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The Availability of Mandamus as a Vehicle for Administrative Review

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THE AVAILABILITY OF MANDAMUS AS A VEHICLE FOR ADMINISTRATIVE REVIEW

INTRODUCTION

> Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler . . . some bureaucrat. Where discretion is absolute, man has always suffered.[1]

The potential injustice inherent in vesting absolute discretion with a single individual has long been viewed with alarm. One antidote which our legal system has prescribed is administered under the broad heading of judicial review. While it may appear in different forms—appeal by right, through extraordinary writ, or to a lesser degree, by referral through a bureaucratic structure or to an ombudsman[2]— the principle upon which it is grounded remains the same. When the rights of an individual may be determined by the discretionary judgment of one person or one group, the decision-maker should be accountable to an independent body, removed from the source of the controversy, and having the power to provide relief from a decision which is capricious, fraudulent or unsupported in law or fact.

With this premise, the following comment will analyze a recent case decided by the Ohio Supreme Court, *Home Savings & Loan Association v. Boesch*[3] and the potential legal consequences which may result from it. A cursory view of remedies which may or may not be available to the parties will be presented, with subsequent focus directed to the use of the extraordinary writ of mandamus, its history and its potential for application in this case.

Home Savings & Loan Association v. Boesch

The opening of a branch office by an established building and loan association is subject to the written approval of the Superintendent of Building and Loan Associations.[4] In *Home Savings & Loan Association v. Boesch*[5] the Ohio Supreme Court held that the decision of the Superintendent

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[1] United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

[2] V. Rosenblum, *On Davis on Confining, Structuring and Checking Administrative Discretion,* in ADMINISTRATIVE DISCRETION 49 (C. Havighurst ed. 1974).

[3] 41 Ohio St. 2d 115, 322 N.E.2d 878 (1975).

[4] OHIO REVISED CODE ANN. §1151.05 (Page 1968). In order for an existing building and loan association to establish a branch office, the statute requires the approval of the superintendent:

> No building and loan association shall establish more than one office, or maintain branches other than those established before July 3, 1923 nor relocate any branch, except with the approval of the superintendent of building and loan associations previously had in writing. *Id.*

[5] 41 Ohio St. 2d 115, 322 N.E.2d 878 (1975).

of Building and Loan Associations granting or denying approval for establishing branch offices is not subject to judicial review within the provisions of the Administrative Procedure Act.[6]

An application for a new branch office was filed pursuant to this requirement, in 1972, by the Falls Savings and Loan Association. Petitioner, Home Savings & Loan Association, was advised[7] of this application and opposed it at an informal conference held by the superintendent. Subsequently the application was granted, and the petitioner/competitor filed an appeal in the Common Pleas Court of Franklin County from the approval pursuant to the Administrative Procedure Act.[8]

The case reached the Ohio Supreme Court following a decision in the court of appeals stating that the approval was a licensing function and therefore sufficient to invoke the procedural safeguards of the Administrative Procedure Act. The supreme court reversed. The court reasoned that in order to qualify as an "agency" within Ohio Revised Code Section 119.01 (A), the superintendent must be exercising a licensing function. The court construed "license" under Section 119.01 (B) as the certification to *commence* business. Since the approval of a branch application was merely the expansion of a pre-existing business, it did not constitute an exercise of a licensing function which would invoke a right to judicial review under Ohio Revised Code Chapter 119.

In denying a right of judicial review through the Administrative Procedure Act, the Ohio Supreme Court in effect eliminates the procedural due process requirements this legislation provides, to wit: notice,[9] adjudication hearing,[10] and judicial review of an agency record to determine whether a decision is "supported by reliable, probative and substantive evidence and is in accordance with law."[11] Since the enabling legislation which established this regulatory proceeding[12] unfortunately made no provision for notice, hearing

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[6] OHIO REVISED CODE ANN. §119.12 (Page. 1968).

[7] Notification was made pursuant to an agreement executed in 1970 to "coordinate the eligibility requirements and administrative treatment of applicants for new branch facilities between Federal Home Loan Bank Board and the Ohio Division of Building and Loan Associations." 41 Ohio St. 2d at 116n.1, 322 N.E.2d at 878n.1. Under the terms of the agreement, as amended January 21, 1972,

> [w]hen a complete application has been filed the appropriate authority shall also notify each local thrift and home-financing institution which he considers might have a competitive interest in the application. *Id.*

[8] OHIO REV. CODE ANN. §119.12 (Page 1969).

[9] OHIO REV. CODE ANN. §119.07 (Page 1969).

[10] OHIO REV. CODE ANN. §119.09 (Page 1969).

[11] OHIO REV. CODE ANN. §119.12 (Page 1969).

[12] OHIO REVISED CODE ANN. §1151.05 (Page 1968).

or appeal, these basic due process concepts are nowhere guaranteed the parties by statutory law.

JUDICIAL REVIEW

The Ohio Supreme Court's decision in *Boesch* raises several questions. If the approval of the superintendent is granted or denied without a supportable evidential basis, or if the decision is made capriciously or arbitrarily, or if the practices and proceedings through which the decision is reached deny the interested parties meaningful participation or violate basic due process concepts, what remedy is available? Is an avenue of judicial review open? By what vehicle is it to be reached?

It is to these questions that the subsequent discussion is directed. However, a preliminary distinction is necessary. The problem of obtaining judicial review confronts both the applicant whose branching request is denied and the competitor who is seeking to overturn a request which has been approved. The positions of these respective parties, however, must be distinguished, particularly on the issue of standing.

At the federal level both charter and branch decisions are subject to judicial review at the behest of either applicants or competitors.[13] The decisions and criteria utilized by the federal courts are not binding, however, on state courts which are subject to widely varying statutory schemes and individualized precedents. The federal tests for standing and ripeness,[14] while certainly guiding forces in state law, should not be considered as definitive. Practitioners must look to local law in this vital area.

An aggreived competitor at the state level in Ohio, must fulfill requirements of standing and ripeness constituting a justiciable issue in order to invoke judicial jurisdiction.[15] The competitor must allege facts

[13] *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 142 (1973); Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 388 (8th Cir. 1966); First Nat'l Bank of Smithfield v. Saxon, 352 F.2d 267, 272 (4th Cir. 1965) (both finding standing for competitor banks). *See also* Scott, *In Quest of Reason: The Licensing Decision of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235 (1975); Note, *Federal Savings & Loan Law*, 51 CHI-KENT L. REV. 656 (1974) (discussing federal and state law in Illinois); Note, *Extending Authority of the Judiciary to Review Administrative Agency Decisions*, 1972 WIS. L. REV. 613 (1972).

[14] *See* Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *See also* Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102 (1975); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Comment, *Reviewability of Administrative Actions: The Elusive Search for a Pragmatic Standard through Discussion of the Presumption of Reviewability, Ripeness, Formality and Finality of Doctrines*, 1974 DUKE L.J. 382 (1974).

[15] *See, e.g.*, Zangerle v. Evatt, 139 Ohio St. 563, 41 N.E.2d 369 (1942). For discussion see Note, *Judicial Review of Administrative Decisions in Ohio*, 34 OHIO ST. L.J. 853 (1973).

establishing a substantial stake in the outcome of the decision such that there is presented an adversary interest which is both timely and capable of judicial determination.

