution or state statutes). The Texas Constitution confers mandamus jurisdiction upon the Texas Supreme Court "as may be necessary to enforce its jurisdiction" and authorizes the legislature to confer additional original jurisdiction on the supreme court to issue writs of mandamus. TEX. CONST. art. V, § 3(a). In addition, the Texas Constitution confers appellate jurisdiction upon the supreme court in certain matters and authorizes the legislature to confer additional appellate jurisdiction on the supreme court. *Id.* The legislature has enacted legislation pursuant to these grants of authority. *Compare* TEX. GOV'T CODE ANN. § 22.002(a)–(c) (Vernon 2004) (defining the supreme court's writ jurisdiction), *with id.* § 22.001(a), (c) (defining the supreme court's appellate jurisdiction). As a general rule, only final judgments—those that dispose of all issues and parties—are subject to appeal in Texas. *See* Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex. 2001) ("The general rule [in Texas], with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment."); N. E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966) ("[The court has] steadfastly adhered through the years to the rule, with certain exceptions . . . that an appeal may be prosecuted only from a final judgment and that to be final a judgment must dispose of all issues and parties in a case."). Although there is a general prohibition against interlocutory appeals in Texas, the legislature has adopted certain limited exceptions to the final judgment rule to permit interlocutory appeals. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1)–(11) (Vernon Supp. 2006) (outlining exceptions to the general prohibition against interlocutory appeals such as a grant or refusal of a temporary injunction). In fact, in recent years the legislature has increased the number of such appeals. For example, in response to the supreme court's decision in *Wittig*, where the court held that mandamus normally would not lie from a denial of a special appearance, the legislature in 1997 created an interlocutory appeal for denials of special appearance. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 310 (Tex. 1994) (orig. proceeding), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon)

of serious concern for anyone interested in the rule of law, the doctrine of stare decisis, or the orderly progression of justice.[548]

(current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2006) (allowing appeal from an order granting or denying the special appearance of a defendant under Rule 120a of the Texas Rules of Civil Procedure, except in a suit brought under the Family Code). At the present time there are eleven such exceptions contained in section 51.014 of the Texas Civil Practice and Remedies Code, although other exceptions are scattered throughout the Texas statutes. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 2.106(b) (Vernon 2006) (allowing interlocutory appeals from a trial court's denial or failure to grant a motion for summary judgment based upon immunity for certain non-profit corporations); TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon Supp. 2006) (authorizing an interlocutory appeal from trial court's determination of whether a plaintiff has independently established proper venue in cases involving multiple plaintiffs). The Legislature also determined that jurisdiction over interlocutory appeals is generally final in the courts of appeals. *See* TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon Supp. 2006) (stating that except as provided by this particular statute the judgment of the court of appeals is conclusive in interlocutory appeals). Thus, the Texas Supreme Court's jurisdiction over interlocutory appeals is limited. *See* TEX GOV'T CODE ANN. § 22.225(c)–(e) (Vernon Supp. 2006) (limiting jurisdiction of the supreme court in general to interlocutory appeals in those cases where the justices on the courts of appeals have disagreed on a question of law or where one court of appeals has held differently from a prior decision of another court of appeals or the supreme court). Even in this area, however, the legislature has moved to give limited additional jurisdiction to the supreme court. For example, in 2003 the legislature expanded the supreme court's ability to hear interlocutory appeals in cases involving conflicts between the various courts of appeals or the supreme court. *See, e.g.*, TEX. GOV'T CODE ANN §§ 22.001(e), 22.225(e) (Vernon Supp. 2006) (stating that a conflict arises when "one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants"). Prior to this change the supreme court had taken a rather narrow view of its conflicts jurisdiction. *See, e.g.*, Collins v. Ison-Newsome, 73 S.W.3d 178, 181 (Tex. 2001) ("Cases conflict for jurisdictional purposes only if the conflict is upon the very question of law actually decided.").

