A RETURN TO THE TRADITIONAL USE OF THE WRIT OF MANDAMUS

by
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A litigant filing a petition for a writ of mandamus takes a gamble. If unsuccessful, the petitioner risks not only wasting time and effort but also insulting the district court judge by calling into question his or her ability to carry out the basic duties of a judge. And even if successful, the petitioner still faces the risk of returning to the district court on less-than-friendly terms. More than anything, however, the writ of mandamus poses such risks because appellate courts have employed widely varying approaches in developing a standard for granting the writ. In order to offer greater predictability to litigants and foster district courts' ease of administration of their cases, appellate courts should adhere to the relatively strict standard set by the history of the writ in England and later endorsed by the U.S. Supreme Court and Congress.

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I. INTRODUCTION

The writ of mandamus has grown to be somewhat of a mystery within appellate practice. The wide discretion held by appellate courts to grant or deny such writs leaves many litigants without the ability to comfortably predict the strengths of their potential petitions. A path to greater predictability, without depriving appellate court discretion, lies in a return to the historical, traditional understanding of the writ as developed in early English history.

The U.S. Code grants federal courts the ability to issue writs of mandamus "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[1] But what, exactly, is the limit of this broad statutory text? More specifically, to what degree may a federal appellate court use a writ of mandamus to supervise an inferior court? In recent years, some courts have departed from the boundaries set by Congress and the Supreme Court and instead expansively use the writ to usurp the discretion of lower courts.[2] Courts should return to a restrained approach to the writ not only to conform to the limits set by Congress, but also in an effort to bring more predictability and uniformity for a litigant. Part II outlines the history of the writ in England through the eighteenth century, and Part III follows the history of the writ into the United States.

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[1] 28 U.S.C. § 1651(a) (2018).

[2] Robert S. Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37, 60–91 (1982).

II. MANDAMUS IN ENGLAND

A. The Origins of the Writ of Mandamus

The earliest uses of mandamus may date as far back as the thirteenth century, though its exact origins remain unclear.[3] Scholars do, however, consistently categorize mandamus as a "prerogative" writ.[4] The prerogative writs earn their name from their association with the King and issued almost exclusively out of the Court of King's Bench.[5] True to the form of a prerogative writ, mandamus issued at the discretion of the court instead of as a matter of course.[6]

In its earliest uses in the fourteenth and fifteenth centuries, mandamus served as a charge from the Crown to a third party with no option of return.[7] An option of return in this context would give the party subject to the mandamus an opportunity to come to court and explain why the commanded action could not or should

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[3] THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 2 (1853). *But see id.* at 56 ("At so early a period of our legal history did this writ exist . . . that the exact date of its institution cannot, with any accuracy, be shewn.").

[4] *E.g.*, 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 527 (n.p. 1740) ("A Mandamus . . . is therefore termed . . . a Prerogative Writ . . . ."); 3 WILLIAM BLACKSTONE, COMMENTARIES *110 (describing mandamus as a "high prerogative writ"); 2 ISAAC 'ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 661 (London, T. Cadell 2d ed. 1793) ("The Writ of Mandamus is a prerogative writ, issuing out of the Court of *King's Bench*, by virtue of that general superintendency which that court possesses over all inferior jurisdictions and persons."); 1 RICHARD GUDE, THE PRACTICE OF THE CROWN SIDE OF THE COURT OF KING'S BENCH AND THE PRACTICE OF THE SESSIONS 179 (London, R. Pheney 1828) ("The writ of mandamus is a high prerogative writ of a most extensive remedial nature . . . ."); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 40–41 (1951) (dating the first uses of the word "prerogative" in describing certiorari, habeas corpus, and mandamus to the 17th and 18th centuries); *see also* R v. Barker (1762) 96 Eng. Rep. 196, 196; 1 Black. W. 352 (KB) (Mansfield, C.J.) ("A mandamus is certainly a prerogative writ, flowing from the King himself . . . .").

[5] de Smith, *supra* note 4, at 44–45.

[6] GUDE, *supra* note 4, at 180 ("[B]ut where it is matter of a private nature, it is in the discretion of the Court either to grant the writ, or refuse the motion for the writ . . . ."); de Smith, *supra* note 4, at 44 ("[Prerogative writs] are not writs of course; they cannot be had for the asking, but proper cause must be shown to the satisfaction of the court why they should issue."). Though Matthew Bacon describes mandamus as "Writ of Right," BACON, *supra* note 4, at 528, he later emphasizes the discretionary power available to the justices of King's Bench in choosing to grant the writ. *Id.* at 540; *see also, e.g.*, R v. Askew (1768) 98 Eng. Rep. 139, 141; 4 Burr. 2186 (KB) (Mansfield, C.J.) ("[T]he Court ought to be satisfied that they have ground to grant a mandamus: it is not a writ that is to issue of course, or to be granted merely for asking.").

[7] TAPPING, *supra* note 3, at 57; *see also, e.g.*, JOHN COWELL, A LAW DICTIONARY (London, D. Browne et al. 1708) (defining mandamus as "a Charge to the Sheriff, to take into the King's hands all the Lands and Tenements of the King's Widow, that against her Oath formerly given, marryeth without the King's consent").

not take place.[8] Later into the fifteenth century, mandamus offered individuals a way to petition Parliament for redress, most commonly restoration to public office, and it eventually came to be known as a "writ of restitution."[9] Next, it grew into its modern use as an original writ, offering a legal remedy in the form of a command from King's Bench.[10]

B. The Mechanics of Moving for the Writ

The English courts developed into a system of specialized divisions by the time mandamus came to relatively common use in the seventeenth century.[11] These divisions include the Courts of Common Pleas, Exchequer, King's Bench, and Chancery.[12] The following two Sections explain the procedures used to pursue a writ of mandamus.

1. Mandamus in King's Bench

Though the Court of Chancery did occasionally grant writs of mandamus,[13] the majority issued out of the Court of King's Bench.[14] King's Bench's close ties to the crown itself led to its extensive jurisdiction not only over many criminal and civil matters but also over complaints of errors made by judicial or governmental officers.[15] This capacity for oversight and connection to the crown made King's Bench a fitting host for the writ.

Lord Chancellor Hardwicke's guidance to the litigants in *Vernon v. Blackerby* offers an illustration contemporary to the time of the proper venue for mandamus.[16]

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[8] *See* COWELL, *supra* note 7 (defining "Return").

[9] TAPPING, *supra* note 3, at 57; *see also, e.g.*, James Bagg's Case (1615) 77 Eng. Rep. 1271, 1272; 11 Co. Rep. 93 b. (KB) (restoring plaintiff to his position in a corporation on a "writ of restitution").

[10] TAPPING, *supra* note 3, at 57 (explaining that mandamus grew to "obtain[] the sanction of an original writ").

[11] *See* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 73–112, 235–51 (1903) (describing the development of the common law courts and the rise of the Court of Chancery).

[12] *Id.* at 93–112.

[13] *E.g.*, R v. Rushworth (1734) 25 Eng. Rep. 618, 619; W. Kel. 287 (Ch); *see also* BACON, *supra* note 4, at 540.

[14] de Smith, *supra* note 4, at 43–44.

[15] 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 594 (London, J. Worrall & Co. 3d ed. 1768) (characterizing King's Bench's power of "reforming and keeping inferior jurisdictions within their proper bounds" as a fundamental category of its jurisdiction); HOLDSWORTH, *supra* note 11, at 92 ("[T]he court of King's Bench had jurisdiction to amend 'other errors and misdemeanours extra-judicial.' This jurisdiction is no doubt due to the peculiarly intimate connection of the court with the person and the prerogative of the crown." (quoting James Bagg's Case (1615) 77 Eng. Rep. 1271, 1277–78; 11 Co. Rep. 93 b. (KB))).

[16] Vernon v. Blackerby (1740) 27 Eng. Rep. 686, 686–87; Barn. C. 377 (Ch).

Vernon, a parson of a church built according to a statute, asked for an account[17] in Chancery of dividends from Blackerby, the treasurer of the fund.[18] Lord Hardwicke expressed doubt in the strength of Vernon's case and took issue with his choice to bring the suit in equity.[19] He proposed that instead of asking for an account in equity, Vernon should first ask the commissioners of the project to decide the issue between themselves and then, if they fail to do so, move for mandamus in King's Bench.[20] Lord Hardwicke described King's Bench as the "natural" and "proper" court for Vernon to seek relief.[21] Though Lord Hardwicke did not fully explain his reasoning, he did note that with a writ of mandamus, Vernon would be asking the court to compel the commissioners to "do their Duty."[22] This characterization of the issue as supervision of inferior officers, rather than as a dispute between two private individuals, highlights the suitability of mandamus for King's Bench.

2. Court Proceedings

In accord with the highly-technical English common law, King's Bench set strict rules for mandamus. The court required plaintiffs to direct the writ only to the party with the power to rectify the wrong.[23] If that party was a corporation, the writ had to list the corporation's name, not just any individual in the corporation.[24] If the party named the incorrect defendant, then the court would not correct that mistake.[25] Further, because mandamus directly commanded a party to complete an action, two cross-motions for mandamus on the same issue, such as an election for public office, would lead to "double trouble" because they would command the parties to complete two opposite actions.[26]

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[17] An "account," also referred to as an "accompt," demands that the defendant pay money owed to the plaintiff. COWELL, *supra* note 7 (defining "Accompt"); *Accompt,* GILES JACOB, A NEW LAW-DICTIONARY (London, J. & J. Knapton, et al. 1729).

[18] *Vernon*, 27 Eng. Rep. at 686.

[19] *Id.* at 686–87.

[20] *Id.* at 687.

[21] *Id.*

[22] *Id.*

[23] BACON, *supra* note 4, at 540 ("The Writ is to be directed to him, who by Law is obliged to execute it, or to do the Thing thereby required . . . ."); 'ESPINASSE, *supra* note 4, at 672; *see also Vernon*, 27 Eng. Rep. at 491 ("It would be absurd if a bill should lie against a person who is only an officer, and subordinate to others, and has no directory power.").