These threshold issues of standing and ripeness which a competitor must face will not be examined in depth at this time. It should be noted, however, that while the petitioner/competitor in the case at hand was denied standing as a "party" within the context of Ohio Revised Code Chapter 119 at the trial level, this denial was reversed by the court of appeals. Although it was not discussed as an issue by the Ohio Supreme Court, lack of standing was not utilized by the high court as a grounds for dismissal. Generally, the applicant is in a more favorable position. Once an application has been filed pursuant to Ohio Revised Code Section 1151.05 and approval of the branch denied, the applicant can allege that the agency action is final, that injury in fact has occurred and that, with an aggreived party, the issue is ripe for review. The primary question then becomes what remedy, if any, is available to secure this review?

Once statutory review has been denied under the Administrative Procedure Act, three general categories of nonstatutory review must be examined. These are injunctive relief, declaratory judgments, and the extraordinary writs—also known as the prerogative writs, *i.e.*, certiorari, habeas corpus, prohibition, procedendo, quo warranto and mandamus. Since the writ of mandamus will only be issued if there is no other remedy at law or equity, a general overview of these remedies is necessary at this point. This overview is not intended as an exhaustive analysis and is basically preparatory for a more extensive presentation of mandamus.

INJUNCTION

An injunction has been defined as, "a command to do or refrain from doing a certain act."[16] By design it is intended to prevent future injury rather than to redress past wrongs.[17] Its issuance lies within the discretion of the court according to established rules of equity. The nature of the

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One commentator argues,

> According to Ohio Rule of Civil Procedure 2 . . . an aggrieved party is entitled to invoke the jurisdiction of the court if he can state a claim for relief. In a court of general jurisdiction it should make no difference whether the claim is couched in terms of "review", under either of the local administration or state agency statutes, or in terms of injunctive, mandamus, declaratory or other remedy.

Rutledge, *Administrative Review and the Modern Courts Amendment*, 35 OHIO ST. L.J. 41, 54 (1974).

[16] Law of March 11, 1853, ch. IV, §237 [1853] Laws of Ohio (repealed 1971). Ohio Rule of Civil Procedure 65 now governs the issuance of injunctions.

[17] Stockhouse v. Steele Canning Co., 22 Ohio Misc. 1, 257 N.E.2d 424 (C.P. 1969).

wrong sought to be avoided must be immediate and irreparable.[18] In seeking the injunction, one of the traditional elements to be established by the plaintiff is the existence of a clear present legal right.[19] However, a temporary preventive injunction will be granted to preserve the status quo until the rights of the parties can be determined.[20]

Could an injunction provide the relief sought by either an applicant or competitor? What clear legal right could be alleged and what act would be prevented or compelled? Can an aggrieved applicant claim a clear legal right that administrative decisions be made in accord with procedural due process standards, when these procedures are not specifically required by appropriate legislation? While there is some support for the recognition of these elements as basic requirements of administrative law,[21] they are not the definitive rights to which injunctive relief is particularly applicable and traditionally applied. The remedy of injunction alone is not structured to provide judicial review, since the usual objective of an injunction is to restrain actual or threatened action detrimental to the petitioner's rights, and not to rectify an injury. Although pre-enforcement review of an agency rule might necessitate a stay or temporary injunction,[22] these would be issued in addition to the primary jurisdictional basis for review utilized.

The existence of additional factors could alter the situation faced by a branch applicant and make an injunction necessary. An example would be the pendency of another application for a branch within the same specified locality. If this occurred, an injunction might be sought to prevent the superintendent's approving a competitor's application while the initial applicant sought review through some other means. Even if this were attempted, the injunction would merely be incidental to the primary remedy of judicial review and could not be used in lieu of it. In *Boesch* a stay was available for the competitor as provided by Ohio Revised Code Section

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[18] Craggett v. Board of Educ., 234 F. Supp. 381 (N.D. Ohio), *aff'd*, 338 F.2d 941 (6th Cir. 1964).

[19] Rupel v. General Motors Corp. 120 Ohio App. 152, 201 N.E.2d 355 (1963); Rice v. Campbell, 71 Ohio App. 477, 50 N.E. 2d 430 (1943).

[20] *Id.*

[21] *See* text accompanying notes 106-10 *infra.*

[22] OHIO REV. CODE ANN. §119.11 (Page 1969) provides in part:

> . . . notice of appeal shall be filed . . . and such notice shall operate as a stay of the effective date thereof unless the appeal has been heard and determined prior to such effective date.

For a discussion of stays, see L.L.JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION chs. 17 & 18 (1965) (Chapter 17 concerns temporary judicial stays pending action by the administrative agency and chapter 18 discusses temporary judicial stays of administrative action while judicial review is pending).

119.12.[23] Absent review through this provision, a competitor is required to seek an injunction or stay while seeking his review.

It is well established that an injunction will not issue if there is an adequate remedy at law.[24] The key issue is the adequacy of the legal remedy. If it is incomplete, discretionary or uncertain, an injunction may be issued despite the availability of alternative relief.[25] The right to a writ of mandamus has been held preclusive of injunctive relief.[26] A recent Ohio Supreme Court case, *State ex rel. Corron v. Wisner,*[27] has held: "Where, as here, an action in mandamus does not provide effective relief unless accompanied by an ancillary injunction, it would appear that injunction rather than mandamus is the appropriate remedy."[28]

This prohibition, however, should not be dispositive of a case where neither mandamus nor injunction alone is adequate to provide complete relief. This would be the case if the aggrieved applicant sought mandamus as a method of review and an ancillary injunction to prevent a competitor's application from being approved. Predicting the decision which any court will reach in issuing either an injunction or any of the prerogative writs is an extremely risky venture. The use of prerogative writs is weighted with technicalities and obscure obstacles which have led one observer to state that "[a]n imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies."[29] The statement goes unchallenged here.

The position of the aggrieved competitor seeking an injunction is

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[23] OHIO REV. CODE ANN. §119.12 (Page 1969), provides in part:

> The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms.

[24] Fisher v. Bower, 79 Ohio St. 248, 87 N.E. 256 (1909); Oberhaus v. Alexander, 28 Ohio App. 2d 60, 274 N.E.2d 771 (1971), Trees v. Loomis, 145 N.E.2d 339 (Ohio C.P.), *appeal dismissed,* 145 N.E.2d 347 (Ohio Ct. App. 1957).

[25] Brissel v. State, 87 Ohio St. 154, 100 N.E. 348 (1912); Central Ohio Co-operative Milk Producers, Inc. v. Rowland, 29 Ohio App. 2d 236, 281 N.E.2d 42 (1972); Widmer v. Fretti, 95 Ohio App. 7, 116 N.E.2d 728 (1952).

[26] State *ex rel* Marshall v. Civil Service Comm'n, 11 Ohio App. 2d 84, 228 N.E.2d 913 (1967), *rev'd on other grounds,* 14 Ohio St. 2d 226, 237 N.E.2d 392 (1968) (The basis of the reversal was a determination that appeal was available under Ohio Revised Code Section 2506.01); Fisher v. Damm, 36 Ohio App. 515, 173 N.E. 449 (1930). *See also* Annot, 93 A.L.R. 1495 (1934) (Right to mandamus as excluding remedy by injunction). The right to a remedy by injunction has also been held to exclude mandamus. State *ex rel.* Adams v. Rockwell, 167 Ohio St. 15, 145 N.E.2d 665 (1957).

[27] 25 Ohio State 2d 160, 267 N.E.2d 308 (1971).

[28] *Id.* at 163, 267 N.E.2d at 310.

[29] 3 K DAVIS, ADMINISTRATIVE LAW TREATISE §24.01, at 388 (1958).

not identical to that of the aggrieved applicant. Since a branch application has been approved, the relief sought will be the prevention of future irreparable injury by enjoining the establishment of the branch. If the competitor sought to enjoin the construction of the branch, could another adequate remedy at law be alleged to prevent the issuance of the injunction? If the competitor had a right of appellate review, the injunction might be properly denied.[30] Neither mandamus nor a declaratory judgment alone would be adequate (assuming either is available) without additional injunctive relief;[31] therefore, arguably neither should preclude the injunction.