548. *See, e.g.*, Lehmann v. Har-Con Corp., 39 S.W.3d 191, 215 (Tex. 2001) ("Strong policies support our practice of adhering to settled rules of law 'unless there exists the strongest reasons for chang[e].'" (alteration in original) (citation omitted)). An early Commission of Appeals opinion expressed the doctrine of stare decisis as follows:

> [T]he doctrine of stare decisis, which as a matter of public policy and sound legal administration requires the courts in the decision of cases to observe a proper respect for the prior decisions of the highest court. While the rule is not unbending, and the courts are not without power to depart from a prior ruling, or of course to overrule it, where cogent reasons exist, and where the general interest will suffer less by such departure, than from a strict adherence, yet a due regard for the stability of rights acquired under the law as announced by the highest court of the state, to say nothing of the propriety of uniformity of decision by that court, requires that when a question of law has been definitely settled once it should remain the law unless there exists the strongest reasons for changing it. . . . Concretely stated, the doctrine merely means that the decisions of law made by the highest court of the state become the law of that state.

Benavides v. Garcia, 290 S.W. 739, 740–41 (Tex. Comm'n App. 1927, judgm't adopted) (citation omitted).

More recently, the court stated a policy rationale for adhering to time honored principles announced by the court:

> Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants . . . who have justifiably relied on the principles articulated in [earlier cases]. Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decision making process that differs dramatically from that properly employed by the political branches of government.

Weiner v. Wasson, 900 S.W.2d 316, 320 (Tex. 1995) (citation omitted) ("'[Stare decisis] permits society to presume that bedrock *principles are founded in the law rather than in the proclivities of individuals*, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.'" (emphasis added) (alteration in original) (quoting Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986))); *see also* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987) ("The rule of law depend[s] in large part on adherence to the doctrine of *stare decisis*."). The legal system's credibility lies in large part upon the twin principles of stability and predictability. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) (explaining that the judicial system could not function if a judge "could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him"); *see also* Wallace B. Jefferson, *The State of The Judiciary in Texas*, PRESENTATION TO THE 80TH LEGISLATURE (2007) ("[W]hen the law does change, court decisions evolve with that change in a principled and considered manner."); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16 (stating that the rule of law underlying our own Constitution requires continuity and a respect for precedent).

However, one must always keep in mind the sage advice of Mr. Justice Holmes who observed:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). However, his advice is not applicable to the requirement that there be an adequate remedy to preclude the application of mandamus authority, as the basis for requiring the relator to establish that the remedy by appeal is inadequate has been well articulated and repeated over the years. There is no "blind imitation of the past." *See, e.g.*, Bagg's Case, 77 Eng. Rep. 1271, 1278 (K.B. 1615) (stating that if there was no other remedy mandamus should be granted "so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law"); Terrell v. Greene, 88 Tex. 539, 545–46, 31 S.W. 632, 634 (1895) (orig. proceeding) (stating that the alternative remedy was inadequate to provide the enforcement of the specific right that the relator was entitled); *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (expressing a concern for "both public and private interests" when deciding whether or nto to grant manduamus review).

The Texas Supreme Court should not so cavalierly jettison over a century of its own precedent—not to mention several centuries of common law precedent—to achieve these obviously desired results.[549] It is clear from reading the *AIU* and *Prudential* decisions that the court attempted to justify the use of mandamus to enforce contractual rights in situations other than arbitration clauses where special circumstances could clearly justify such use.[550] The repeated reliance upon *Anglin,* in both of these decisions, suggests that the primary basis for the decisions was the perceived loss of a right that could not be corrected on appeal.[551] Apparently, however, the court did not wish to assert openly that these two contractual rights were substantial ones, whose loss, in whole or in part, would trigger mandamus relief.[552] Thus, the

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Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. These grounds are just as important today as they were when they were first explained by the courts.

549. On the same day as the *Prudential* decision, the court, in *AIU,* held that an appeal was not an adequate remedy for a trial court's failure to enforce a contractual forum selection clause. *In re* AIU Ins. Co., 148 S.W.3d 109, 120 (Tex. 2004) (orig. proceeding). The court reached its decision without resort to or mention of the new balancing test. Furthermore, the *Prudential* court, although introducing the new balancing test, applied the traditional mandamus jurisprudence in reaching its decision. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 137–38 (Tex. 2004) (orig. proceeding).