[24] 'ESPINASSE*, supra* note 4, at 672.

[25] *E.g.*, R v. Corp. of Wigan (1759) 97 Eng. Rep. 560, 561; 2 Burr. 782 (KB) ("The Court cannot take upon themselves, previously to issuing the writ, to determine 'to whom it shall be directed.'"); R v. Mayor of Rippon (1700) 91 Eng. Rep. 1276, 1276–77; 1 Ld. Raym. 563 (KB) (rejecting the writ because it incorrectly listed the defendant as "Mayor, Aldermen, and Commonalty of Rippon" instead of "Mayor, Burgesses, and Commonalty").

[26] *Wigan*, 97 Eng. Rep. at 561–62.

Even if the plaintiff did list the proper defendant, the court also rejected petitions that were too broad. For example, in *R v. Mayor of Kingston*, the court had granted mandamus commanding the mayor to hold a corporate assembly, but the clerk of the court added the phrase: "to admit all those to their freedom who have a right to be free of that corporation."[27] This additional phrase rendered the writ "ill" because it dealt with the distinct rights of different people.[28]

So long as the writ named the correct defendant and struck the correct level of specificity, plaintiffs could apply for mandamus in the first instance.[29] The court would then make an initial ruling asking the defendant to show cause why the court should not make the rule absolute.[30] Once the court made the rule absolute, the defendant would have to comply with the writ or offer an explanation for his failure to do so.[31] Sometimes the court would grant or refuse the writ without requiring the opposing party to show cause if the resolution of the issue was clear enough to the court.[32] If the defendant could not persuade the court to discharge the rule, the court would then grant a peremptory writ, which, as opposed to the initial writ, commanded the defendant to complete the action without giving any further opportunity to convince the court otherwise.[33] If the defendant did not comply with the peremptory writ, the defendant would suffer contempt by attachment.[34] A person put in contempt by attachment could be personally seized and brought to court or have his personal property seized.[35] Any question as to the accuracy of facts alleged during this process could only be tried in a separate proceeding.[36] The legislature later simplified this process for plaintiffs wrongfully displaced from public office by condensing the two steps of "showing cause" into only one and allowing parties to dispute the facts alleged in the mandamus proceeding.[37]

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[27] R v. Mayor of Kingston (1724) 88 Eng. Rep. 151, 151; 8 Mod. 209 (KB).

[28] *Id.*

[29] GUDE, *supra* note 4, at 180.

[30] BLACKSTONE, *supra* note 4, at *111; GUDE, *supra* note 4, at 180.

[31] BLACKSTONE, *supra* note 4, at *111.

[32] *E.g.*, R v. Bishop of Ely (1794) 101 Eng. Rep. 267, 268; 5 T.R. 475 (KB) ("If there were the most remote probability of raising a question in this case, we ought to grant a rule to shew cause, in order that the question might be further investigated. But as there is no probability of throwing fresh light on this case . . . I think it would be unjustifiable to put the bishop to the expence of shewing cause against a rule.").

[33] BLACKSTONE, *supra* note 4, at *111.

[34] *Id.* at *113.

[35] COWELL, *supra* note 7 (defining "Attache").

[36] BLACKSTONE, *supra* note 4, at *111.

[37] The Municipal Offices Act 1710, 9 Ann. c. 25, § 6 (Eng.).

C. Elements of the Writ

By the end of the eighteenth century, King's Bench had developed two elements required for a writ of mandamus: a clear right to relief and the lack of a specific remedy. The following Sections describe each element.

1. Clearly Established Legal Right

In a series of cases, Lord Mansfield, Chief Justice of King's Bench from 1756 to 1788,[38] ironed out the rules governing the writ of mandamus.[39] First, in *R v. Blooer*, he emphasized the necessity of showing a clear legal right.[40] Samuel Blooer, a parishioner, had thrown out the curate of the town's chapel, William Langley.[41] Langley asked the court to issue mandamus directing Blooer to reinstate him to his position at the chapel.[42] Counsel for Blooer argued that Langley could not clearly show that he held a license for his position.[43] But Lord Mansfield granted the writ, concluding that Langley did have a legal right to hold the position.[44] Although Mansfield swiftly dismissed Blooer's argument, this point of discussion in court emphasizes the importance of holding a clear legal right to the relief requested.

Unlike the plaintiff in *Blooer*, the plaintiff in *R v. Doctor Askew* failed to show a clear right to a remedy.[45] Dr. Letch, the plaintiff, was denied admission to the College of Physicians in London. A committee had approved Dr. Letch, but the full body of the college later rejected his admission.[46] Dr. Letch moved for mandamus directing his admission to the college.[47] The court unanimously denied Dr. Letch's petition.[48] Each justice's opinion emphasized Dr. Letch's failure to show a right to admission because the college had followed the prescribed procedures.[49] Though the point may seem fundamental, the plaintiff must clearly establish a denial of some right.[50]

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[38] C.H.S. FIFOOT, LORD MANSFIELD 46, 50 (1936).

[39] *See* R v. Blooer (1760) 97 Eng. Rep. 697; 2 Burr. 1043 (KB); R v. Barker (1762) 97 Eng. Rep. 823; 3 Burr. 1265 (KB); R v. Askew (1768) 98 Eng. Rep. 139; 4 Burr. 2186 (KB) (Mansfield, C.J.).

[40] *Blooer*, 97 Eng. Rep. at 698.

[41] *Id.* at 697.

[42] *Id.*

[43] *Id*. at 698.

[44] *Id.* at 699.

[45] R v. Askew (1768) 98 Eng. Rep. 139, 141; 4 Burr. 2186 (KB) (Mansfield, C.J.).

[46] *Id.* at 140.

[47] *Id.*

[48] *Id.* at 144.

[49] *E.g.*, *Askew*, 98 Eng. Rep. at 142 ("[I]t does not by any means appear, that they have acted upon improper grounds, or arbitrarily and capriciously. Here is no ground laid for demanding a mandamus.").

[50] *See* R v. Governor of the Bank of Eng. (1780) 99 Eng. Rep. 334, 335; 2 Dougl. 524 (KB)

Protector v. Town of Kingston reveals the extent to which the court will protect a party's clearly established rights.[51] This case presents the opposite outcome as seen in *Doctor Askew*: instead of denying mandamus because of a lack of a clearly established right, the court here granted the writ on a finding that the plaintiff, Yates, had demonstrated a clear legal right. The bailiff of a corporation apparently had wrongfully disfranchised Yates and five other "freemen" from the corporation.[52] Yates asked for a writ of restitution[53] ordering the bailiff to restore Yates to the corporation.[54] When defendants came to court to show cause, the court ended up dismissing everyone because they believed the disagreement between the plaintiff and defendant would likely cause "a tumult and uproar."[55] The defendants complied and left court, but Yates and his co-plaintiffs remained in the town hall. They lied to the record keeper and somehow convinced him that they "were a Court" and ordered favorable entries into the court book such as that there "was no sufficient matter of fact retorned to be done by Yates and the others, to cause them to be disfranchised."[56] When the parties came to court for a second time, the defendants argued that lying to the court should be reason enough to disfranchise the plaintiffs.[57]

Despite the plaintiffs' clear act of fraud, or in Chief Justice Glynne's words, their "act of a high nature tending to evert all government in hindring the proceedings of justice,"[58] the court granted the writ restoring Yates to the corporation.[59] The justices stuck to the question of whether or not the plaintiffs had a clear right to relief. Because the corporation did not follow local custom in disfranchising the plaintiffs, the court did find such a right.[60] Though the plaintiffs' actions in court alone could justify the disfranchisement, the court stated that the defendants still must follow custom.[61]

The court's willingness to set aside Yates's deception reveals the court's formal-

("When there is no specific remedy, the Court will grant a mandamus that justice may be done. But where (as in this case) . . . the right of the party applying is not clear, the Court will not interpose the extraordinary remedy of a mandamus.").

[51] Protector v. Town of Kingston (1655) 82 Eng. Rep. 876; Style 477 (UB).

[52] *Id.*

[53] "Writ of restitution" was another term for "writ of mandamus." *See* TAPPING, *supra* note 3, at 57.

[54] *Town of Kingston*, 82 Eng. Rep. at 876.

[55] *Id.* at 877.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 878.

[59] *Id.* at 879.

[60] *Id.*

[61] *Id.*

istic approach to analyzing a party's clear right to relief. In one opinion, Lord Mansfield even expressed some reproach for the fact that mandamus "ha[d] been liberally interposed" in the name of the "advancement of justice" in recent years and emphasized that courts should not "scrupulously weigh[]" matters of public policy when considering an application for mandamus.[62] In the eyes of Lord Mansfield, mandamus should ignore arguments of fairness and public policy.[63] After all, mandamus issued primarily out of King's Bench, not out of Chancery.[64] Instead, the analysis was strictly limited to whether the petitioner had a right to relief and, as explained in the next Section, whether the petitioner had an alternative remedy.

2. No Other Adequate Remedy

In the seventeenth century, King's Bench began to express reservations in granting the writ when the party could seek his remedy elsewhere.[65] And by the eighteenth century, the court routinely refused to grant mandamus if the party already had an adequate legal remedy.[66] In *R v. Barker*, Lord Mansfield issued a writ of mandamus commanding the trustees of a religious "meeting-house" to accept the validity of the election of Mr. Hanmer, a protestant priest.[67] Conflict between the Protestants and Catholics likely fueled this dispute. Lord Mansfield noted that mandamus came into use to correct the "failure[s] of justice" and it followed, he explained, that courts must limit its application to "occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."[68] He explained that ordering a new election or trying the election in Chancery would "prove[] a determined purpose of violence" and further emphasized that the Protestants deserved protection of the law.[69] In light of the heated religious animosity laying the groundwork for the dispute, Lord Mansfield concluded that Hanmer's only other remedy was a resort to violence, which was by no means adequate or desired.[70]

In addition to having no other "adequate" legal remedy, Lord Mansfield often

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[62] R v. Barker (1762) 97 Eng. Rep. 823, 825; 3 Burr. 1265 (KB).