There is, however, some precedent to support the injunction as a means of obtaining a limited form of review. In 1888 the Ohio Supreme Court in *Haff v. Fuller*[32] discussed the availability of the injunction stating that

> . . . courts of equity will not sit as courts of error, to revise or correct proceedings at law or grant injunctions against judgments, because of errors in the proceedings, where proper relief can be had in the ordinary course of appellate procedure.[33]

While this was the orthodox position regarding judicial proceedings, the court went further to state that where illegality does not appear on the face of the proceedings and the judgment or order has been obtained from a *board* or tribunal by fraud, misconduct, accident, mistake or the like, and no appeal is available, injunction restraining the execution of the judgment or order is a proper remedy.[34] While this case may provide some basis for the use of the injunction by the competitor, the relief was granted based on a rather extraordinary and narrow fact situation and appears to be of little use today given normal agency proceedings.

To summarize, the aggrieved party may seek a practical means of preserving the status quo while effecting review of the superintendent's decision. An injunction, however, is not historically or functionally intended to provide such review, and the technicalities and requirements which attend its issuance effectively preclude use of the injunction alone to secure judicial review.

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[30] Haught v. Dayton, 34 Ohio St. 2d 32, 295 N.E.2d 404 (1973).

[31] The remedy of declaratory judgment is not an adequate remedy at law precluding an action for injunction where it would be effective only if coupled with injunctive relief. *See* Whitt v. Cook, 22 Ohio Misc. 254, 255 N.E.2d 587 (C.P. 1970).

[32] 45 Ohio St. 495, 15 N.E. 479 (1888).

[33] *Id.* at 498, 15 N.E.2d at 480.

[34] *Id.*

DECLARATORY JUDGMENT

The Declaratory Judgments Act[35] provides a statutory remedy unknown at common law. It was intended as a procedure to determine justiciable controversies with respect to rights, status and other relations without the necessity of parties acting at their peril to establish their legal rights.[36] The declaratory judgment is not an exclusive remedy,[37] and it has been held in Ohio that failure to exhaust administrative remedies will not prevent maintenance of this action.[38] This somewhat unusual holding in *American Life and Ins. Co. v. Jones*[39] involved a ruling by the administrator of the Unemployment Compensation Bureau adverse to petitioner, who without completing available appeal proceedings, received a declaratory judgment reversing the agency's decision as to a finding of fact. In effecting the review sought, the court stated:

> . . . it is settled in Ohio that an action for a declaratory judgment may be alternative to other remedies in those cases in which the court, in the exercise of sound discretion finds that the action is within the spirit of the Uniform Declaratory Judgments Act, that a real controversy between adverse parties exists which is justiciable in character, and that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost.[40]

While the *Jones* case is clearly not definitive precedent for the review sought in *Home Savings & Loan Association v. Boesch*,[41] the "spirit of the Uniform Declaratory Judgments Act"[42] arguably is expansive enough to provide review if the petitioner can allege rights which may otherwise be lost. Does the applicant have the right to open a branch bank? In concluding that branching is not a licensing function the Supreme Court in *Boesch* stated that: "[T]he right to commence operations is the subject of the licensing function, and whether the association may operate a branch is ancillary

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[35] OHIO REV. CODE ANN. §2721.01 *et. seq.* (Page 1954).

[36] Burger Brewing Co. v. Liquor Control Comm'n, 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973); Travelers Ins. Co. v. Buckeye Union Casualty Co., 160 N.E.2d 874 (Ohio C.P. 1959), *aff'd on other grounds,* 172 Ohio St. 507, 178 N.E.2d 792 (1961).

[37] OHIO REV. CODE ANN. §2721.02 (Page 1954).

[38] American Life & Accident Ins. Co. v. Jones, 152 Ohio St. 287, 89 N.E.2d 301 (1949). The decision has been criticized; *see* Note, *Declaratory Judgment v. Administrative Proceeding,* 19 U. CINN. L. REV. 344 (1950).

[39] 152 Ohio St. 287, 89 N.E.2d 301 (1949).

[40] *Id.* at 295-96, 89 N.E.2d at 306.

[41] In Home Savings & Loan Ass'n v. Boesch, the petitioner sought judicial review from an adverse decision by the Superintendent of Building and Loan Associations. In *Jones,* the supreme court stated, by way of dicta, that the Declaratory Judgments Act was not available to circumvent an adverse decision of an administrative agency, 152 Ohio St. at 296, 89 N.E.2d at 306.

[42] *Id.*

to that right."[43] How this language is to be interpreted in determining the nature of the branching function is crucial. Once a savings association has been licensed, is branching an intrinsic part of an established right which, though subordinate, has already been legally determined and therefore is subject only to operational or ministerial control? This would provide petitioner with an extant right which may be impaired or lost through arbitrary or unsupportable agency action.

The nature of the branching function may also be approached as a question of law. Determining the construction of a statute through a declaratory judgment is a well established procedure,[44] assuming a real and justiciable controversy.[45] Would a declaratory judgment be available to a prospective applicant who sought to have the "approval" of the superintendent under Ohio Revised Code Section 1151.05 construed?

In considering a question of law, a declaratory judgment should be available despite the fact that the defendant is an administrative agency.[46] Arguably, since the approval specified by statute as a prior requirement for branching is not an "adjudication" under the Administrative Procedure Act, it is merely a non-discretionary ministerial function which requires the perfunctory filing of forms and then "pro forma" approval.[47] If the legislature had intended to invest the superintendent with discretionary authority, proper procedural safeguards would have been provided or the branching function would have been included within the definitional terms of the Administrative Procedure Act itself.[48] This, however, was not the

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[43] 41 Ohio St. 2d at 119, 322 N.E.2d at 880.

[44] OHIO REV. CODE ANN. §2721.03 (Page 1954), which provides in part:

> Any person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under such ... statute ... and obtain a declaration of rights, status or legal relations thereunder.

[45] Burger Brewing Co. v. Liquor Control Comm'n, 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973); Canton v. Imperial Bowling Lanes, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968); American Life & Accident Ins. Co. v. Jones, 152 Ohio St. 287, 89 N.E.2d 301 (1949).

[46] 2 F. COOPER, STATE ADMINISTRATIVE LAW 636 (1965).

[47] If the approval of the superintendent is labeled ministerial, it is by statute excluded from the definition of adjudication in Ohio under Ohio Revised Code Section 119.01(D). Arbitrary characterizations and labels such as this tend to trigger results but are not sound reasons or rational guides in the decision-making process. Absent clear statutory direction, the intrinsic nature and importance of the branching activity should determine its status and the safeguards needed to insure its fair, impartial and effective regulation.

