NOTES

RECONCILING TEXTUALISM WITH AGENCY PRIORITIZATION AMONG CLEAR STATUTORY MANDATES

One key responsibility of the executive branch is to "take Care that the Laws be faithfully executed."[1] Traditionally, that means that Congress passes the laws and the President, along with the rest of the executive branch, enforces them. Nevertheless, Congress has considerable ability to control implementation, and it frequently enacts statutory text littered with goals, deadlines, and provisions directing that agencies "shall" perform certain tasks. Sometimes, however, the resources allocated may be insufficient to meet Congress's requirements. This may arise in a single, oversubscribed program;[2] multiple mandates competing for a limited pot of agency resources;[3] or any other situation where the resources allocated are far short of what is needed to complete the job.[4] As scholars have noted, overzealous Congresses have often enacted statutory requirements that have opened a "yawning gap between statutorily assigned responsibilities and the resources made available to meet them."[5] In these situations, the law imposes a duty that the relevant agency or department believes it cannot fulfill.

What may an agency do in response? May it explicitly prioritize among its responsibilities or among a program's intended beneficiaries — and in so doing, concede that it is ignoring certain statutory mandates? May it implicitly prioritize — but only quietly, lest it be seen as too openly flouting the law? Or is it an agency's place not to question why — and should it be forced to attempt what it knows at the outset to be impossible?

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[1] U.S. CONST. art. II, § 3.

[2] *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 230–31 (1974); *see also infra* notes 6–10 and accompanying text.

[3] *See, e.g.*, United States v. Texas, 143 S. Ct. 1964, 1969 (2023); *see also infra* notes 28–33 and accompanying text.

[4] *See, e.g.*, *In re* Aiken County, 725 F.3d 255, 259 (D.C. Cir. 2013); *see also infra* note 70 and accompanying text.

[5] Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 64 (1997) (predicting that "[f]or the foreseeable future, agencies will have access to constantly diminishing resources to implement their statutory mandates"); *see also* James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57, 65–68 (2012) (outlining the "chronic, systemic problems," *id.* at 65, a host of underfunded agencies face); Bret Kupfer, Note, *Agency Discretion and Statutory Mandates in a Time of Inadequate Funding: An Alternative to* In re Aiken County, 46 CONN. L. REV. 331, 334 (2013) (noting that mere budgetary uncertainty is harmful because "federal agencies are increasingly tasked with implementing our federal laws without knowing what resources they may rely upon to perform a sufficient job").

In the 1970s, the Supreme Court appeared to suggest an answer: absent explicit language to the contrary, agencies could prioritize to respond to resource constraints and other circumstances rendering statutory mandates impossible. In *Morton v. Ruiz*,[6] a unanimous Court explained that an agency could, in light of "the limited funds available," superimpose "reasonable classifications and eligibility requirements" to select which of a group of statutorily mandated beneficiaries would ultimately receive funds.[7] In that case — decided ten years before *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[8] made gap filling a hallmark of agency action[9] — the Court emphasized that prioritization was "incumbent upon" the agency as part of its power to make "rules to fill any gap left, implicitly or explicitly, by Congress."[10] And *Morton* was not alone: the *Morton* Court relied in part on *Dandridge v. Williams*,[11] a similar case about allocating scarce governmental resources in light of the "strong policy of the statute."[12]

While it has never overruled *Morton* or *Dandridge*, today's Court has focused on the statutory text and taken a far more skeptical view of agency pleas about resource constraints. Instead of treating situations of impossibility as a gap to be filled, the Court has found the statutory text to be directly applicable and controlling. Invariably, that text unyieldingly requires agencies to implement statutory provisions when they are written with verbs like "shall." For example, in *Maine Community Health Options v. United States*,[13] the Court reminded the Secretary of Health and Human Services that "shall" should be understood to be "mandatory language" and a "sign that the statute imposed an obligation."[14] In *Kingdomware Technologies, Inc. v. United States*,[15] the Court lectured the Secretary of Veterans Affairs that "the word 'may,' which implies discretion" was unlike "the word 'shall[,]' [which] usually connotes a requirement."[16] And in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[17] the Court commented that "the mandatory 'shall'" is used to "create[] an obligation impervious to judicial discretion."[18]

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[6] 415 U.S. 199.