[63] *Id.*

[64] de Smith, *supra* note 4, at 43–44.

[65] *E.g.*, Daniel Appleford's Case (1671) 86 Eng. Rep. 750, 751; 1 Mod. 82 (KB) (Hale, C.J.) ("Suppose a Temporal Court over which we have jurisdiction do give judgment in assise to recover an office; so long as that judgment stands in force, do you think that we will grant a *mandamus* to restore him against whom a judgment is given?").

[66] *E.g.*, R v. Governor of the Bank of Eng. (1780) 99 Eng. Rep. 334, 334; 2 Dougl. 524 (KB); *see also* T.E. TOMLINS, A DIGESTED INDEX TO THE SEVEN VOLUMES OF TERM REPORTS IN THE COURT OF KING'S BENCH 127 (London, J. Butterworth 1799) ("Wherever a party has a specific legal remedy, the Court of K. B. will refuse to grant a mandamus.").

[67] *Barker*, 97 Eng. Rep. at 823–24.

[68] *Id.* at 824–25.

[69] *Id.* at 826.

[70] *Id.*

used the phrase "specific remedy."[71] By "specific," he meant that the party applying for mandamus must show a lack of a legal remedy that directly addressed the wrong committed. Lord Mansfield demonstrated this approach in *R v. Blooer*, discussed in Part I.C.1, a case where Blooer had dismissed the plaintiff Langley from his position as a chapel curate.[72] Counsel for Blooer argued that Langley could bring an action for ejectment or trespass, rendering mandamus unnecessary.[73] But Lord Mansfield granted the writ, reasoning that ejectment and trespass were not "specific" remedies in Langley's case.[74] He explained that Langley may not be able to bring an action for trespass because the chapel was not legally in his name.[75] Lord Mansfield also described the difficulty Langley would encounter in locating the heirs of the "feoffees" and persuading them to let him use their names to bring his action.[76] Further, Lord Mansfield noted that even if Langley could bring an action for trespass, he still may not fully recover.[77] Trespass may offer him a way of recovering damages or the land itself, but it would not restore him to his position as curate.[78] By stating that Langley had no other "specific" remedy, Mansfield meant that Langley had no other remedy that would restore him to his position as curate.

Although the justices of King's Bench frequently referred to a party's adequate "legal" remedy,[79] the availability of a remedy in equity also barred mandamus.[80] In *R v. Marquis of Stafford*, the court rejected the writ because the party possibly had a remedy at law or in equity.[81] William Moreton had been nominated as curate of a chapel in the manor of Stowe Heath.[82] The lord of the manor refused to accept Moreton, apparently because of Moreton's reputation for "immoral" behavior.[83] Counsel for the lord argued that Moreton could seek a remedy by *quare impedit*, citing *R v. Barker*.[84] Although counsel for Moreton argued that *quare impedit* would require him to join nearly one hundred individuals as parties to the action and thus

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[71] *E.g.*, R v. Blooer (1760) 97 Eng. Rep. 697, 698–99; 2 Burr. 1043 (KB); *see also* R v. Bishop of Chester (1786) 99 Eng. Rep. 1158, 1160; 1 T.R. 396 (KB); R v. Governor of the Bank of Eng. (1780) 99 Eng. Rep. 334, 335; 2 Dougl. 524 (KB).

[72] *Blooer*, 97 Eng. Rep. at 697.

[73] *Id.* at 698.

[74] *Id.* at 699.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] R v. Barker (1762) 97 Eng. Rep. 823, 825; 3 Burr. 1265 (KB).

[80] *See* R v. Marquis of Stafford (1790) 100 Eng. Rep. 782, 785; 3 T.R. 646 (KB).

[81] *Id.*

[82] *Id.* at 782.

[83] *Id.* at 782–83.

[84] *Id.* at 783.

pose too great a burden to be classified as an adequate alternative legal remedy,[85] the court did not agree and denied the writ.[86]

Cases and treatises of the eighteenth century often cite *R v. Marquis of Stafford* for the simple proposition that mandamus will not issue if the party had another remedy.[87] But there is more to take away from this case. First, Justice Buller clarified that the party opposing mandamus could not point to a remedy in equity as an adequate specific remedy.[88] Unfortunately for Moreton, the justices denied mandamus in part because they believed he may have had an adequate legal remedy in *quare impedit*.[89] Further, despite the fact that Justice Buller made an effort to draw the distinction between law and equity with respect to the "adequate remedy" prong, it seems this distinction was without a difference.[90] The justices suggested that if the plaintiff had a remedy in equity, then the "Court [could not] interfere at all."[91] Thus, at bottom, the party opposing mandamus could either argue that the plaintiff had another legal remedy, thus precluding mandamus, or alternatively, that the case more properly fit in Chancery and should be dismissed from King's Bench. Either way, if the party applying for mandamus did have other means of relief either at law or in equity, apart from a few exceptions made by King's Bench,[92] the court would likely not grant the writ.

D. Substantive Limits

Beyond a clear right to relief and no alternative remedy, the court considered additional factors. In contrast to the primary elements described above, these factors were not necessarily dispositive. The factors described in the next Section only follow from the court's hesitancy to exceed the bounds of its own authority.

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[85] *Id.* at 783–84.

[86] *Id.* at 785.

[87] *E.g.*, R v. Barker (1762) 96 Eng. Rep. 196, 196; 1 Black. W. 352 (KB); 1 JOSIAH BROWN, A NEW ABRIDGEMENT OF CASES IN EQUITY 59 (London, 1793).

[88] *Marquis of Stafford*, 100 Eng. Rep. at 785 (Buller, J.) ("For it appears to me on these affidavits that this is a trust, and therefore that the remedy is in a Court of Equity. A party applying for a mandamus must make out a legal right; though if he shew such legal right, and there be also a remedy in equity, that is no answer to an application for a mandamus; for when the Court refuse to grant a mandamus because there is another specific remedy, they mean only a specific remedy at law.").

[89] *Id.*

[90] *See id.*

[91] *Id.* at 784.

[92] The court in *Clarke v. Bishop of Sarum* granted mandamus even though the party applying could pursue a *quare impedit*, reasoning that courts have been "giv[ing] into" the fact that mandamus was "more expeditious and less expensive." (1738) 93 Eng. Rep. 1046, 1046; 2 Strange 1082 (KB).

1. Mandamus Offered Redress for "Public" Wrongs

At its core, mandamus remedied the "refusal or neglect of justice."[93] It then follows that the writ usually addressed disputes relating to some public concern. This context contrasts with that of an injunction, for example, which traditionally resolved purely private disputes.[94] The public versus private distinction became commonplace in counsels' arguments in court,[95] court opinions,[96] and treatises.[97]

The court's characterization of "public," however, was fairly broad. For example, in *R v. Blooer*, the case in which the plaintiff sought restoration to his position as curate to a chapel, the court failed to take up defense counsel's argument that Blooer's claim posed a dispute insufficiently public for mandamus.[98] Because Blooer was a curate to a "private chapel" and did not hold a "public office," defense counsel argued mandamus should not issue.[99] But the court failed to accept this argument and instead issued the writ.[100] As explained by counsel for Blooer, Blooer's position as a curate, regardless of the chapel's private or public funding, still served the public good and placed the dispute within the realm of public wrongs remedied by mandamus.[101]

2. Mandamus Rectified "Temporal" Rights

The court was careful to draw a line in the sand from the Church. For example, in *R v. Ashton*, the issue before the court boiled down to whether the plaintiff held

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[93] BLACKSTONE, *supra* note 4, at *109; *see also* James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1525 (2001) (describing mandamus as the redress for the "victim of official inaction").

[94] See 14 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 422–28 (London, 1742) for a list of cases in which the Court of Chancery granted injunctions. These cases cover issues such as disputes over real property and other cases pending in King's Bench. An injunction prohibiting a party from litigating his case at law, for example, would be directed at that individual and not the court.

[95] See, for example, *R v. Lord Montacute*, in which counsel for the plaintiff and defendant argued about whether or not the issue was in "furtherance of public justice." (1751) 96 Eng. Rep. 33, 33; 1 Black. W. 61 (KB).

[96] *E.g.*, Daniel Appleford's Case (1671) 86 Eng. Rep. 750, 751; 1 Mod. 82 (KB) (Hale, C.J.) ("I confess, that *mandamus's* do generally respect matters of public concern.").

[97] *E.g.*, BACON, *supra* note 4, at 527 ("A Mandamus is a Writ . . . issuing regularly only in Cases relating to the Publick and the Government; and is therefore termed . . . a Prerogative Writ, being grantable only where the Publick Justice of the Nation is concerned."); 'ESPINASSE, *supra* note 4, at 666 (stating that mandamus will not issue "where the office is of a *mere private nature*," but will issue "in all cases of public concern, or of offices of a public nature"); TAPPING, *supra* note 3, at 58–59 ("[Mandamus] is not applicable as a redress for mere private wrongs."); 15 VINER, *supra* note 94, at 185 ("Mandamus ought *not* to go *where the Office is private* . . . .").

[98] R v. Blooer (1760) 97 Eng. Rep. 697, 698; 2 Burr. 1043 (KB).

[99] *Id.*

[100] *Id.* at 699.

[101] *Id.* at 698.

a temporal right.[102] The plaintiff applied for mandamus directing his restoration to parish clerk.[103] Despite the defendant's argument that this right was "ecclesiastical," the court granted the writ.[104] Each reported opinion made note of the party's temporal right.[105] Chief Justice Ryder, for example, explained a parish clerk should not be removed without cause, whether he had been "appointed by the parson or elected by the parishioners."[106] It matters less exactly how King's Bench distinguished "temporal" from "ecclesiastical." Rather, the fact that this distinction received attention reveals the court's hesitance to step on the toes of the Church. Although only explicitly addressed in a few opinions, the lawyers and judges seemed to have an implicit understanding that the party supporting mandamus must assert a temporal, legal right to relief.