[48] The *Boesch* court rejected the assertion made during oral argument that the legislature intended to designate branching as a licensing function. This argument was based on Amended Substitute House Bill No. 366, Section 3, effective November 22, 1973, which provided:

> The Superintendent of Building and Loan Associations shall promulgate and make effective not later than January 1, 1974, rules governing his licensing functions relating to the consideration of applications to organize an association or create a branch office thereof. Such rules shall be adopted pursuant to Chapter 119. of the Revised Code. This section is not to be construed as an expression of legislative intent as to whether

case. The enabling legislation clothing the superintendent with the duty to issue branch certifications did not provide for notice and hearing. These elementary due process requirements were codified however as regulations[49] promulgated by the superintendent effective January, 1974. The proceeding which these regulations prescribe is similar to an "informal meeting held by the consent of the agency and all interested parties . . . . ", a type of proceeding which is statutorily excluded from the definition of adjudication in Maine.[50]

Although not binding in Ohio, the exact issue presented in the *Boesch* case was ruled upon by the Supreme Judicial Court of Massachusetts in *Natick Trust Co. v. Board of Bank Incorporation.*[51] In *Natick,* an application for a branch was granted, and a competitor bank appealed under the state's Administrative Procedure Act. The court disallowed the appeal stating that it did not fall within the act. The court declared that since no statute required a hearing, there was no adjudicatory proceeding and, hence, no

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or not Chapter 119. of the Revised Code applies to any other function or circumstance. The *Boesch* court's restrictive view of what action will constitute an "adjudication" and what is a licensing function may substantially effect future decisions by the superintendent under the provisions of the Ohio Revised Code, Chapter 1151.

[49] Though not at the time required by statute, the provisions of Chapter 119 were adhered to in adopting the following Regulations of the Superintendent of Building and Loan Associations which became effective January, 1974. COg REGULATIONS COg-7-04(B), (C) & (D), read in part:

> B. . . . When the application is determined to be complete, the Division shall also notify each local domestic association within the county and each domestic association located in adjacent counties in a 15 airline mile radius of the proposed site . . . .
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> C. Upon determination by the Division that an application for permission to establish a branch office is complete, and that the association is eligible, the Division shall advise the applicant, in writing, to publish within 10 days from the date of such advice, in a newspaper printed in the English language and having general circulation in the community to be served by the proposed branch office, a notice of filing of the application in form prescribed by the Superintendent . . . .
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> D. Any person may file communications, including briefs, in favor or in protest of said application at the office of the Division of Building and Loan Associations within 20 days of publication of notice or within 20 days after date of notification to competing institutions, whichever is later. A copy of all communications in protest of said application shall be furnished to the applicant by the protestant. Oral argument will be held unless no question is raised with respect to the application, by a protestant or the Superintendent . . . .

Since the decision in the *Boesch* case, the Ohio legislature has enacted Ohio Revised Code Section 1155.20 which became effective October 30, 1975. This section requires that the Superintendent of Building and Loan Associations shall issue rules and standards necessary to carry out Chapter 1151 and further provides that these rules and standards shall be issued subject to sections 119.01 to 119.13 of the Revised Code. While this section provides needed safeguards for the rulemaking function of the superintendent in this area, it does not require that similar procedural safeguards be accorded to the adjudicatory decision-making process.

[50] *See* ME. REV. STAT. ANN. Tit. 5 §§2401-2407 (West. Supp. 1973), *amending* ME. REV. ANN. Tit. 5 §§2401-2407 (West 1964).

[51] 337 Mass. 615, 151 N.E.2d 70 (1958).

right of review. The court characterized the determination of the board as "political";[52] and, as sole arbiter of the public convenience, its decision was final. The Massachusetts court further stated, by way of dictum, that it could consider neither the quantum of evidence provided nor alleged inconsistencies in the decision.[53]

Natick represents a highly undesirable solution to what is essentially a correctable statutory problem. The court applied a simple rule— if there is no formal procedural requirement provided by statute, the proceeding is not an adjudication and not subject to the safeguards of the Administrative Procedure Act. This rule is applied without regard to the intrinsic importance of the issues involved. The courts should not ignore the substantial economic impact upon a savings association which is denied opportunities for crucial development through prudent, yet expeditious, branching. However, neither should unrestrained competition and expansion be permitted to weaken and overextend the savings institutions so vital to our economic health.

Properly drafted legislation ideally should provide for the essential safeguards commensurate with the importance of the issue at stake. This must be accomplished by the enabling legislation authorizing the particular agency action. Where as here, such legislation is lacking, one noted author has made two suggestions for limited solutions.[54] First, courts can recognize constitutional requirements of notice and hearing as conditions precedent to effective administrative action and thereby trigger their inclusion in procedural codes.[55] Secondly, legislatures may make particular provisions applicable in informal adjudications where the complex and exacting procedures of full adjudicatory processes are unnecessary to provide fully informed, fair administrative action.[56]

In Ohio, the Declaratory Judgments Act has been recognized as a vehicle for relief in obtaining pre-enforcement review of rulemaking activities which are no longer subject to appeal through Ohio Revised Code Section 119.11. In *Rankin-Thoman v. Caldwell*,[57] the Ohio Supreme Court held Section 119.11 unconstitutional and cited *Burger Brewing Co. v. Liquor Control Commission*,[58] for the proposition that a declaratory judgment was

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[52] *Id.* at 617, 151 N.E.2d at 72.
[53] *Id.*
[54] 1 F. COOPER, STATE ADMINISTRATIVE LAW 125-27 (1965).
[55] *Id.* at 126.
[56] *Id.* at 127.
[57] 42 Ohio St. 2d 436, 329 N.E.2d 686 (1975).
[58] 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973).

the available remedy for review of agency regulations. Limitations on the scope of review available through the declaratory judgment were implied in the supreme court's reasoning in *Burger Brewing*. The Ohio Supreme Court analogized the construction and validity of statutes and ordinances with the construction of regulations. The court also stated: "Relief sought in the nature of a declaratory judgment is distinctly different from the relief sought in an administrative review."[59] Arguably the scope of review available through a declaratory judgment is limited to the construction of the regulation itself, the authority of the agency to promulgate such a regulation, and the degree of agency compliance with required statutory procedures. Clearly, *Rankin-Thoman* does not provide precedent for the utilization of a declaratory judgment in a case such as *Boesch* since the "approval" challenged in *Boesch* was not a regulation.[60]

In summation, the declaratory judgment may provide a method of direct attack for a plaintiff seeking to construe the agency's authority to withhold branching "approval" as ministerial, or to challenge the regulations promulgated pursuant to exercising such approval under Ohio Revised Code Section 1151.05. However, if the petitioner seeks to obtain judicial review of a specific decision itself on the issues of abuse of discretion, error in findings of fact or law, lack of substantial evidence, or denial of due process, an alternative method must be sought.

EXTRAORDINARY WRITS

The extraordinary or prerogative writs, *i.e.*, certiorari, mandamus, prohibition, quo warranto, habeas corpus, and procedendo, all originated as common law remedies.[61] While today they are primarily statutory, their issuance is still controlled by many of their earlier equitable attributes.

The writ of certiorari was utilized as an investigatory tool following a final judgment by an inferior tribunal. The writ would issue to require the record of the lower proceeding to be sent to the court for review. The use of the writ declined as review procedures were increasingly determined by statute, and although theoretically possible, its use today in the federal system is virtually non-existent.[62]

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[59] *Id.* at 99, 296 N.E.2d at 265.

[60] The "approval" of the superintendent required to establish a branch is not a rule which is defined by Ohio Revised Code Section 119.01(C) as having general and uniform operation. By contrast an adjudication under Section 119.01(D) is a determination applicable to a specific person. Orders may be issued by an agency as a result of either decision-making process but this term is unfortunately undefined by statute. *See generally* Comment, *Symposium: Judicial Review of State and Local Administrative Agencies Emphasis on Ohio*, 22 CLEV. ST. L. REV. 229, 320 (1973).

[61] *See generally* Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401 (1958).

[62] W. GELHORN & C. BYSE, ADMINISTRATIVE LAW CASES & COMMENTS 132-36 (5th ed. 1970).

A review of the early decisions in Ohio indicates infrequent issuance of the writ of certiorari to review administrative decisions.[63] However, later case law supportive of such a practice is nil. In 1935 the writ was intended to be abolished by statutory enactment[64] and, therefore, no longer presents a viable method of review in Ohio.