[7] *Id.* at 230; *see also id.* at 231 (discussing eligibility standards).

[8] 467 U.S. 837 (1984).

[9] *See id.* at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

[10] *Morton*, 415 U.S. at 231.

[11] 397 U.S. 471 (1970); *Morton*, 415 U.S. at 230–31 (citing, inter alia, *Dandridge*, 397 U.S. 471).

[12] *Dandridge*, 397 U.S. at 480; *see also id.* at 479 (flipping the modern presumption that statutory language overrides practical considerations and instead noting that "[w]e see nothing in the federal statute that forbids a State to balance the stresses" of resource constraints via prioritization).

[13] 140 S. Ct. 1308 (2020).

[14] *Id.* at 1320.

[15] 136 S. Ct. 1969 (2016).

[16] *Id.* at 1977.

[17] 523 U.S. 26 (1998).

[18] *Id.* at 35.

These strict views of textual mandates have not yielded in the face of pleas about resources. For example, in two cases involving EPA rulemakings, the Justices enforced seemingly clear statutory language despite concerns about practicality. In *Utility Air Regulatory Group v. EPA*,[19] Justice Scalia, writing for the Court, held that the "agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms"[20] and that "[a]n agency confronting resource constraints may change its own conduct, but it cannot change the law."[21] Likewise, in *EPA v. EME Homer City Generation, L.P.*,[22] Justice Ginsburg's majority opinion — this time, siding with the agency and rejecting an exception read in by the D.C. Circuit — held that "practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text."[23] And perhaps most colorfully, the Supreme Court said in 2015 that even "[i]f the task of [a statutory mandate] is 'Sisyphean' . . . , it is a Sisyphean task that the statute imposes."[24] Modern Supreme Court decisions have thus made clear that statutory text is presumed to apply to all situations, including when resource constraints and impossibility arise.[25] Whatever discretion agencies might retain, "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers."[26]

Yet the Court's firmness in interpreting statutory mandates does not alter the realities that agencies face. With today's more textualist judiciary[27] that is more skeptical of the arguments that carried the day in *Morton* — arguments rooted in statutory purpose and flexibility — what is an agency to do?

That is not an idle question. This past Term, the Supreme Court granted certiorari on — but ultimately declined to resolve — precisely this issue. In *United States v. Texas*,[28] one question presented asked

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19 573 U.S. 302 (2014).

20 *Id.* at 325.

21 *Id.* at 327.

22 572 U.S. 489 (2014).

23 *Id.* at 509.

24 Ala. Dep't of Revenue v. CSX Transp., Inc., 575 U.S. 21, 31 (2015) (citations omitted) (quoting CSX Transp., Inc. v. Ala. Dep't of Revenue, 720 F. 3d 863, 871 (11th Cir. 2013), *rev'd*, *Ala. Dep't of Revenue*, 575 U.S. 21).

25 The courts of appeals have decided cases similarly. *See, e.g.*, Salameda v. INS, 70 F.3d 447, 452 (7th Cir. 1995) (Posner, C.J.) ("[U]nderstaffing is not a defense to a violation of principles of administrative law . . . .").

26 Heckler v. Chaney, 470 U.S. 821, 833 (1985).

27 *See, e.g.*, Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), https://youtu.be/dpEtszFToTg [https://perma.cc/UA47-7ANH] ("[W]e're all textualists now."); Babb v. Wilkie, 140 S. Ct. 1168, 1177 (2020) ("[W]here, as here, the words of [a] statute are unambiguous, the 'judicial inquiry is complete.'" (alteration in original) (quoting Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003))).