3. Mandamus Corrected Non-Discretionary Errors

The justices of the King's Bench also refrained from using mandamus to override the discretion of inferior officers. In *John Giles's Case*, the court refused to issue mandamus ordering the justices of the peace in the City of Worcester to grant Mr. Reeve a license to keep an ale house.[107] The justices of the peace had already denied Mr. Reeve this license and he moved for mandamus in King's Bench.[108] The justices of the court unanimously denied the writ.[109] Although the report lacks reasoning from the justices, the case was later cited for the proposition that mandamus would not issue if there was no "legal necessity."[110] That is, there was no legal necessity when some other judicial officer had already exercised its discretion.

Similarly, in *R v. Bishop of Ely*, the court rejected a writ of mandamus that it believed would have infringed on the discretion of the bishop of a college.[111] The plaintiff sought the writ to compel readmission of a fellow of a college.[112] According to the court, the writ would have improperly superseded the discretionary power of the bishop. Chief Justice Kenyon noted that it had been "so clearly settled for near a century" that the court would not meddle in the college's affairs.[113] He stated:

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[102] R v. Ashton (1754) 96 Eng. Rep. 837, 837; Sayer 159 (KB).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] Giles's Case (1731) 93 Eng. Rep. 914, 914; 2 Strange 881 (KB).

[108] *Id.*

[109] *Id.*

[110] *See* 'ESPINASSE, *supra* note 4, at 668 ("As where the application was for a mandamus to be directed to the justices of the peace, to compel them to grant a licence to *Giles* to keep an alehouse, it was refused; for it is discretionary in the justices to grant or to refuse it.").

[111] R v. Bishop of Ely (1794) 101 Eng. Rep. 267, 269; 5 T.R. 475 (KB).

[112] *Id.* at 268.

[113] *Id.*

> [T]his Court has no other power than that of putting the visitatorial power in motion, . . . but that if the judgment of the visitor be ever so erroneous, we cannot interfere in order to correct it. . . . [The bishop] has exercised his judgment upon the whole. If therefore we were to interfere, it would be for the purpose of controlling his judgment.[114]

Justice Kenyon's comments clarify that a writ of mandamus should only set in motion an individual's execution of his duties, but not question his discretion when he did so. Justice Grose offered the following example: "If the bishop had not exercised his judgment at all, we would have compelled him . . . ."[115] This understanding of mandamus's role as simply a non-discretionary command later carried over to the United States, as discussed below.

E. Primary Uses

Considering the established elements of the writ and its substantive limits, mandamus was more properly suited for certain issues than others. The following Sections address its use to restore the plaintiff to public office and to supervise inferior courts.

1. Restoration to Public Office

During the seventeenth and eighteenth centuries, individuals frequently employed mandamus to seek restoration to a public office.[116] This use was welcomed by courts[117] and subsequently listed in treatises as the primary type of case in which a court would grant mandamus.[118] A request for restoration to public office brought into play many of the fundamental characteristics of mandamus. The plaintiff would assert the failure to be restored to office as a clear, legal right. Next, the plaintiff would easily show a lack of an adequate remedy by claiming that the only way to reclaim what he was duly owed—his position—was to compel the defendant to restore the plaintiff to his position. Finally, these cases involved public rather than private disputes because an individual's right to reclaim his duly earned position

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[114] *Id.*

[115] *Id.* at 269.

[116] *E.g.*, R v. Corp. of Wells (1767) 98 Eng. Rep. 41, 41–42; 4 Burr. 1999 (KB); R v. Mayor of Wilton (1697) 87 Eng. Rep. 642, 642; 5 Mod. 257 (KB); *see also* 15 VINER, *supra* note 94, at 185–98.

[117] See, for example, Chief Justice Holt's opinion in *Anonymous*, in which he notes that this use strikes at the core of the writ: "The true reason of *mandamus* was when aldermen, capital burgesses, or such other officers concerning the administration of justice, were kept out, to swear them into, or at least restore them into their places . . . ." Anonymous (1702) 88 Eng. Rep. 1589, 1589; 12 Mod. 666 (KB).

[118] *See, e.g.*, BACON, *supra* note 4, at 529.

involved the public "administration of justice," for which the court would comfortably grant mandamus.[119] Finally, the decision to accept an individual to public office involved little to no discretion because the dispute would come down to whether or not the defendant had followed the proper procedures.[120]

2. Supervision of Lower Courts

King's Bench rarely granted writs of mandamus compelling certain actions of inferior courts. The court restricted the use of mandamus in this context to only ensuring that the lower courts fulfilled their duties.[121] That is, mandamus could not usurp the discretion of a lower court or change the outcome of a lower court's ruling.[122] Instead, mandamus in this context remained true to form by only correcting non-discretionary errors. King's Bench's supervision of inferior courts via mandamus differs from other means of review because it regulated only the mechanics of the lower courts.[123] Rather than reviewing the merits of an underlying case, with mandamus, King's Bench only controlled the way justices of lower courts exercised their discretion.[124] This supervision differs from a modern-day appellate court's remand to a lower court because, for example, instead of asking the lower courts to reexamine a particular issue, a writ of mandamus from King's Bench would simply compel the lower court to examine the issue in the first place, that is, exercise its judicial discretion.

A pair of cases involving the same underlying facts outline the limited extent to which King's Bench would review a ruling of an inferior court. The master and five fellows of Jesus College, a college within the University of Cambridge, voted to remove the plaintiff, Reverend W. Frend, from his fellowship because he had written, printed, and dispersed a controversial pamphlet.[125] Frend appealed their vote

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[119] *E.g.*, *Corp. of Wells*, 98 Eng. Rep. at 44 (describing a serjeant at law as a public office concerning the "administration of justice"); R v. Barker (1762) 97 Eng. Rep. 823, 826; 3 Burr. 1265 (KB) ("The right depends upon election: which interests all the voters.").

[120] *See, e.g.*, R v. Askew (1768) 98 Eng. Rep. 139, 142; 4 Burr. 2186 (KB) (Mansfield, C.J.).

[121] *See, e.g.*, R v. Chancellor of the Univ. of Cambridge (1794) 101 Eng. Rep. 451, 451; 6 T.R. 89 (KB) (finding the lower court exercised proper jurisdiction, and refusing to alter the lower court's sentence); Mr. Amhurst's Case of Gray's-Inn (1673) 86 Eng. Rep. 127, 127; 1 Ventris 187 (KB) (granting mandamus commanding alderman to enter a judgment).

[122] *See, e.g.*, *Ex parte* Cook (1860) 121 Eng. Rep. 221, 222; 2 El. & El. 586 (QB) ("[N]or does this Court, on application to it for a mandamus to a Court having a judicial discretion, ever do more than direct the Court to hear and determine the case; we never say how the case is to be decided.").

[123] *See, e.g.*, R v. Peters (1758) 97 Eng. Rep. 452, 454; 1 Burr. 569 (KB) (denying mandamus because the inferior court held the power to set aside an interlocutory judgment).

[124] *See* FREDERIC W. MAITLAND, JUSTICE AND POLICE 102–03 (London, MacMillan & Co. 1885) (distinguishing King's Bench control of lower courts from appellate review).

[125] R v. Bishop of Ely (1794) 101 Eng. Rep. 267, 268; 5 T.R. 475 (KB); R v. Chancellor of the Univ. of Cambridge (1794) 101 Eng. Rep. 451, 451; 6 T.R. 89 (KB).

to remove him within the college's internal court system but was unsuccessful.[126] He then applied for mandamus in King's Bench, demanding that the college hear his appeal again. The court denied the writ without even asking the university to show cause.[127] Chief Justice Lord Kenyon explained that mandamus should only issue to set the lower courts "in motion," but it could not correct an erroneous judgment.[128] The other justices of King's Bench agreed, making a point to state that mandamus would only have been appropriate if the university entirely refused to hear Frend's appeal.[129] The University of Cambridge also removed Frend from his position at the university.[130] After giving him a chance to defend himself, the vice-chancellor issued the following punishment: to publicly acknowledge and withdraw his "error."[131] Frend refused, and the college "banished" him.[132] Frend appealed his banishment within the university's internal court system, but his sentence was affirmed.[133] He then applied for mandamus in King's Bench, contesting the jurisdiction and sentence given by the university court.[134]

The justices did acknowledge that they could use mandamus to correct an "injustice" of a lower court,[135] but they found no injustice in this case and discharged the rule.[136] The court concluded that the university properly exercised jurisdiction in determining Frend's sentence and choosing to banish him.[137] The justices anchored their opinions on the jurisdictional question. For example, Chief Justice Kenyon expressed his certainty that the university could review cases like Frend's.[138] But Frend not only objected to the jurisdiction of the university court, he also disputed his sentence.[139] Though a few of the justices could not help but express their

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[126] *Bishop*, 101 Eng. Rep. at 267.

[127] *Id.* at 268.

[128] *Id.*

[129] Along with Chief Justice Lord Kenyon, Justices Ashhurst, Buller, and Grose all found it dispositive that the university had heard Frend's appeal. *Id.* at 268–69 ("If the bishop had not exercised his judgment at all, we would have compelled him: but it is objected that he has not exercised it rightly; to this I answer that we have no authority to say how he should have decided.").

[130] *Chancellor of the Univ. of Cambridge*, 101 Eng. Rep. at 452.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 451.

[135] *Id.* at 462 ("The principal ground for granting a mandamus . . . is, where it is to prevent a failure of justice, and where there is no other specific remedy; that chiefly applies to cases where there is no jurisdiction to appeal to, or where the judgment pronounced is clearly an excess of the jurisdiction of the court below.").

[136] *Id.* at 465.

[137] *Id.* at 461.

[138] *Id.* at 460.