The writ of quo warranto today is defined by statute[65] as a proceeding in the name of the state against unlawful claim or exercise of public office or corporate office. It is intended to protect the interests of the state and may not be resorted to at the instance of a competitor to prevent competition.[66] It is a writ designed to review misconduct, but only to the extent such misconduct requires a forfeiture of office or is in the nature of an ultra vires act. It will not lie to review a decision clearly authorized by law and exercised by the proper public official.

Habeas Corpus, also defined by statute,[67] is available to test the unlawful restraint of bodily liberty, and while it may be suitable for administrative action involving enforced military service, commitment to mental institutions or the like, it will not serve for purpose of general review.

Prohibition is in the nature of a preventive writ to restrain an unlawful assumption of jurisdiction by a tribunal or administrative body. It has been expressly held that it is not a method whereby a party may have a second review of an alleged erroneous decision,[68] nor is it available as a substitute for error proceedings.[69] Procedendo, on the other hand, is employed to coerce a lower court to proceed to judgment in a case pending before it. The writ provides a method of supervision within the judiciary and does not lie to control administrative action.

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[63] Burrows v. Vandevier, 3 Ohio 383 (1828) (A writ of certiorari was granted to review county commissioner's decision establishing a new road. The court also announced a new rule that unless it is an extraordinary case, it would not sustain a writ of certiorari directed to any inferior jurisdiction where the court of common pleas had the power to act in the case); Ferris v. Bramble, 5 Ohio St. 109 (1855) (A writ of certiorari was granted to revise proceedings of township trustees establishing a township road. One error alleged was lack of notice to interested parties.).

[64] Law of April 19, 1935, Laws of Ohio 114 [now OHIO REV. CODE ANN. §2505.44 (Page 1954)]. *See also* OHIO R. PRAC. SUP. CT. VIII, §3, which reads:

> In absence of extraordinary circumstances, no alternative writ will be issued in an original action other than a habeas corpus action.

[65] OHIO REV. CODE ANN. §2733.01 (Page 1953).

[66] State v. Dayton Trac. Co., 64 Ohio St. 272, 60 N.E. 291 (1901).

[67] OHIO REV. CODE ANN. §2725.01 (Page 1953).

[68] State *ex rel.* Stanley v. Court of Com. Pleas, 20 Ohio St. 2d 7, 251 N.E.2d 609 (1969) (Prohibition is a preventive remedy and not a method whereby a party may have a second review of an alleged erroneous decision). *See* Lehman v. Cmich, 23 Ohio St. 2d 11, 260 N.E.2d 835 (1970).

[69] State *ex rel.* Frasch v. Miller, 126 Ohio St. 287, 185 N.E. 193 (1933). *See* State *ex rel.* Niederlehner v. Mack, 125 Ohio St. 559, 182 N.E. 498 (1932).

In conclusion, it may be definitively stated that in Ohio none of the prerogative writs discussed above will be issued to effect judicial review of an administrative decision of a duly authorized public official as delegated by law.

Mandamus

The writ of mandamus, as a vehicle of administrative review, is subject to distinct limitations, but its historical basis and the changes it has undergone with the legal system present significant potential for its use as a method of review. The federal approach to mandamus[70] is enlightening in its broad outlines but does not provide definitive guidance at the state level[71] in this highly complex area. One respected authority has noted:

> The adjective *extraordinary* may be applied not only to the writ of mandamus but also to the baffling procedural technicalities which attend its issuance . . . Years of historical development, in each state, have accumulated intricate age-encrusted filigrees which vary from state to state.[72]

The development of the writ in each state is so individualized that little is to be gained by comparisons between states and the discussion which follows will primarily be directed to Ohio law.[73]

The statutory authority for the writ of mandamus is contained in Ohio Revised Code Chapter 2731. Section 2731.01 contains the following definition:

> Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

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[70] *See* C. Byse & J. Fiocca, *Section* 1361 *of the Mandamus and Venue Act of* 1962 *and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308 (1967); Comment *Mandamus in Administrative Actions: Current Approaches,* 1973 DUKE L.J. 207 (1973).

[71] Several articles have been written examining the use of the writ in particular states. Comment, *Mandamus to Review Administrative Action in Arkansas,* 11 ARK. L. REV. 351 (1957); Note, *Applying the Writ of Mandamus,* 25 BAYLOR L. REV. 385 (1973); Comment, *Use of Mandamus to Review Administrative Actions in New York,* 4 BUFFALO L. REV. 334 (1955); Comment, *California's Administrative Mandamus,* 8 CALIF. W.L. REV. 301 (1972); Comment, *Reviewing Administrative Action by Writ of Mandamus in South Caroline,* 7 S.C.L. REV. 427 (1955); Comment, *Mandamus to Review Administrative Action in West Virginia,* 60 W.VA. L. REV. 1 (1957). *See also* Sherwood, *Mandamus to Review State Administrative Action,* 45 MICH L. REV. 123 (1946).

[72] 2 F. COOPER, STATE ADMINISTRATIVE LAW 653 (1965), stating in addition:

> . . . no thorough-going analysis of the availability of the writ, and the scope of review afforded thereby, could be essayed except on the basis of a state-by-state analysis under the supervision of fifty lawyers skilled in complexities of the procedure in their respective fifty states.

[73] *See* note 71 *supra.*

This definition was first construed by the Ohio Supreme Court in 1908 in *State ex rel. Moyer v. Baldwin,*[74] where the court stated that the definition goes toward describing the writ but was not intended to limit jurisdiction and that whether the writ shall issue is to be determined by case law. The Ohio Supreme Court thereby incorporated the traditional precedents which accompanied the issuance of the writ and required that it be contingent on common law jurisdiction.[75]

The writ is limited in its availability by categorizing it as prerogative in nature to the extent that it may only issue in the discretion of the court[76] to enforce clear legal rights.[77] There has also been required the showing of a beneficial interest which plaintiff (the relator) must show in addition to a bare legal right,[78] so that the writ will not issue for a vain act. Mandamus issues as a legal remedy in a civil action[79] with the elements of a civil action proscribed by statute.[80] It has been statutorily declared an exclusive remedy and lies only where relief cannot otherwise be obtained.[81]

Mandamus will be denied where the relator has a plain and adequate remedy in the ordinary course of the law including an action in equity.[82] A mandamus action seeking administrative review has been denied when the court found a right of appeal under the Administrative Procedure Act[83] existed. Clearly, in Ohio, the pleadings in a mandamus action should allege that no right of appeal exists and there is no alternative adequate remedy.[84]

These requirements for the issuance of mandamus are reasonably clear and generally followed by the courts. Other elements respecting the writ, however, are unevenly and inaccurately applied giving rise to a maze

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[74] 77 Ohio St. 532, 83 N.E. 907 (1908).

[75] *See State ex rel.* Libby-Owens Ford Glass Co. v. Industrial Comm'n, 162 Ohio St. 302, 123 N.E.2d 23 (1954).

[76] Geropacher v. Coffinberry, 157 Ohio St. 32, 104 N.E.2d 1 (1952).

[77] *See* State *ex rel.* Royal v. Columbus, 3 Ohio St. 2d 154, 209 N.E.2d 405 (1965); Carson v. Board of Educ., 115 Ohio St. 55, 152 N.E.2d 646 (1926); State *ex rel.* Murphy v. Graves, 91 Ohio St. 36, 109 N.E. 590 (1914).

[78] State *ex rel.* Keppler v. Houston, 172 Ohio St. 485, 178 N.E.2d 781 (1961). *See* State *ex rel.* Moskowitz v. Dickerson, 172 Ohio St. 551, 179 N.E.2d 48 (1961).