550. *See In re Prudential*, 148 S.W.3d at 142 (Phillips, C.J., dissenting) (listing the special circumstances influencing the choice of mandamus relief in cases covered by the FAA); *In re AIU Ins. Co.*, 148 S.W.3d at 123 (Phillips, C.J., dissenting) (noting the special circumstances in arbitration cases supporting an exception to the general rule that the court would "not specifically enforce contractual rights by mandamus").

551. *In re AIU Ins. Co.*, 148 S.W.3d at 115–16 (noting that there is "no meaningful distinction between [a] forum selection clause and [an] arbitration clause"); *In re Prudential*, 148 S.W.3d at 138–39 (noting the loss of the contractual right of arbitration and non-jury trial if mandamus was not granted). Interestingly, the court did not refer to any of the other cases holding the remedy by appeal inadequate if a party stood to lose a substantial right. *See, e.g.*, Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (stating that an appellate remedy was inadequate when "parties stand to lose their substantial rights"); Iley v. Hughes, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958) (orig. proceeding) (citing Womack v. Berry, 291 S.W.2d 677 (Tex. 1956)) (holding that "interference [by way of mandamus was] justified only when parties st[oo]d to lose their substantial rights").

552. The dissenting opinions both realized that the court was implicitly arguing that these two contractual rights were substantial rights that would be lost absent mandamus relief. *In re Prudential*, 148 S.W.3d at 143 (Phillips, J., dissenting) (asserting that, in this case, the party will not permanently lose a substantial right if mandamus relief is denied); *In re AIU Ins. Co.*, 148 S.W.3d at 124 (Phillips, J., dissenting) (asserting that, in this case,

court filled its opinions with other arguments that, in and of themselves, would never have justified mandamus relief.[553]

In any event, the *Prudential* decision is binding on the courts of this state and will have a significant impact upon the future of mandamus jurisprudence. The court's alleged balancing of the benefits versus the detriments of mandamus relief in a particular situation is an abrogation of the court's responsibility to make informed decisions on the basis of established legal principles and precedents. Replacing this responsibility with a pseudo-scientific calculation is nothing short of simple ad hoc decision making. The result is that the court's mandamus jurisprudence resembles a judicial comptrollers' office, forcing mandamus cases through a sieve in which the detriments or costs of mandamus relief are labeled in derogatory terms as rigid, simple, and formulaic, while the benefits of such relief are labeled in positive terms as "practical" or pragmatic and prudential.[554] This ad hoc approach is juxtaposed with the basic ideal of judicial reasoning as being a rational application of neutral principles that have been well documented over time and whose application inexorably leads to a given result.[555] While prior to the *Prudential* decision the court

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the party will not suffer irreparable loss if mandamus relief is denied).

553. The *Prudential* court made references to: the preference for mandamus relief rather than expansion of interlocutory appeals; the inconsistency between affording relief to the denial of constitutional jury trial by mandamus while denying it for refusal to enforce a contractual jury waiver; and the fact "that other courts have granted mandamus relief to enforce contractual jury waivers." *In re Prudential*, 148 S.W.3d at 137–40. (majority opinion). In *AIU*, the court made references to: harassing a party; "adding a layer of expense . . . to encourage a favorable settlement"; wasting of judicial resources; and observing that other jurisdictions enforce forum selection clauses by mandamus or interlocutory appeal. *In re AIU Ins. Co.*, 148 S.W.3d at 117–20. The *Prudential* court's reference to the availability of mandamus to afford relief in the case of a denial of a constitutional right to jury trial is misplaced. The case referred to by the court specifically stated that "[b]ecause the denial of a [constitutional right to a] jury trial can be reviewed by ordinary appeal, mandamus is generally not available to review such a ruling." Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding) (citations omitted). In *Gayle*, the court held that, because of the special circumstances, the case was properly before the court on mandamus review of a discovery order. *Id.* "[T]he interests of judicial economy dictate that [the court] should also remedy the trial court's denial of the right of jury trial by mandamus." *Id.*

554. *See generally* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES viii (1985) (observing that constitutional choices should be weighed as matters of principle and not as instrumental calculations).