[139] *Id.* at 452.

disapproval of Frend's actions, Chief Justice Kenyon ultimately avoided assessing the merits of that question, reasoning that it was within the university's discretion to discipline Frend.[140] Justice Grose did express some reservations regarding Frend's banishment but stated that any appeal as to the nature of the sentence should only be heard within the university's appellate courts.[141]

These companion cases offer an opportunity to understand the boundary established by King's Bench that limited a superior court from overriding the ruling of a lower court. The superior court could use mandamus to ensure that the lower court exercised proper jurisdiction, but the court could not go further and alter the judgment so long as the judgment itself did not exceed the jurisdiction of the court.[142]

III. MANDAMUS IN THE UNITED STATES

A. The Bounds of the Writ in the United States

The law governing the use of mandamus has remained largely unchanged throughout its use in the United States. One of the more consequential interpretations lies in Chief Justice Marshall's treatment of the writ in *Marbury v. Madison*.[143] The following sections explain *Marbury*'s impact, as well as the early uses of the writ, the constitutional limitations, and the statutory limitations.

1. Federal Courts' Early Understanding of the Writ

The United States Supreme Court carried mandamus into the United States in a nearly identical form to its roots in England.[144] *United States v. Judge Lawrence*, the only Supreme Court opinion published before *Marbury v. Madison*, demonstrates the Court's restricted use of the writ, especially in the context of appellate review.[145] The U.S. Attorney General had moved for a writ of mandamus compelling a New York District Court judge to issue a warrant for the arrest of the captain

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[140] *Id.* at 461 ("I am of the opinion that we have no authority to revise the judgment given.").

[141] *Id.* at 464.

[142] *See id.* at 462 ("The principal ground for granting a mandamus . . . is . . . where the judgment pronounced is clearly an excess of the jurisdiction of the court below.").

[143] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803).

[144] *See Ex parte* Newman, 81 U.S. (14 Wall.) 152, 165 (1871); JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION 6 (Chicago, Callaghan & Co. 1874) (listing the elements required of mandamus in England, such as a clear legal right and no other adequate specific relief); HORACE G. WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS AND PROHIBITION, HABEAS CORPUS, CERTIORARI AND QUO WARRANTO 17–18 (Albany, W. C. Little & Co. 1880) (explaining the circumstances in which a court will grant mandamus, which mirror Lord Mansfield's early articulation of the writ).

[145] United States v. Lawrence, 3 U.S. (3 Dall.) 42, 42 (1795).

of a French ship.[146] The Court denied the motion, explaining that mandamus would not issue to override the discretion of a lower court because the Court "ha[d] no power to compel a Judge to decide according to the dictates of any judgment, but his own."[147] This understanding comports with the limits placed on mandamus in England, echoing Justice Grose's treatment of the writ from the Court of King's Bench.[148]

Two circuit court opinions published before *Marbury* addressing mandamus also followed the writ's history in England. The differing outcomes in the two cases, both from the D.C. Circuit, highlight the writ's core function as a tool to compel an individual to carry out his non-discretionary duties. In the first case, *United States v. Bank of Alexandria*, the court denied a writ of mandamus that would have compelled a bank to allow an insurance company to buy its stock.[149] The parties discussed familiar factors such as whether the insurance company held a clear right to relief, whether it had an alternative remedy, and whether the right at issue concerned the public.[150] Ultimately two of the three judges on the panel voted to deny the writ because, as explained by Judge Cranch, the insurance company could have addressed its dispute over the bank's stock obligations via an action on the case, a remedy traditionally used to recover property interests.[151] In the second case, *United States v. Deneale*, the court granted mandamus ordering a former clerk of a county court in Alexandria, Virginia to turn over records of wills to the register of an Alexandria probate court.[152] In *Deneale*, the petitioner simply asked the court to order a lower court official to carry out a straightforward task: hand over court records. But in *Bank of Alexandria*, the petitioner asked the court to interpret the bank's obligations as stated in its articles of incorporation, assess whether the insurance company was entitled to buy stock, and then finally order the bank to allow the stock purchase. The court's grant of mandamus in *Deneale* and denial in *Bank of Alexandria* solidify mandamus's proper purpose as an order to carry out a non-discretionary task.

Nineteenth century treatises confirm the courts' limited approach. One treatise characterizes the distinction between discretionary and non-discretionary functions as the "most important principle" governing mandamus.[153] A second reiterates that

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[146] *Id.*

[147] *Id.* at 53.

[148] *See* R v. Bishop of Ely (1794) 101 Eng. Rep. 267, 269; 5 T.R. 475 (KB).

[149] United States v. Bank of Alexandria, 24 Fed. Cas. 982, 984 (C.C.D.C. 1801) (No. 14,514).

[150] *Id.* at 982–83.

[151] *Id.* at 984.

[152] United States v. Deneale, 25 Fed. Cas. 817, 817 (C.C.D.C. 1801) (No. 14,946).

[153] HIGH, *supra* note 144, at 25.

mandamus may only "set an inferior court in motion" but will not dictate a particular outcome.[154]

2. Article III's Limitation

Article III of the Constitution proved to be an obstacle for the traditional take on mandamus because it limits Supreme Court original jurisdiction.[155] In *Marbury*, Chief Justice Marshall's traditional understanding of mandamus placed Section 13 of the Judiciary Act of 1789 in conflict with Article III.[156] William Marbury had asked the Supreme Court to issue a writ of mandamus directing the Secretary of State to deliver his commission as a Justice of the Peace.[157] Chief Justice Marshall looked to Section 13 of the Judiciary Act as the source of the Court's power to issue the writ.[158] But in his view, the Act's authorization to direct a writ of mandamus "to any courts appointed, or persons holding office, under the authority of the United States" conflicted with Section 2 of Article III, which delineated the Supreme Court's limited original jurisdiction.[159]

Given the history of the writ in England as a source of original jurisdiction in the Court of King's Bench, it is only natural that Chief Justice Marshall understood the Judiciary Act as improperly expanding the original jurisdiction of the Supreme Court. Although Chief Justice Marshall's interpretation has since suffered criticism,[160] it does follow the traditional use in England. Parties could apply for mandamus in the first instance in King's Bench, and, given this context, the text of Section 13 appears to permit expansive Supreme Court original jurisdiction: "The Supreme Court shall . . . have power to issue . . . writs of mandamus . . . to any courts appointed, or persons holding office, under the authority of the United

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[154] WOOD, *supra* note 144, at 20 (emphasis omitted).

[155] *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . under such Regulations as the Congress shall make.").

[156] *See* Pfander, *supra* note 93, at 1518–19 (arguing that Chief Justice Marshall's understanding of the Judiciary Act follows the use of mandamus in eighteenth century England as a form of expansive original jurisdiction).

[157] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 153–54 (1803).

[158] *Id.* at 173.

[159] *Id.*

[160] *See, e.g.*, Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 456 (1989) (arguing that a "better, alternative to *Marbury*'s reading" is that Section 13 does not confer any original jurisdiction on the court, but rather only gives the Court another remedial tool in cases already properly before it on appeal); Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 541–42 (1914) (explaining that, contrary to Marshall's interpretation, Section 13 of the Judiciary Act did not expand the original jurisdiction of the Supreme Court).

States."[161] In light of the conflict between the expansive original jurisdiction permitted by the Judiciary Act and the limited original jurisdiction required by the Constitution, Chief Justice Marshall invalidated Section 13 and enshrined the power of judicial review.[162]

*3. Implications for Mandamus Post-*Marbury

After *Marbury*, what uses remained for mandamus? *Marbury* did not invalidate Section 13 of the Judiciary Act as a whole. It only limited its reach in the hands of the Supreme Court. Because the statutory grant of mandamus power still stood in 1803 and still stands today, the exact boundaries of that power reveal themselves through the English history setting the backdrop for the statute, the statutory text itself, and the general common law interpreting that text.

a. The Evolution of § 1651

The exact language of the Judiciary Act of 1789 does not appear in the United States Code in its current form. Instead, § 1651 of the Code assumes a more general tone: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[163] The Judiciary Act nevertheless remains relevant to our understanding of the statutory grant of mandamus power in its current form.[164]

Both Sections 13 and 14 of the Judiciary Act found their way into § 1651 of the current Code. Some scholars trace § 1651 to either Section 13 or Section 14 of the Judiciary Act.[165] But it appears that both Sections have been incorporated into § 1651.[166] As explained below, the section that Congress cut out in the 1948 amendments to the U.S. Code traces back to Section 13, and the notes accompanying the amendment make it clear that this section was only eliminated to avoid

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[161] Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (emphasis omitted). For a more extensive explanation of Chief Justice Marshall's interpretation of Section 13, see Pfander, *supra* note 93, at 1531–49.

[162] *See Marbury*, 5 U.S. at 176.

[163] 28 U.S.C. § 1651(a) (2018). In contrast, the Judiciary Act specifically mentioned mandamus. Judiciary Act of 1789, ch. 20, § 13.

[164] *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3933 (3d ed. 2012); Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 433 (1999); James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 510 (2011) ("The Supreme Court's power to issue these supervisory writs dates from the Judiciary Act of 1789 and now rests on the All Writs Act."); *see also Ex parte* Republic of Peru, 318 U.S. 578, 582 (1943) (explaining that Sections 13 and 14 of the Judiciary Act were incorporated into the Judicial Code).

[165] *E.g.*, Griffin B. Bell, *The Federal Appellate Courts and the All Writs Act*, 23 SOUTHWESTERN L.J. 858, 859 (1969) (tracing the All Writs Act to Section 14).

[166] *See* Hoffman, *supra* note 164, at 433.

redundancy.[167] Without the influence of both Sections 13 and 14, Congress would not have been faced with this repetition.