28 143 S. Ct. 1964 (2023).

whether the Department of Homeland Security (DHS) could conserve its resources by issuing internal guidance directing its agents to enforce some immigration mandates only as to certain categories of individuals.[29] Challenging the legality of this guidance, the State of Texas argued that the mandatory statutory text, replete with commands that DHS "shall" perform certain enforcement activities, foreclosed the exercise of agency discretion.[30] The Fifth Circuit agreed with Texas and held that the use of "shall" made the requirements "incontrovertibly mandatory."[31] In its briefing, DHS recognized that the "shall" language appeared to require enforcement, but the agency argued that because "Congress has not appropriated the enormous resources that would be required" to fully enforce each of these supposedly mandatory provisions, the agency could properly exercise "enforcement discretion" in deciding which ones to pursue.[32] And though the Court ultimately disposed of *United States v. Texas* on standing grounds,[33] these questions seem likely to recur. How should courts respond to agency attempts to prioritize if those prioritization attempts are subsequently challenged?

This Note offers a path to reconcile commitments to textual fidelity with the pragmatic realities agencies often face. It takes seriously the present Court's textual focus — that statutory purpose or mere congressional silence cannot justify unchecked deviations from the literal text — and argues that agency prioritization, despite seemingly clear statutory language, is still defensible. First, a reasonable reader could read prioritization as permitted even within the unambiguous text of most "shall" statutes — believing it to be the best reading of the text. Rules of linguistic meaning do not compel courts to treat statutory mandates as always applicable. Properly understood, a reasonable reader would understand them to be cabined by a series of unwritten background assumptions. Second, even if prioritization is not clearly justified by statutory "shall" language, the Court's present approach of enforcing mandatory requirements regardless of practical realities suffers from equal and opposite textual problems. Specifically, when

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[29] *See id.* at 1968; *see also* United States v. Texas, 143 S. Ct. 51 (2022) (mem.) (granting certiorari).

[30] *See* Brief for Respondents at 2, United States v. Texas, 143 S. Ct. 1964 (No. 22-58) ("When Congress requires the Executive to act, the Executive lacks the authority to disregard that instruction." *Id.* at 1.).

[31] Texas v. United States, 40 F.4th 205, 225 (5th Cir. 2022) (per curiam). Technically, this was a decision of a Fifth Circuit stay panel, not a merits panel. *See id.* at 213. As the Supreme Court subsequently granted certiorari before judgment directly from the district court's final order, a Fifth Circuit merits panel was never assembled and the stay panel's decision was not directly appealed. Nevertheless, because the stay panel's discussion of whether the government was likely "to succeed on the merits," *id.* at 215, covered all three questions on which the Supreme Court granted certiorari, this opinion is treated as that of the Fifth Circuit.

[32] Reply Brief for the Petitioners at 2, United States v. Texas, 143 S. Ct. 1964 (No. 22-58).

[33] *See* United States v. Texas, 143 S. Ct. at 1976 ("The States lack Article III standing because this Court's precedents and the 'historical experience' preclude the States' 'attempt to litigate this dispute at this time and in this form.'" (quoting Raines v. Byrd, 521 U.S. 811, 829 (1997))).

agencies lack sufficient resources to satisfy all congressional requirements or pay all beneficiaries, judges seeking to compel agency action must atextually pick "winners" to receive those scarce resources. Finally, strong policy reasons, both internal and external to textualism, support preferring prioritization. By recognizing that unchecked prioritization could be an invitation to fully ignore the statutory text, this Note concludes with a few limiting principles.