555. *See, e.g.*, Zollie Steakley & Weldon U. Howell, Jr., *Ruminations on Res Judicata*, 28 SW. L.J. 355, 362–63 (1974) (arguing that without any objective standards, each case would be decided on abstract principles that would be inherently unpredictable,

engrafted a few modest exceptions to the fundamental tenet of mandamus—that the writ would not issue unless the remedy by appeal was inadequate—the court never even intimated that it did not understand the meaning of the word adequate.[556] It appears as if the court has made the unilateral decision to circumvent the legislative restrictions on its jurisdiction in the area of reviewing trial courts' interlocutory orders and has made the conscious

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"afford[ing] little basis for consistency"). Oliver Wendell Holmes once noted that the law was a prediction of what judges would do. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Thus, in some small way the law is indeterminate because, although a judge generally will follow precedent, his decision will also be the result of a large number of other factors. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73 (1990) (mentioning, among others, factors such as common sense, experience, and intuition). But precedent has an overall important role to play in this process of prediction. One author has recently put it in these terms:

> Ultimately, if law (in the sense of what judges do and say) is to have any effect outside of the closed system of the courts, it is because other human beings will conform their conduct to the decisions issued by judges. Further, except for the parties to a particular case whose conduct will be directly influenced (often dictated) by the judgment, human beings will conform their conduct to current decisions only if they predict that future judges in future cases will follow them. Precedent becomes critical not merely for legitimacy in terms of respect for judgments being enforced, but in the broader sense that the power of the judiciary depends on an expectation that precedents will be followed. While it is not necessary that precedents be invariably followed, the power of the judiciary depends on them being usually followed.

Charles A. Sullivan, *On Vacation*, 43 HOU. L. REV. 1143, 1209 (2006).

556. In fact, the obiter dicta in *Cleveland* fully explained the meaning of the word adequate, while the *Walker* court had clearly explained when an alternative remedy was inadequate. *See* Walker, 827 S.W.2d at 842 (quoting *Iley*, 311 S.W.2d at 652 and stating that an appeal was inadequate and mandamus interference with a trial court's incidental ruling "was justified only when parties stand to lose their substantial rights"); Cleveland v. Ward, 285 S.W. 1063, 1068 (Tex. 1926) (orig. proceeding) (noting that a remedy was adequate when it was "equally convenient, beneficial, and effective as mandamus"). Since at least 1803, the United States Supreme Court had a rather clear picture of what was meant by the specific legal remedy that would prevent the issuance of mandamus. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803) (noting that Marbury had the legal right to obtain the office in question and nothing else would suffice); *see also* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614–15 (1838) (explaining fully why certain alternative remedies were not adequate in the case). The common law courts never had a problem with understanding what was meant by the fact that the alternative remedy had to be complete and effective in providing the injured party with the equivalent of the legal right of which he had been deprived. *See, e.g.*, The King v. Severn & Wye Ry. Co., 196 Eng. Rep. 501, 503 (Q.B. 1819) (Holroyd, J. concurring) (noting that an indictment and fine were not as equally effectual to compel the performance of the legal duty and thus, mandamus would be granted); *see also* WILLIAM BLACKSTONE, 2 COMMENTARIES *110 (explaining that mandamus would issue unless the other remedy compelled the performance of the legal duty to which the party was entitled).

decision to use mandamus as a general supervisory writ of trial court decisions with which it is dissatisfied.[557]

It is fairly obvious that over its history, the Texas Supreme Court has "chafe[d]"[558] at the restrictions that have been imposed

557. Unlike the federal courts, the Texas Supreme Court does not have any general procedures available for reviewing interlocutory rulings of trial courts except in limited statutory situations. The federal courts have various additional appellate methods of reviewing interlocutory orders that could serve as a model for Texas. The certification exception available in 28 U.S.C. § 1292(b) and Rule 54(b) of the Federal Rules of Civil Procedure are the most significant federal methods of obtaining interlocutory review of a federal district court order. 28 U.S.C. 1292(b) (2000); FED. R. CIV. P. 54(b); *see, e.g.*, Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 185–99 (2001) (discussing the interpretative doctrines, the certification exceptions, and category exceptions to the federal final judgment rule); *see also* Renée Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 738–40 (1998) (discussing exceptions to the rule about final judgement).