[79] State *ex rel.* Marshall v. Civil Service Comm'n, 11 Ohio App. 2d 84, 228 N.E.2d 913 (1967).

[80] OHIO REV. CODE ANN. §2731.09 (Page 1953). *See* State *ex rel.* Wilson v. Preston, 173 Ohio St. 203, 181 N.E.2d 31 (1962).

[81] OHIO REV. CODE ANN. §2731.05 (Page 1953).

[82] OHIO REV. CODE ANN. §2731.05 (Page 1953). State *ex rel.* Assn. of Ins. Agents v. Dept Dept. of Ins., 175 Ohio St. 222, 193 N.E.2d 84 (1963); State *ex rel.* Adams v. Rockwell, 167 Ohio St. 15, 145 N.E.2d 665 (1957).

[83] State *ex rel.* Kendrich v. Masheter, 120 Ohio App. 168, 201 N.E.2d 707 (1963), *aff'd,* 176 Ohio St. 232, 199 N.E.2d 13 (1964).

[84] OHIO REV. CODE ANN. §2731.05 (Page 1953),

of case law that seems almost hopelessly contradictory. One authority in this field has noted:

> Any clear statement of the law of mandamus in the state courts is sure to be inaccurate because the law is unclear and variable not only from state to state but usually within each jurisdiction; the propositions to which the courts pay lip service are unclear and variable, and what is worse, the courts in their holdings commonly violate the principles they enunciate.[85]

To realize the source of the confusion and deal with it productively while mindful of the above caveat, it is necessary to have some understanding of the historical basis of the writ and the trends of more recent development.

Historically, the writ of mandamus arose to provide a remedy for the petitioner whose rights were denied through the dereliction of duty of some minister or agent of the king.[86] Petitioner would seek redress by requesting a writ to compel the reluctant performance of the act. If, however, petitioner did not have an established legal right to the performance of the act, the court, constrained by rigid forms of action required at law, could not intervene to determine such rights, and the writ would not issue. When the performance of the act requested was within the discretionary power of the agent, there was no legal right to have that discretion exercised favorably to petitioner, and the courts would not, in effect, overrule the agent and compel performance. They would, however, issue the writ to force the agent to exercise his discretion if he, in fact, did nothing at all, *i.e.*, a clear dereliction of duty.[87]

To guide the court in its decision there evolved a ministerial/discretionary distinction which promoted judicial efficiency, if not justice, by providing the judges with a shorthand classification to decide the case. If the act was purely ministerial, that is, the official had no choice of whether to do it or not, the writ could issue since the court would not be exercising his discretion but merely prodding him to perform an act to which the petitioner had a clear legal right.[88] However, if the performance of the act required discretionary judgment on the part of the official, the writ could only issue if he had done nothing at all.[89]

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[85] 3 K. DAVIS ADMINISTRATIVE LAW TREATISE §24.03, at 402 (1958).

[86] *See* L.L. JAFFEE CONTROL OF ADMINISTRATIVE ACTION 178-80 (1965).

[87] *See* Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 412-20 (1958).

[88] This is the orthodox ministerial requirement. *Compare* ICC v. United States *ex rel.* Humboldt Steamship Co., 224 U.S. 474, 484 (1911), *with* Work v. Rives, 267 U.S. 175, 177 (1924). *See* also Decatur v. Paulding, 39 U.S. (14 Pet. 497 (1840); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838).

[89] *Compare* Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969), *with* Jarrett v. Restor, 426 F.2d 213 (9th Cir. 1970) [and] Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C. 1972). For

As with all simplistic distinctions, the ministerial/discretionary dichotomy became unworkable. There are few governmental functions that do not involve at least some discretion on the part of the government official. Furthermore, no clear, satisfactory standards evolved to determine what actions fit into what category.[90] The distinction has been severely criticized[91] and should be abandoned as a relic of a past era. It has proved far more of an impediment than an aid to sound judicial decision-making. The primary objection to the distinction is that it obscures the issues which the petitioner typically seeks to raise—the scope and proper procedural exercise of the administrator's duty.[92] If the judge simply labels the duty discretionary and then concludes that the writ will not issue, petitioner is denied the judicial review of the exercise of such discretion which is the real relief sought.

A futher problem is presented by another historical barrier: the requirement that there be a clear dereliction of duty which arose as a result of the ministerial/discretionary distinction. An excellent example of this is shown in an early Ohio case, *Ex parte Black*[93] decided in 1852. Petitioner, a county commissioner, sought to compel his fellow commissioners to proceed with the construction of a court house and jail which had been authorized by the legislature and for which contracts had already been let by the prior board of commissioners, of which only petitioner was a member. Although not stated in the opinion, apparently it was clearly within the self-interest of the newly elected commissioners not to proceed as planned. The Ohio Supreme Court held that the determination of *when* to erect the courthouse is within the discretion of the commissioners and further stated:

> . . . although that discretion of the commissioners is not an arbitrary one, its mere abuse, if such abuse exists, does not authorize us to exercise the discretion ourselves by issuing a writ of mandamus . . . . [i]t is . . . well settled . . . that the lawful discretion . . . cannot be destroyed or limited by the writ of mandamus [and] that before the writ will [lie] . . . a plain dereliction of duty must be established.[94]

The requirement of a plain dereliction of duty was expressed by the

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good discussion of ministerial/discretionary distinction see Comment, *Mandamus in Administrative Actions: Current Approaches,* 1973 DUKE L.J. 207, 209-11.

[90] *See, e.g.,* note 127 *infra* and accompanying text.

[91] 3 K. DAVIS ADMINISTRATIVE LAW TREATISE §23.11, at 356 (1958) (in which the distinction is stated to be ". . . undesirable, unworkable and without practical justification"), L.L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965) in which the author, another incisive critic of the dichotomy, stated the distinction was more ". . . apt to label the result rather than explain it."

[92] *See* W. GELHORN & C. BYSE, ADMINISTRATIVE LAW CASES & COMMENTS 152 (6th ed. 1974).

[93] 1 Ohio St. 30 (1852).

[94] *Id.* at 37.

Ohio Supreme Court in *State ex rel. Stanley v. Cook*,[95] which cited *Ex parte Black* as recently as 1946. It was stated again in 1962 in *State ex rel. Spellmire v. Kauer*[96] and expressed as obiter dictum in *State ex rel. Federal Homes Properties, Inc. v. Singer*[97] in which an alternative right of appeal was found, and in 1971, in *Cleveland ex rel. Neelon v. Locher*.[98] The requirement has been ignored more often than it has been applied however, since the writ will now lie for an abuse of discretion which challenges the exercise of duty and not the failure to discharge it.

One reason the dereliction of duty requirement has been ignored is that it has curtailed severely the flexibility of the judiciary to deal with obvious injustice resulting from administrative excesses. This frustration was expressed by a New York judge in 1815 in *People ex rel. Wilson v. Supervisors of Albany*,[99] in which petitioner, a city constable, sought judicial review of a decision made by the city supervisors, whereby they disallowed certain expenses for which petitioner sought reimbursement. After allowing payment of only $28.00 of the $102.00 claimed, the city supervisors destroyed petitioner's accounts and vouchers. The court stated that the unfortunate plight of the man could not be remedied since the decision of the supervisors was discretionary. This case was cited as precedent for a similar holding in one of the earliest Ohio cases, *Burnet v. Auditor*,[100] decided in 1843.