I. TEXTUAL DEFENSES OF AGENCY PRIORITIZATION

A. Prioritization as the Best Textual Approach

Even for card-carrying textualists, statutory mandates, including "shall" provisions, need not be read absolutely. That is because, as Justice Scalia once noted, "the good textualist is not a literalist"[34] and ought to construe a statute "reasonably, to contain all that it fairly means."[35] A court must "situate[] text in context."[36] Determining a statute's clearest ordinary meaning thus requires more than simply reading a "shall" provision in isolation. To prioritize among otherwise mandatory provisions, an agency could point to congressional silence about how to handle resource constraints, identify default principles favoring discretion, or find prioritization authority in Congress's subsequent appropriations legislation.

1. Congressional Silence. — Imagine an everyday situation. You are instructed: "You shall go to the store to get bread."[37] Upon arriving at the store, however, you discover it is closed. Your instructions are no longer clear on what to do next. You could wait at the store overnight until it opens, go to another store, or perhaps break in and steal bread. But none of those options are supported by the text of your instructions alone — whatever the advisability of each one.

Next, imagine another situation. You are told to "Buy bread, eggs, and milk." This time, though the store is open, you discover you only have enough money to purchase one of the three. Once again, the text of your instructions does not clarify what you should do. Should you buy only one of the three — and if so, which one? Does it matter that you like milk but not bread or eggs? Alternatively, despite being told to go to the store, can you go to the bank for more money? Or should you understand "bread, eggs, and milk" as a collective unit and, unable to purchase all three, simply return empty handed?

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[34] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 24 (Amy Gutmann ed., new ed. 2018).

[35] *Id.* at 23.

[36] Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring).

[37] Justice Barrett employed a somewhat similar hypothetical in *Biden v. Nebraska* to explain her view of the major questions doctrine. *See id.* at 2379.

In both hypotheticals, the instructions clearly express the default wishes of the person giving the instructions. They accordingly heavily circumscribe your behavior: after all, in neither case can you go and buy ice cream. But in both cases, the instructions fail to give you guidance about what to do in situations where achieving the original goal has become impossible.[38]

To put it in statutory interpretation terms, a court that interprets a statutory "shall" provision as mandatory regardless of the circumstances overreads the text. Imagine a statute that says: "An agency shall do X." The traditional approach is to see that text as an unconditional mandate for all circumstances, denying discretion to the agency to do X only in certain circumstances. That reading, however, implicitly adds additional language to the statute, understanding it as: "An agency shall do X, regardless of the circumstances or practical constraints." That second clause is plainly not present in many statutory mandates. In reality, many statutory mandates are silent about what to do if they become impossible to carry out.[39] Unless Congress has explicitly addressed the possibility of resource constraints, either by prescribing a backup plan or mandating unconditional implementation, the statute simply gives no guidance on what to do if its requirements are impossible to achieve. And because "[t]extualists give primacy to the *semantic* context — evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words,"[40] a committed textualist should recognize that Congress's seemingly unconditionally statutory mandates have practical limits.

Understanding the fair limits of Congress's commands reveals two possibilities for agency prioritization: gap-filling regulation and context-driven textual analysis. First, longstanding principles of administrative law permit agencies to fill gaps in statutes, and a few courts have recognized practical circumstances as an example of a statutory gap. For example, in *City of Los Angeles v. Adams*,[41] the D.C. Circuit suggested that agencies could fill the gap if Congress did not establish a backup plan in the event of insufficient resources. There, Los Angeles sued to require the Federal Aviation Administration (FAA) to pay a statutorily mandated grant.[42] In dicta, the court commented that if there were insufficient funds to pay every grantee and "Congress [was] silent on how to handle this predicament," the FAA could permissibly "establish reasonable priorities and classifications" among the otherwise eligible

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[38] *See also id.* at 2380 (describing similar logic as "commonsense principles of communication").

[39] As one example, see the statutes at issue in *United States v. Texas*, 143 S. Ct. 1964, 1968–69 (2023): 8 U.S.C. §§ 1226(c), 1231(a).

[40] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006).

[41] 556 F.2d 40 (D.C. Cir. 1977).