558. *See* Garza v. Garcia, 137 S.W.3d 36, 40 (Tex. 2004) (stating that some appellate judges "chafe at restrictions on appellate review"). The *Garza* case involved the Texas venue provision dealing with motions to transfer for the convenience of the parties. *Id.* at 38. The venue statute mandates that a trial court's decision on such a motion "is 'not grounds for appeal or mandamus and is not reversible error.'" *Id.* at 37; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(c) (Vernon 2002) ("A court's ruling or decision to grant or deny a transfer under Subsection (b) is not grounds for appeal or mandamus and is not reversible error."). In *Garza*, the "defendant filed a motion [to transfer] asserting both improper venue and" specifying grounds of inconvenience. *Garza*, 137 S.W.3d at 37. "[T]he trial court granted [the motion] without specifying" any basis for the transfer. *Id.* Following a final judgment in the case, the matter was appealed. The court of appeals reversed the case asserting that the original trial court had proper venue over the case, and that the trial court's granting the motion to transfer the case was reversible error. Garcia v. Garza, 70 S.W.3d 362, 372 (Tex. App.—Corpus Christi 2002), *rev'd*, 137 S.W.3d 36 (Tex. 2004)). In reaching this decision, the court of appeals had determined that it could consider the venue issue because the trial judge's order failed to specify that it was transferring the case for the convenience of the parties; thus, the appellate court assumed that the transfer was based on improper venue. *Id.* at 368. The Supreme Court of Texas reversed the case. *Garza*, 137 S.W.3d at 40–41. The majority of the court followed strict construction of the venue statute and held that because the motion sought a transfer for the inconvenience of the parties—the order being silent—then the statute applied, and the appellate court was not to hear an appeal on the venue issue. Chief Justice Phillips dissented, arguing that although the literal language of the statute might lead to the result of the court, in his opinion, the court could review the trial court's decision because refusing to do so would undermine the essential purpose of the legislation. *Id.* at 42–45. Chief Justice Phillip's admission that the language of the statute supported the majority's decision should have been the end of the issue. The simple truth of the matter is that the court is not a legislative body, and its jurisdiction is limited. It is up to the legislature to address changes in the law, which it is clearly capable of doing. For example, in response to the supreme court's decision in *American Home Products Corp. v. Clark*, 28 S.W.3d 92, 96 (Tex. 2000)—holding that an interlocutory appeal was not available from a trial court's determination that venue was proper as to an intervening plaintiff—the legislature

upon it by the Constitution and the legislature. In the area of mandamus jurisprudence, the court has, from time to time, developed different ways to circumvent the common law history and precedents whenever it felt the need to exercise jurisdiction over a case because of the egregious abuse of discretion by the trial court. It is interesting that instead of addressing the real issue—the abuse of discretion by trial courts in incorrectly determining matters of law or misapplying the law to the

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clarified its intent as to a broad scope of interlocutory appeals in cases involving venue determinations of intervening plaintiffs. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b) (Vernon Supp. 2006) (codifying the legislature's response). In the area of mandamus relief, in response to the court's decision in *Wittig* where the court held that mandamus normally would not lie from a denial of a special appearance, the legislature in 1997 created an interlocutory appeal for denials of special appearances. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 310 (Tex. 1994) (orig. proceeding), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec. 1, § 51.014(a)(7), 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (current version codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2006)) (codifying the legislature's response); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2006) (codifying the legislature's response).