Another early case which helped shape the parameters of the writ was *Re Turner*,[101] which involved issuance of mandamus within the court system. The court in *Turner* stated:

> . . . the writ may issue, commanding the court to act; but care is to be taken that it shall not interfere with the full and legitimate exercise of judgment . . . . It is not a remedy adapted to correct errors, or to constrain them [judges] to act in a particular manner.[102]

The opinion expressed a legitimate concern that proper channels of appeal be utilized in correcting errors within the judicial system and that judicial discretion not be unduly trammeled by higher courts issuing writs of man-

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[95] 146 Ohio St. 348, 66 N.E.2d 207 (1946).

[96] 173 Ohio St. 279, 181 N.E.2d 695 (1962) (writ granted only upon showing clearly defined duty and a plain dereliction of that duty).

[97] 9 Ohio St. 2d 95, 223 N.E.2d 824 (1967) (*obiter dictum*).

[98] 25 Ohio St. 2d 49, 266 N.E.2d 831 (1971). *See also* Mihocka v. Zeigler, 28 Ohio Misc. 105, 274 N.E.2d 583 (1971).

[99] 12 Johns. 414 (N.Y. 1815).

[100] 12 Ohio 54, 57 (1843).

[101] 5 Ohio 542 (1832).

[102] *Id.* at 544.

damus when in disagreement with the judgment of a fellow member of the bench. However, the considerations which prompted the degree of caution expressed above do not apply to administrative functions from which there is no appeal available.

Finally, some courageous jurist defied clear precedent and held that mandamus included relief sought for fraud or a gross abuse of discretion.[103] This revolutionary change surmounted (or ignored) the ministerial/discretionary distinction and greatly increased the scope of mandamus as a remedy for administrative excess. It is also consistent with the historical origin of mandamus as the relief of "last resort" against the agents of the king and supports the equitable notion that for every wrong there should be a remedy—a not inconsequential concept in an enlightened system of jurisprudence.[104]

Once it is recognized that the writ may be issued as a legal remedy to review the exercise of discretion, the existence of a "clear legal right" should be discarded as conceptually unnecessary. So too, the ministerial/discretionary distinction which the "clear legal right" doctrine spawned should no longer be utilized to shut off relief or to distract the court from its proper role—critical review of the exercise of judgment. The court should not be bound by the historical limits of equity jurisdiction and should determine the existence and violation of petitioner's procedural and substantive rights as does any court of law. The court in examining the administrative determination would not be substituting its judgment[105] for that of the administrator but would review the scope of the decision, the manner in which it is reached and the extent to which it is in accord with basic due process concepts.

Unfortunately, the courts have not yet cast off the burdens imposed by the "clear legal right" doctrine. While Ohio courts have been obtuse in recognizing the problem, they, nonetheless, have edged toward a solution. This solution is the development of a body of "rights" to which parties

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[103] *See* Work v. Rives, 267 U.S. 175, 177 (1924) (for an excellent discussion by Chief Justice Taft); State *ex rel.* Coen v. Indus. Comm'n, 126 Ohio St. 550, 186 N.E. 398 (1933); State *ex rel.* Breno v. Industrial Comm'n, 34 Ohio St. 2d 227, 298 N.E. 150 (1973).

[104] *See* Jaffee, *The Right to Judicial Review* I, 71 HARV. L. REV. 401, 412-20 (1958). *See also* State *ex rel.* Libby-Owens Ford Glass Co. v. Industrial Comm'n, 162 Ohio St. 302, 123 N.E.2d 23 (1954).

[105] It is a general principle of administrative law that courts will not substitute their judgment for the determination of an administrator if it is based on substantial evidence. 2 F. COOPER, STATE ADMINISTRATIVE LAW 665-67 (1965). See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); SEC v. Cogan, 201 F.2d 78, 84 (9th Cir. 1951) (for statement of considerations guiding judicial restraint); State *ex rel.* Breno v. Industrial Comm'n, 34 Ohio St. 2d 227, 298 N.E.2d 150 (1973); State *ex rel.* Foster v. Miller, 136 Ohio St. 295, 25 N.E.2d 686 (1940).

to administrative decision-making are entitled by law. These rights are emerging slowly through the case law and although not expressly recognized as such, form the foundation of minimal procedural due process to which all administrative decisions must adhere. Theoretically such rights may be compelled by mandamus.

One of the most recent and significant cases advancing this development is *State ex rel. Great Lakes College, Inc. v. State Medical Board.*[106] In this case the appellant, a school offering limited training in medicine and surgery, was notified that it no longer met the approval of the State Medical Board and that pursuant to Ohio Revised Code Section 4731.19 its graduates would no longer be granted standing to take the state examinations required to certify them for practice in these fields. Appellant sought a writ of mandamus compelling the State Medical Board to revoke this decision and to provide a hearing.

The court of appeals dismissed the action stating relator had no clear legal right to a hearing and that his claim for relief was more suited to injunction, over which the court had no original jurisdiction. The Ohio Supreme Court reversed, grounding its decision on two factors.

First, the *ex parte* decision of the State Medical Board exceeded its authority, was an arbitrary exercise of its discretion and violated the fundamental constitutional due process rights of appellant, to wit, notice and an opportunity to be heard. In so holding, the court explicitly recognized that discretion is to be exercised within the boundaries of fundamental due process[107] and denial of due process constitutes an abuse of discretion. While the case on its facts is limited to this express holding, arguably any denial of fundamental due process in the exercise of discretion establishes the clear legal right required for issuance of the writ of mandamus. Since fundamental due process is a judicially defined concept which encompasses those processes that one commentator has called "justice according to law,"[108] the court has definitely expanded the potential for review of administrative discretion through mandamus.

The second issue decided by the Ohio Supreme Court was that the substance of the proceeding was in mandamus and not for mandatory injunction. The appellant was not seeking to restore a status wrongfully changed but to compel the State Medical Board to grant the opportunity to be heard.[109] This is an affirmative action to correct the board's abuse of

[106] 29 Ohio St. 2d 198, 280 N.E.2d 900 (1972).

[107] *Id.* at 200, 280 N.E. 2d at 902.

[108] R. Pound, *Justice According to Law*, 14 COLUM. L. REV. 1 (1914).

[109] 20 Ohio St. 198, 201, 280 N.E.2d 900, 903 (1972).

discretion and lies in mandamus, not injunction. *Great Lakes College* represents an important step in developing a body of law which will define the "abuse of discretion" required for mandamus.

Another enlightening Ohio Supreme Court decision is *State ex rel. Selected Properties, Inc. v. Gottfried,*[110] which was cited in *Great Lakes College* for its discussion of the availability of mandamus as opposed to injunction.[111] In this case mandamus was granted to compel the issuance of a zoning variance where the statute granting discretion to the administrative board was held unconstitutional as lacking sufficient criteria or standards to guide the tribunal in the exercise of its discretion. The court compelled issuance of the variance though obviously it could not substitute its judgment for that of the zoning board. This principle of judicial restraint is well-established in administrative law.[112]

While petitioner had no clear legal right to the variance itself, the court was stating that decisions must be reached by procedures that accord petitioner certain rights. In this case petitioner had the right to have the zoning board formulate standards of criteria by which it would be guided in granting or denying zoning variances. The action of the court in this instance was in accord with a proposal by one commentator that mandamus should be used to annul administrative action when there is a failure to follow statutory guidelines or a denial of due process. Mandamus could then be utilized without resort to the unproductive ministerial/discretionary distinction.[113]

It should be noted that in neither *Great Lakes College* nor *Gottfried* was the ministerial/discretionary distinction raised nor was a dereliction of duty required. Apparently neither of these elements will be grounds for dismissal when abuse of discretion is alleged. The pleadings for mandamus must allege facts which if proved would tend to show an abuse of discretion.[114]

The main issue is, of course, what constitutes abuse of discretion. One useful and deceptively simple definition was given by the Sixth Circuit in *McBee v. Bonner.*[115] The court stated that an abuse of discretion was a "clear error of judgment in the conclusion . . . reached upon a weighing of relevant factors."[116]

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[110] 163 Ohio St. 469, 127 N.E.2d (1955).