As described above, Section 13 of the Judiciary Act conferred the Supreme Court with the power to grant writs of mandamus. But mandamus was not only limited to use by the Supreme Court. Section 14 of the Act gave all federal courts the power to grant the writ, even if not specifically approved by statute, so long as it was "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[168] This text from Sections 13 and 14 of the Judiciary Act appeared largely unchanged in the Revised Statutes of 1878,[169] in the All Writs Act codified in the Judicial Code of 1911,[170] and in the 1940 edition of the United States Code.[171]

Congress trimmed up the wording and consolidated a few sections in 1948, resulting in the version we have today in the most current edition of the Code.[172] This consolidation eliminated the section that specifically mentioned mandamus and traced back to Section 13 of the Judiciary Act. Congress, however, did not intend for any substantive change in federal courts' ability to issue the writ. The notes accompanying the amendment clarified that this section was left out only in an effort to clean up the language.[173]

b. How to Interpret § 1651

Though we do know that statutory interpretation begins with the text itself,

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[167] *See* H.R. REP. NO. 80-308, pt. 5, at A145 (1947).

[168] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

[169] With regard to the Supreme Court's power to issue writs, the Revised Statutes provided:

> The Supreme Court shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an embassador, or other public minister, or a consul or vice-consul is a party.

13 Rev. Stat. § 688 (2d ed. 1878). With regard to all federal courts, the statute provided: "[T]he circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs . . . necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." *Id.* § 716.

[170] The Judicial Code of 1911 copied the language concerning the Supreme Court exactly as it appeared in the Revised Statutes of 1878. *See* Judicial Code, ch. 231, § 234, 36 Stat. 1156 (1911). The Judicial Code added "Supreme Court" and only slightly altered the punctuation in the section discussing the federal courts. *See id.* § 262 ("The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute . . . .").

[171] Sections 342 and 377 directly mirror Sections 234 and 262 of the Judicial Code. *See* 28 U.S.C. §§ 342, 377 (1940).

[172] *See* H.R. REP. NO. 80-308, *supra* note 167, at A144 (explaining that § 1651 consolidates the coordinating sections from the 1940 edition of the Code, including sections 342 and 377).

[173] *See id.* at A145 ("The special provisions . . . with reference to writs of prohibition and mandamus . . . were omitted as unnecessary in view of the revised section.").

what exactly is the limit of "all writs necessary" that aid federal courts "in their respective jurisdictions"? What exactly is "agreeable to the usages and principles of law"?[174] This broad language gives courts quite a bit of leeway in interpreting the limits to their own power. But there is a limit. Congress, the Supreme Court, and the King's Bench provided an ultimate boundary at the very least: mandamus cannot serve as a substitute for an appeal.

Congress likely understood this limit as implicit in the statutory text establishing federal courts' power to issue writs of mandamus. When interpreting a statute, courts assume that Congress has considered the legal context at the time of enactment.[175] For example, in order to understand whether or not Congress intended for Section 13 of the Judiciary Act to give the Supreme Court the power to issue writs of mandamus to parties beyond the reach of its limited original jurisdiction, we would have to look to the state of the law of mandamus as of 1789. Considering the roots of mandamus in England and the comparatively undeveloped state of the law in the United States as of 1789, this inquiry would also consider influences from England, as Chief Justice Marshall demonstrated in his *Marbury* opinion.[176] Thus, the English history is relevant in determining the scope of mandamus power as enacted by the Judiciary Act.

The 1948 amendments alter our point of reference here. When Congress substantially alters the text of a statute, courts assume that Congress has considered developments in the law relating to that statutory text.[177] Thus, we can assume that in consolidating and rewording Sections 342, 376, and 377 of the 1940 edition of the U.S. Code, Congress acted with an understanding of the common law interpreting federal courts' mandamus power as of the time of revision.

In fact, we know Congress considered developments in the courts' use of mandamus. In the notes accompanying the 1948 amendments, it expressly endorsed the approach taken by two 1945 Supreme Court cases.[178] In the first case, *U.S. Alkali Export Ass'n v. United States*, the defendants petitioned for a writ of mandamus in

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[174] *See* 28 U.S.C. § 1651(a) (2018).

[175] *E.g.*, Carter v. United States, 530 U.S. 255, 266–67 (2000); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 569–70 (1982); Gilbert v. United States, 370 U.S. 650, 655 (1962).

[176] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168 (1803) (citing Blackstone and Lord Mansfield); *see also* HIGH, *supra* note 144, at 10 ("While in this country the writ has been regulated to a considerable extent by constitutional and statutory enactments, it has lost but few of its ancient remedial incidents, and is still governed by common law rules where such rules have not been abrogated.").

[177] *E.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 384–86 (1983); Francis v. S. Pac. Co., 333 U.S. 445, 449–50 (1948).

[178] The committee wrote: "The revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U.S. v. Alkali Export Assn.* . . . and *De Beers Consol. Mines v. U.S.* . . . ." H.R. REP. NO. 80-308, *supra* note 167, at A145 (citations omitted).

order to seek review of the district court's denial of their motion to dismiss.[179] The Court used this request as an opportunity to lay out the "traditional" purpose of mandamus and denounce the use of "extraordinary writs as a means of review."[180] The Court thoroughly delineated the boundaries of appellate court review via what it called "common law writs," which include certiorari, mandamus, and prohibition.[181] It explained that appellate courts traditionally used common law writs only to ensure that lower courts had not exceeded their jurisdiction and to "compel them to exercise their authority when it is their duty to do so."[182] Finally, the Court justified the impropriety of appellate review via common law writs by looking to the text and legislative intent of the Judicial Code to "avoid piecemeal reviews."[183]

In the second case, *De Beers Consolidated Mines, Ltd. v. United States*, the Court took a similar approach as it did in *Alkali* by distinguishing "a mere error in the exercise of conceded judicial power" from a "usurpation of power."[184] As in *Alkali*, the Court expressed its disapproval of appellate review via Section 262 of the Judicial Code: "When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power."[185] The petitioners in *De Beers* asked the Court to review a preliminary injunction granted by the district court.[186] The Court did reverse the district court's order, but only after finding that the district court had attempted to step entirely outside the scope of its authority.[187] In other words, the Court only analyzed the district court's *ability* to issue a preliminary injunction rather than the *soundness* of its decision.[188] Although Congress mentioned only *Alkali* and *De Beers*, the Supreme Court had interpreted the statutory grants of mandamus power, in all of its forms, as separate from an appeal.[189]

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[179] U.S. Alkali Exp. Ass'n v. United States, 325 U.S. 196, 198 (1945).

[180] *Id.* at 202.

[181] *Id.* at 201–02; *see* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 721 (2004).

[182] *U.S. Alkali Exp. Ass'n*, 325 U.S. at 202.

[183] *Id.* at 203 ("The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.").

[184] De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945).

[185] *Id.*

[186] *Id.* at 216–17.

[187] *Id.* at 223.

[188] *See id.* at 217 ("But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262.").

[189] For cases interpreting the All Writs Act as stated in the 1940 edition of the United States Code, see *Ex parte* Fahey, 332 U.S. 258, 260 (1947) ("We are unwilling to utilize them as

The historical roots of the writ back in England continue to bear on this analysis because the 1948 amendments did not change the core substance of mandamus power as first established by the Judiciary Act. As explained above, Congress characterized the 1948 amendments as an effort to trim up the language,[190] and Courts have also interpreted this change as inconsequential.[191] Further, the notes accompanying the Judiciary Act explicitly discourage the use of mandamus as a tool to usurp discretion of an inferior court. The notes make clear that "[o]n a mandamus a superior court will never direct in what manner the discretion of the inferior tribunal shall be exercised" and that parties should instead pursue a writ of error or other appeal to seek correction of a lower court judgment.[192] This note from Congress indicates that it intended to offer the mandamus power to the courts in its traditional form consistent with its roots in England.

In seventeenth and eighteenth century England, King's Bench did not have a constitution limiting its use of mandamus. Instead, King's Bench enjoyed more free rein. It could issue writs to command inferior officers, such as directors of corporations, as well as judges in lower courts.[193] But despite the fact that King's Bench could issue the writ in a wider variety of contexts than courts in the United States, it still adhered to a consistent doctrine. In the context of directing lower court

substitutes for appeals."); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) ("[W]hile a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute."); *In re* Dutile, 935 F.2d 61, 63 (5th Cir. 1991) (noting that mandamus is not a "substitute for appeal"). For a case interpreting the All Writs Act as stated in the Judicial Code of 1911, see Work v. United States ex rel. Rives, 267 U.S. 175, 177 (1925) (Chief Justice Taft noting that mandamus "can not be used to compel or control a duty in the discharge of which by law he is given discretion. . . . No court in such a case can control by mandamus his interpretation, even if it may think it erroneous."). For cases interpreting the Judiciary Act as stated in the Revised Statutes of 1878, see *In re* Glaser, 198 U.S. 171, 173 (1905) (denying mandamus because the Court lacked appellate and original jurisdiction); *In re* Blake, 175 U.S. 114, 117 (1899) (denying mandamus directed to the circuit court to review a writ of error); *In re* Sherman, 124 U.S. 364, 368–69 (1888) (denying mandamus directed to the circuit court to vacate its removal order); *Ex parte* Schwab, 98 U.S. 240, 241–42 (1878) (denying mandamus directed to the district court to vacate its preliminary injunction); and *Ex parte* Cutting, 94 U.S. 14, 22 (1876) (denying mandamus directed to the circuit court to allow a new party to the litigation to intervene and appeal). For a case interpreting the Judiciary Act of 1789, see *Ex parte* Newman, 81 U.S. (14 Wall.) 152, 169 (1871) ("Power is given to this court by the Judiciary Act, under a writ of error, or appeal, to affirm or reverse the judgment or decree of the Circuit Court . . . but no such power is given under a writ of mandamus. . . .").

[190] *See* H.R. REP. NO. 80-308, *supra* note 167, at A144.

[191] *See, e.g.*, Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 42 (1985) ("[W]e conclude that [Congress] apparently intended to leave the all writs provision substantially unchanged.").

[192] *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 n.(d).