The present court's desire to circumvent the legislative limitations on its jurisdiction is nothing new. In 1891, the Texas Constitution was amended creating intermediate appellate courts in Texas but also limiting the supreme court's jurisdiction to questions of law. TEX. CONST. art. V § 6; *see, e.g.*, Betts v. Johnson, 96 Tex. 360, 362, 73 S.W. 4, 5 (1903) (orig. proceeding) (explaining that the purpose of the constitutional amendments in 1891 was to correct the evil of the then-present system so as to "carefully limit[] the jurisdiction of the Supreme Court"); Choate v. San Antonio & Aransas Pass Ry. Co., 91 Tex. 406, 409, 44 S.W. 69, 69 (1898) (orig. proceeding) (stating that the new constitutional provisions "restrict, in express terms, the jurisdiction of the supreme court, and to confine it to questions of law"). Under this constitutional provision, the intermediate appellate courts were given exclusive jurisdiction of factual sufficiency points of error. *See* City of Keller v. Wilson, 168 S.W.3d 802, 822 (Tex. 2005) (stating that points of error raising "factual sufficiency [have] been the sole domain of the intermediate appellate courts . . . since 1891"). Notwithstanding this clear restriction prohibiting the court from factual sufficiency review of trial court findings, the court found an ingenuous way to circumvent this limitation. In the case of *In re King's Estate*, the supreme court held that it might accept jurisdiction, notwithstanding the constitutional prohibition, to determine if a correct legal standard was applied by the courts of appeals in reviewing a factual sufficiency point of error. *In re* King's Estate, 150 Tex. 662, 664–66, 244 S.W.2d 660, 661–62 (Tex. 1951) (per curiam). Since *King's Estate*, the supreme court has continued to accept jurisdiction to determine whether the courts of appeals have utilized correct legal principles in reviewing factual insufficiency points. *See, e.g.*, Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988) (expanding the court's jurisdiction to review intermediate court rulings on non-findings under the same standards as findings); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986) (expanding the court's jurisdiction to not only "determin[ing] if a correct [legal] standard [was used] by the intermediate courts," but determining if such court correctly applied the standard).

facts[559]—the court focuses on the inadequacy of the legal remedy as a way to address its concerns with what it sees as the injustice of a particular situation. For, absent an abuse of discretion, there is no need to inquire as to the adequacy of a legal remedy. Apparently frustrated by being unable to affect the quality of the state judiciary, the court has used its power much like the old common law courts in a general supervisory role as a check and balance of the injustice and the additional costs and delay caused by clearly erroneous trial court decisions. While this might have been possible in England as a result of the peremptory nature of the writ and the power of the King's Bench as supervisor of inferior courts and public officials, this has never been the case in Texas.[560] The attempt to expand its jurisdiction with the new balancing test is simply an usurpation of the prerogative of the legislature to expand or contract the jurisdiction of the supreme court. It is simply wrong; moreover, it sends the wrong message to the trial bench and the Bar by placing mandamus at the level of an interlocutory appeal. If the court will not follow its own precedents that have been in place for nearly 175 years, what degree of predictability and advice can lawyers give clients? It would probably be best if the Texas Supreme Court took to heart the counsel of Oliver Wendell Holmes when he stated: "The history of what the law has been is necessary to the knowledge of what the law is."[561]

After reflecting on the long history of mandamus jurisprudence, the court should take the earliest opportunity to reverse the *Prudential* decision and specifically reject the balancing test; it should return to the tried and trusted traditional approach to mandamus jurisprudence.

In our present culture of instant gratification, the thought of delay or costs to achieve what one perceives as justice is generally

559. A trial court has no discretion to determine matters of law or to apply the law to the facts incorrectly. Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 437 (Tex. 1997) (orig. proceeding) (citing Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

560. *See, e.g.*, *In re* TXU Elec. Co., 67 S.W.3d 130, 135 (Tex. 2001) (orig. proceeding) (Phillips, C.J., concurring) (stating that the Texas Supreme Court's mandamus authority "[was] not a general, supervisory power"); Comm'r of the Gen. Land Office v. Smith, 5 Tex. 471, 478 (1849) (noting that, in Texas practice, the writ is not considered a prerogative writ but is a private remedy).

561. OLIVER WENDELL HOLMES, THE COMMON LAW 37 (1881).

not palpable. Most individuals want the wrong immediately remedied without delay or additional cost. The *Prudential* court indulged this philosophy and, in so doing, abdicated its responsibility to decide cases in a reasoned and thoughtful manner. While one can always applaud good intentions, the court's decision shows an overly-aggressive pursuit to insert into mandamus jurisprudence a new wrinkle for no logical reason other than to satisfy its own desire for more control over incidental trial court rulings. The old cliché is probably an appropriate response to the court's seemingly blind adherence to its good intention to achieve the perceived right result in the case: The road to hell is paved with good intentions. However, that is not the manner in which the judicial system functions. The law, like Christianity, must take the time to put faith and trust into the system and hope for a better tomorrow.[562]

562. "Faith is the realization of what is hoped for and evidence of things not seen." *Hebrews* 11:1 (RSV).