[111] *Id.* at 475, 127 N.E.2d at 374.

[112] *See* note 105 *supra.*

[113] *See* Sherwood, *Mandamus to Review State Administrative Action,* 45 MICH L. REV. 123, 152 (1946).

[114] State *ex rel.* Dickerson v. Rike, 113 Ohio App. 228, 177 N.E.2d 681 (1960).

[115] 296 F.2d 235 (6th Cir. 1961).

[116] *Id.* at 237.

One Ohio case, *State ex rel. Marble Cliff Quarrier v. Industrial Commission,* states that an unlawful order constitutes abuse,[117] while a later case, *State ex rel. Shafer v. Ohio Turnpike Commission,*[118] requires more than an error of law or judgment. A 1931 case, *State ex rel. United District Heating, Inc. v. State Building Commission,*[119] stated that the writ should issue when the exercise of discretion resulted in abridging constitutional guarantees or denying equal protection of the law.[120] In a more recent decision, *State ex rel. Dahmen v. Youngstown,*[121] the court of appeals suggested that appellant must be apprised of the reasons on which a decision is predicated and failure to so apprise would be an act sufficiently arbitrary and unreasonable to subject the proceeding to judicial scruitiny.

One more element for the issuance of the writ of mandamus remains to be considered. It is the need for a legal duty to exist, that is, an act which the law enjoins as a duty.[122] The clear legal duty requirement is one both of statute,[123] Ohio Revised Code Section 2731.01 and case law.[124] The duty must be one resulting from the office,[125] and, traditionally, it is required to be ministerial in nature. Although objections have previously been offered to the ministerial/discretionary distinction, it does remain in the case law, and no discussion of mandamus would be complete without it.

Precedent examining the nature of a ministerial act goes back to *Marbury v. Madison*[126] in which Chief Justice Marshall described it as depending on the nature of the act rather than the office. An early definition in an Ohio case, *State ex rel. Fornoff v. Nash*[127] stated in 1873:

> Where a precise, definite act is required to be performed on a given state of fact, it may be said to be purely ministerial. But where the doing of the act is made dependent not upon the actual facts, but

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[117] 154 Ohio St. 459, 96 N.E.2d 297 (1951).

[118] 159 Ohio St. 581, 110 N.E.2d 14 (1953).

[119] 124 Ohio St. 413, 179 N.E. 138 (1931).

[120] *Id.* at 416, 179 N.E. at 139.

[121] 40 Ohio App. 2d 166, 318 N.E.2d 433 (1973). *See* State *ex rel.* Ruggles v. Stebbins, 41 Ohio St. 228, 325 N.E.2d 231 (1975); State *ex rel.* Truckey v. Industrial Comm'n, 29 Ohio St. 2d 132, 279 N.E.2d 875 (1972); State *ex rel.* Haines v. Industrial Comm'n, 20 Ohio St. 2d 15, 278 N.E.2d 24 (1972); State *ex rel.* Reed v. Industrial Comm'n, 2 Ohio St. 2d 200, 207 N.E.2d 755 (1965).

[122] OHIO REV. CODE ANN. §2731.01 (Page 1953).

[123] *Id.*

[124] State *ex rel.* Clink v. Smith, 16 Ohio St. 2d 1, 240, N.E.2d 869 (1968).

[125] State *ex rel.* Bargar v. Gilligan, 39 Ohio St. 2d 129, 314 N.E.2d 185 (1974). *See* L.L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 183 (1965) (which provides a good interpretation of the 'clear duty to act' rule).

[126] 1 Cranch 137 (U.S. 1803).

[127] 23 Ohio St. 568 (1873). *See* State *ex rel.* Tauger v. Nash, 66 Ohio St. 612, 64 N.E. 558 (1902).

> upon the judgment of the agent in respect to them, the duty of the agent is discretionary, and is fully performed when his discretion has been fairly exercised.[128]

The ministerial/discretionary analysis will be applied where no abuse of discretion is alleged and a dereliction in duty denies plaintiff a clear legal right; beyond this, however, it should not be raised as a barrier to the issuance of mandamus.

CONCLUSION

In conclusion, does the writ of mandamus lie for either the aggrieved petitioner whose application for a branch has been denied, or for his competitor, when the application has been granted? The petitioner could argue on the basis of one of two theories. First, he may claim that the approval of the superintendent is ministerial in nature and the superintendent, having denied the requisite permission is in dereliction of a duty as defined by statute.[129] Thus mandamus should issue to effect petitioner's clear legal right. This position rests essentially upon a finding by the court that the approval is ministerial in nature. Given the intrinsic importance of the branching function and the inherent judgmental nature of "approval" this appears highly unlikely. The superintendent has statutory authority to promulgate rules and standards by which to exercise the branching function, and the legislature has apparently clothed the superintendent with the discretion to regulate branching activities. This discretion is not likely to be nullified by the courts by declaring such approval ministerial only.

The second position which the aggrieved petitioner may adopt is that the superintendent in reaching the decision has abused his discretion through a denial of due process or has otherwise acted in an arbitrary capricious or unlawful manner. This results in denial to petitioner of a clear legal right — the *lawful* exercise of discretion which the legislature has delegated to the superintendent and which he has a clear duty to discharge.

Absent factual allegations which will constitute an abuse of discretion as the court views it, mandamus clearly will not lie. If petitioner objects to evidentiary rulings, the sufficiency or quantum of evidence, the reliability of evidence, or if he asserts that the decision was not based upon a record at all, his petition may be dismissed as stating no claim for which relief may be granted, since none of these elements may be found to specifically constitute abuse of discretion.[130] The issuance of the writ while certainly possible, is at best highly speculative.

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[128] *Id.* at 574.

[129] OHIO REV. CODE ANN. §1151.05 (Page 1968).

[130] *See* L.L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 186-92 (1965).

These are the practical obstacles to utilizing mandamus for judicial review of administrative action. They are based upon several policies which are rarely enunciated by the courts. Reluctance on the part of the judiciary to expand the availability of judicial review is attributable to several different causes. One is the doctrine of separation of powers between the judicial, legislative, and executive branches, which as a general proposition precludes the substitution of judicial decision-making for decisions properly delegated to the administrative branch.[131] The judiciary has neither the expertise, nor the time, for the factual determinations for which agencies are established. If authority has been properly delegated to the agency, the role of the court should be limited to that for which it is designed — review. This can be achieved not by denying access to the courts but by limiting the scope of review. The court should serve as a watchdog to insure that basic concepts of due process, well-established in our jurisprudence, are applied throughout our system of government. The possibility of review also serves as a restraint against abuses in the exercise of bureaucratic power.

Perhaps the key to the issuance of mandamus for judicial review is found in these words of Lord Mansfield, who, in 1762, said of the writ:

> It was introduced to prevent disorder from a failure of justice and defect of the police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.[132]

Despite hesitation by the courts to expand mandamus to provide broad administrative review, no individual, as the plaintiff in the *Boesch* case, should be bound by the absolute discretion of a bureaucrat. When appeal by right is denied, mandamus *ought* to lie.

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[131] 1 F. COOPER, STATE ADMINISTRATIVE LAW 15-29 (1965).

[132] Rex v. Barker, 3 Burr. 1265, 97 Eng. Rep. 823 (K.B. 1762).