[193] *See supra* Part II.

judges, the justices of King's Bench often stated that they would not override the lower court judges' discretion. Rather, mandamus would only issue to ensure that the judge actually carried out his duties, such as reaching a final judgment.[194]

Thus, in addition to the fundamental requirements of a clear right to relief and lack of an adequate remedy, the interpretation of statutory grants of mandamus power also suggest that the writ may not be used to usurp discretion of an inferior court. And a post-*Marbury* mandamus petition at the Supreme Court must only ask the Court to exercise its appellate jurisdiction unless the case falls into its limited Article III original jurisdiction.[195]

B. Federal Appellate Courts' Modern Interpretations of Mandamus

Though it seems fairly settled that both Congress and the Court did not intend for mandamus to subsume established appellate procedure, a difficult question follows: what exactly constitutes an appeal? If courts may use mandamus to aid their appellate jurisdiction, what exactly does this look like? If a judge refused to perform a routine function of his duties, such as a duty to recuse himself from an obvious conflict of interest, the aggrieved party could seek relief by petitioning a superior court for a mandamus. But what if the judge misinterpreted binding precedent? Would mandamus issue in that case to correct the judge's understanding of the law? If it would, where is the line in that question? How "clear" must the precedent be? Federal appellate courts have attempted to tackle similar questions.

1. The Supreme Court's Recent Use of an Expanded Approach

Throughout the majority of the twentieth century, the Supreme Court consistently found mandamus petitions inappropriate on the basis that mandamus may not serve as a form of appeal parallel to established appellate procedure.[196] But the

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[194] *See supra* Part II.D–E.

[195] The Supreme Court has interpreted the phrase, "in aid of their respective jurisdictions" as stated in the All Writs Act, 28 U.S.C. § 1651(a) (2018), as including any case that it *could* review on appeal. *See Ex parte* Republic of Peru, 318 U.S. 578, 578 (1943) (holding that the Supreme Court may issue a writ of prohibition or mandamus not only if the matter is on direct appeal, but also if the matter is within its "ultimate discretionary jurisdiction by certiorari") (quoting *Ex parte* United States 287 U.S. 241, 248 (1932)); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943) (drawing the distinction between cases that have in fact been appealed to the superior court and cases that are simply appealable to the superior court, though no appeal had been filed); *see also* Pfander, *supra* note 164, at 512–13 (describing the Supreme Court's expansive understanding of its supervisory authority under the All Writs Act).

[196] Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36–37 (1980) (reversing the circuit court's grant of mandamus because the petitioner had the adequate remedy of appealing after final judgment); Kerr v. U.S. Dist. Court, 426 U.S. 394, 406 (1976) (affirming the circuit court's denial of mandamus that would have directed the district court to vacate its discovery order because the petitioner had the adequate remedy of asserting privilege); U.S. Dist. Court (*Will*) v. United States, 389 U.S. 90, 107 (1967) (reversing mandamus granted by the circuit court to the

Court took a turn in 2004.[197] In *Cheney v. U.S. District Court for the District of Columbia*, two organizations sued the United States Government and Vice President for violating the Federal Advisory Committee Act.[198] The district court deferred ruling on both parties' motions to dismiss and allowed limited discovery.[199] The government petitioned the circuit court for a mandamus directing the district court to vacate its discovery orders and dismiss Cheney as a defendant.[200] The circuit court denied the petition, reasoning that the government could assert executive privilege.[201] The Supreme Court agreed to weigh in on the issue of whether the circuit court could have issued the writ.[202] Though the Court did not explicitly direct the circuit court to issue the writ, it vacated the judgment and strongly suggested mandamus would have been appropriate.[203] The Court seemed especially eager to protect executive privilege.[204] Justice Ginsburg, in dissent, sided with the circuit court and drew on the traditional fundamental principles of mandamus, calling attention to the fact that the government had not pursued its alternative means of relief.[205] The Court's broad language in *Cheney* took it a step away from the traditional approach.

2. The Circuit Courts' Varied Approaches

Several circuits have also adopted the traditional approach to mandamus, stating that litigants may not use it as an alternative means of appeal.[206] But variation

district court, which had directed the district court to vacate an order requesting information); *Ex parte* Fahey, 332 U.S. 258, 260 (1946) (denying mandamus to compel the district court to vacate order allowing fees to counsel because the petitioner could appeal); *Roche*, 319 U.S. at 32 (reversing the circuit court's grant of mandamus and criticizing the circuit court for substituting its own view of the merits).

197 *See* Cheney v. U.S. Dist. Court, 542 U.S. 367, 367 (2004).

198 *Id.* at 373.

199 *Id.* at 375.

200 *Id.* at 376.

201 *Id.* at 376–77.

202 *Id.* at 372.

203 *Id.* at 370 ("Accepted mandamus standards are broad enough to allow a court to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities.").

204 *See id.* at 391.

205 *Id.* at 403 (Ginsburg, J., dissenting) ("When parties seeking a mandamus writ decline to avail themselves of opportunities to obtain relief from the District Court, a writ of mandamus ordering the same relief—*i.e.*, here, reined-in discovery—is surely a doubtful proposition.").

206 *E.g.*, *In re* Ozenne, 841 F.3d 810, 815 (9th Cir. 2018) ("Procedurally, a writ of mandamus cannot substitute for a timely appeal.") (citing Calderon v. U.S. Dist. Court, 137 F.3d 1420, 1421 (9th Cir. 1998)); *In re* Smith, 332 Fed. App'x 734, 736 (3d Cir. 2009) ("[M]andamus must not be used as a mere substitute for appeal.") (quoting Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1422 (3d Cir. 1991)); *In re* BellSouth Corp., 334 F.3d 941, 965–66 (11th Cir. 2003) (reserving the use of mandamus only when the petitioner has demonstrated

does inevitably result from a writ invested with quite a bit of discretion. The courts do often recite the basic requirements of mandamus that mirror the English history: a clear and indisputable right to relief and no other adequate means of relief. Some circuits also consider factors such as whether the lower court had repeatedly made the same error or whether the appellate courts view mandamus as "appropriate under the circumstances."[207]

As for distinguishing between confining the district court judge to his or her proper authority and second-guessing his or her discretionary judgment, the circuits have formulated several approaches. Some only review mandamus petitions that "pose elemental question[s] of judicial authority"[208] or a clear "usurpation of power"[209] while others take a closer look at the merits of a case and ask if the lower court clearly abused its discretion by interpreting the law incorrectly, at least in the view of the appellate court.[210] The former approach conforms to mandamus's traditional use, and the latter conflicts with the English history, statutory text, and Supreme Court precedent. Further, the latter distinction is subtle and subject to inconsistent interpretation.[211] The following two Sections describe a few cases that exemplify each approach.

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a "clear and indisputable right to relief or demonstrable injustice").

[207] *E.g.*, *In re* Mohammad, 866 F.3d 473, 475 (D.C. Cir. 2017).

[208] *E.g.*, *In re* Queen's Univ. at Kingston, 820 F.3d 1287, 1291 (Fed. Cir. 2016) (limiting the use of mandamus only to correct the district court's "usurpation of judicial authority"); Rigby v. Damant, 486 F.3d 692, 693 (1st Cir. 2007) (citing *In re* Justices of the Superior Court Dep't, 218 F.3d 11, 16 (1st Cir. 2000)); *see also* McLee v. Chrysler Corp., 38 F.3d 67, 68–69 (2d Cir. 1994) (issuing the writ because the district court had expressly noted it did not analyze the merits of the case and thus did not exercise discretion).

[209] *E.g.*, *In re* Tsarnaev, 780 F.3d 14, 19 (1st Cir. 2015) (stating that the mandamus is only appropriate when the lower court was clearly without jurisdiction or its error amounted to a "clear usurpation of power"); *In re* Zyprexa Prods. Liab. Litig., 594 F.3d 113, 122 (2d Cir. 2010) (stating that, in the context of an appeal of a jurisdictional ruling, mandamus is only appropriate in order to "confine a lower court to the exercise of its proper jurisdiction").

[210] *See, e.g.*, Swift Transp. Co. v. U.S. Dist. Court, 830 F.3d 913, 916–17 (9th Cir. 2016) (stating that a writ will only issue if the lower court's interpretation of the law was clearly erroneous and contrary to established precedent); Carpenter v. Mohawk Indus., Inc., 541 F.3d 1048, 1054 (11th Cir. 2008) (sanctioning mandamus as a method of interlocutory appeal for discovery orders that compel disclosure of privileged information); *In re* Volkswagen of Am., Inc. 545 F.3d 304, 311 (5th Cir. 2008) (stating that the petitioner must show that it has a "clear and indisputable right" and that the lower court clearly abused its discretion); *In re* Patenaude, 210 F.3d 135, 141 (3d Cir. 2000) (stating that mandamus may issue even to correct discretionary acts, so long as the lower court had clearly abused its discretion); *In re* Asbestos Sch. Litig., 46 F.3d 1284, 1284 (3d Cir. 1994) (issuing the writ because the district court's ruling contravened clear precedent).

[211] *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965) (stating that even if mandamus is typically used to correct "ministerial" mistakes, it is difficult to classify actions as strictly ministerial or discretionary).

a. The Traditional Approach: "Usurpation of Power"

The Fifth Circuit employed a uniquely restrained approach to mandamus in *In re Gee*.[212] Two doctors and an abortion clinic, the plaintiffs in *In re Gee*, had challenged the constitutionality of Louisiana's abortion regulations.[213] The basis for the mandamus petition stemmed from the State of Louisiana's motion to dismiss that challenged standing. The district court denied the motion but declined to address Louisiana's standing argument, even acknowledging that the standing argument posed problems for the plaintiffs because assessing standing at that point would have prevented it from reaching the merits.[214] Louisiana then petitioned for a writ of mandamus seeking reversal of the denial of its motion to dismiss.[215]

The Fifth Circuit walked as close as it could to expressing its grave disapproval of the district court's actions without actually granting mandamus. Despite the court's characterization of the district court's actions as "strange" and "extraordinary," the Fifth Circuit nevertheless denied the writ in an exercise of its discretion.[216] In outlining the standard for mandamus, the court listed the two fundamental elements, a clear right to relief and the lack of an alternative remedy, and it also highlighted the distinction between discretionary and non-discretionary actions.[217] The court found Louisiana did hold a clear right to relief solely on the basis that the district court had refused to even address standing, but the court also proceeded to offer its own extensive analysis of plaintiffs' standing issues.[218] This additional and arguably unnecessary analysis reveals the court's strong disapproval for the district court's treatment of Louisiana's motion. The court also found that because it was an "extraordinary case," an appeal did not provide an adequate alternative remedy.[219] But despite this strong disapproval for the district court's actions and despite Louisiana's satisfaction of the two fundamental elements required for mandamus, the court nevertheless "exercised [its] discretion not to issue it at this time."[220] The court's reasoning largely rested on its hesitancy to consider the merits of the standing challenge before offering the district court a chance to address the issues.[221] The Fifth Circuit's restraint here strikes at the heart of the limited purpose for mandamus: only to compel the lower court to carry out its duties rather than substitute its own judgment on the merits.

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212 *In re* Gee, 941 F.3d 153, 156 (5th Cir. 2019).

213 *Id.*

214 *Id.* at 157.

215 *Id.*

216 *Id.* at 156–57.

217 *Id.* at 157–58.

218 *Id.* at 159–65.

219 *Id.* at 170.

220 *Id.*

221 *Id.* at 171.

b. The Expanded Approach: Use as an Appeal

The Third Circuit looked more closely at the merits in *In re Asbestos School Litigation*.[222] More than 30,000 school districts brought a class action against manufacturers of building products that contained asbestos.[223] Among other claims, the class alleged that the defendants had engaged in a civil conspiracy and concerted action to promote the use of asbestos-containing materials and based this argument largely on the defendant's association with a trade organization.[224] The district court denied one of the defendant's motions for summary judgment, denied its motion for reconsideration, and denied its request for interlocutory appeal.[225] The defendant petitioned for a writ of mandamus.[226]

In granting defendant's petition, then-Judge Alito emphasized the extraordinary nature of the case due to its implications for the defendant's First Amendment right of free association.[227] Further, in looking at the merits of the claims, Judge Alito concluded that the district court judge's "decision [lay] far outside the bounds of established First Amendment law"[228] and was "squarely contrary to Supreme Court precedent."[229] He fully engaged with the summary judgment record and determined that, based on established precedent, no rational jury could find that the defendant's association fell outside of First Amendment protection, or that the defendant intended to promote the allegedly tortious activities of its trade association.[230] Alito also considered broader policy implications, reasoning that in denying the defendant's motion for summary judgment, the district court effectively inhibited not only the defendant's right of free association, but could also chill association among the public at large.[231] Thus, the defendant stood to lose not only the resources necessary to reach a final judgment, but also its constitutional right of free association.

The Ninth Circuit may have been the most candid in its embrace of mandamus as a means of appeal. In *Barnes v. Sea Hawaii Rafting*, the Ninth Circuit went so far as to scrutinize the facts of the underlying case, acknowledge that the state of the law was unclear, and override the district court's denial of summary judgment.[232]

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222 *In re* Asbestos Sch. Litig., 46 F.3d 1284, 1286 (3d Cir. 1994).

223 *Id.*

224 *Id.*

225 *Id.* at 1287–88.

226 *Id.* at 1288.

227 *Id.* at 1295.

228 *Id.* at 1289.

229 *Id.* at 1295.

230 *Id.* at 1290.

231 *Id.* at 1295–96.

232 Barnes v. Sea Hawaii Rafting, LLC, 889 F.3d 517, 541–42 (9th Cir. 2018).

The plaintiff suffered injuries when the ship he worked on exploded.[233] Seeking maintenance and cure, he moved for summary judgment three times.[234] The district court denied all three motions, explaining that any disagreement between the parties regarding the amount of maintenance and cure constituted a dispute of material fact and thus precluded summary judgment.[235] Next, the plaintiff sought the district court's permission to file an appeal under 28 U.S.C. § 1292(a)(3), but again the district court denied his request.[236]

The court jumped through several hoops for the plaintiff in order to grant mandamus. Though the plaintiff properly appealed other rulings in the case, he did not formally appeal the denial of summary judgment on maintenance and cure.[237] Instead, he raised the issue in his opening brief.[238] The court found that by addressing the maintenance and cure issue in his brief, despite the lack of a proper appeal, the plaintiff had put the defendants on notice.[239] Next, the court decided to treat the appeal of separate orders as a petition for a writ of mandamus on the maintenance and cure issue.[240] Further, the court explained that the "inherent tension" between admiralty law and the Federal Rules of Civil Procedure has led to disagreement among the district courts as to the correct legal standard to use in reviewing pretrial requests for maintenance and cure.[241] Considering the uncertain state of the law, it cannot be said that the district court usurped its judicial power by denying summary judgment on the maintenance and cure issue, let alone even abused its discretion. The court nevertheless concluded that the district court "clearly erred."[242] The district court only "erred" because it did not anticipate the way the Ninth Circuit would ultimately resolve this uncertain state of the law. In *Barnes*, the court treated mandamus and § 1292 as interchangeable mechanisms of appeal and in doing so, abandoned the original use of mandamus established by English history, our own U.S. history, and the statutory text of the All Writs Act.

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[233] *Id.* at 517.

[234] *Id.* at 526.

[235] *Id.*

[236] *Id.* at 535–36 n.15. Section 1292(a)(3) allows for interlocutory appeals of orders that "determin[e] the rights and liabilities of the parties" in admiralty cases. 28 U.S.C. § 1292(a)(3) (2012).

[237] The district court had expressed the view, and the Ninth Circuit agreed, that § 1292(a) appeals do not require court approval. *Barnes*, 889 F.3d at 527–28 n.8. The plaintiff could have requested permission to appeal under § 1292(b). *See* 28 U.S.C. § 1292(b) (2012) (allowing appeals, with the district court's approval, of orders involving "controlling question[s] of law" that may "materially advance the ultimate termination of the litigation").

[238] *Barnes*, 889 F.3d at 535 n.14.

[239] *Id.*

[240] *Id.* at 535.

[241] *Id.* at 537.

[242] *Id.* at 542.

C. Policy Implications

Appellate courts' more flexible standard for mandamus impacts the efficiency of litigation in lower courts. Specifically, the expanded approach leads to less certainty and predictability for litigants and offers yet another avenue for piecemeal interlocutory appeals. The following Sections address each of these arguments.

1. Lack of Predictability

If courts fail to adhere to a strict standard for granting mandamus, litigants will lack the ability to comfortably assess the probability of a successful petition. This presents unnecessary opportunities for wasted time and effort on the part of a litigant that considers filing such a petition, as well as the parties opposing mandamus petitions. In fact, in its earlier origins, mandamus was regarded as one of the most predictable writs.[243] A nineteenth-century treatise even noted that "few branches of the law have been shaped into more symmetrical development, and few legal remedies are administered upon more clearly defined principles" than those governing mandamus.[244] But today, the expanded approach deprives litigants of this predictability. With such a wide range of treatment of the writ among the circuit courts,[245] parties nearly gamble the expense of time and effort when filing the writ. Some litigants may present errors as grave as a refusal to consider standing yet still not satisfy the court's treatment of mandamus,[246] and others may secure mandamus relief without even filing a petition.[247] Returning to the writ's predictable roots will offer litigants greater certainty in both filing and opposing such petitions.

Providing greater predictability through a stricter doctrine will also relieve appellate courts of the burden of addressing unnecessary petitions. If litigants lack the tools to accurately predict the likelihood of success of a mandamus petition, they may file them as a form of a fallback, shot-in-the-dark appeal. Thus, a more predictable application of the mandamus standard will conserve judicial resources at both the trial and appellate levels.

2. Piecemeal Appeals

Appellate courts should refrain from broadening the avenues for interlocutory appeals. As a general rule, aggrieved parties must wait until the lower court has reached a final judgment before filing an appeal.[248] But a handful of exceptions permit appeals before final judgment, known as interlocutory appeals. A petition for a writ of mandamus falls into one of these exceptions and presents parties with an opportunity for interlocutory appeal. But with an expanded, lenient application of

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243 *E.g.*, HIGH, *supra* note 144, at 10.

244 *Id.*

245 *See supra* Part III.B.

246 *In re* Gee, 941 F.3d 153, 170 (5th Cir. 2019).

247 *Barnes*, 889 F.3d at 535.

248 28 U.S.C. § 1291 (2018).

the standard for granting mandamus, courts ultimately foster greater incentive for parties to file interlocutory piecemeal appeals that are better suited for post-judgment treatment. Piecemeal appeals frustrate and interrupt the lower court's administration of its cases as well as ask the appellate court to interject over issues that may well be resolved in the lower court throughout the course of litigation.

IV. CONCLUSION

Some federal courts' use of mandamus has strayed from the bounds of the writ established by King's Bench, the Supreme Court in the early twentieth century, and Congress. King's Bench issued mandamus only to compel an inferior officer to exercise its discretion, not to reexamine that officer's discretionary decision. The Supreme Court has explained that mandamus should not substitute for an appeal. Congress expressly endorsed this view when granting the federal courts the statutory power to issue writs of mandamus. The courts' departure from the writ's original use leads to inconsistency, a lack of predictability, and a greater opportunity for unnecessary interlocutory appeals. Courts should return to the view that this tool is an "extraordinary remedy"[249] and one of the "most potent weapons in the judicial arsenal."[250] Courts should view the writ as a form of internal self-regulation, but wholly apart from the legal issues and merits of the underlying case.

[249] Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

[250] U.S. District Court (*Will*) v. United States, 389 U.S. 90, 107 (1967).