[42] *Id.* at 43.

grant recipients.[43] Though the court ultimately sided with the city, it did so only because Congress had established a payment formula that logically applied regardless of the resources available — in other words, because Congress had filled the gap.[44] Under this approach, if the resource-constraints question is understood as a potential gap in Congress's original statutory scheme, an agency has a free hand to prioritize as it wishes. As the Supreme Court held in *Chevron*, "[t]he power of an administrative agency . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[45]

Moreover, in a case decided ten years before *Chevron*, the Supreme Court suggested that formulating a plan to deal with potential resource constraints is precisely the kind of gap filling that Congress generally intends agencies to perform via regulation. In *Morton v. Ruiz*, the Court considered a challenge to a Bureau of Indian Affairs (BIA) benefit assistance policy that excluded some otherwise eligible individuals on the grounds that there were insufficient funds to cover the entire statutorily eligible population.[46] The Court imagined a hypothetical where the agency had the funds to cover only half the eligible beneficiaries. In that situation, it was "incumbent upon the BIA to develop an eligibility standard to deal with this problem"[47] in order "to allocate the limited funds available."[48] The BIA had the "power to create reasonable classifications"[49] even if such a rule "might leave some of the class otherwise encompassed by the appropriation without benefits."[50] Said differently, the agency could bend the otherwise clear statutory mandate — precisely because Congress had not specified what to do if full compliance was impossible. Gap-filling does not require willfully misreading the original text — it merely recognizes the fair limits of what Congress did and did not say.

Second, even if courts do not recognize practical considerations as a gap requiring *Chevron* deference — or if *Chevron* is overruled[51] —

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[43] *Id.* at 49–50.

[44] *See id.* at 50 ("[I]n the case before us, the shortfall of obligational authority in no way prevented the FAA from adhering to the distributional formula in the mandate of the Act.").

[45] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[46] *Morton*, 415 U.S. at 204–05.

[47] *Id.* at 231.

[48] *Id.* at 230 (citing Dandridge v. Williams, 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972)).

[49] *Id.* (citing *Dandridge*, 397 U.S. at 478; *Hackney*, 406 U.S. at 546).

[50] *Id.* at 231.

[51] The Supreme Court is currently considering whether to overturn *Chevron*. *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari); *see also* Petition for Writ of Certiorari at i–ii, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451), 2022 WL 19770137, at *i–ii. Even absent *Chevron*, a court would first have to determine for itself whether a gap

basic statutory interpretation principles still counsel in favor of prioritization. Justice Barrett recently argued that contextual clues should inform a reasonable reader's interpretation of statutory text in the context of the major questions doctrine. In *Biden v. Nebraska*,[52] she wrote separately to emphasize that statutory interpretation should reflect "how we communicate conversationally."[53] As one example, she imagined a grocer telling a clerk to buy apples for their store. If the grocer's usual practice, as understood by the agent, is to stock two hundred apples, the clerk could not reasonably purchase a thousand.[54] Accordingly, "[t]hough this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits."[55] While Justice Barrett wrote to limit agency authority, the same contextual interpretation principles apply to congressional demands on agencies. A reasonable reader should "know that there are limits" even on statutory mandates that might "sound[] unqualified."[56] Thus, even absent *Chevron*, *Skidmore*,[57] or any other form of judicial deference, Justice Barrett's reasoning suggests an implicit limit on textual mandates that — while not independently justifying gap-filling regulations — would at least render agency prioritization fully consistent with the organic statute.

2. Default Principles Favoring Discretion. — Second, textualists agree that Congress legislates against background assumptions.[58] As the Supreme Court has noted, "[t]he notion that some things 'go without saying' applies to legislation just as it does to everyday life."[59] Professors William Baude and Stephen Sachs similarly explain that because legislators "act in a world already stuffed full of legal rules," there are written and unwritten "rules of interpretation" that govern our understanding of otherwise clear texts in a manner fully consistent with textualism.[60]

Baude and Sachs note that this comports well with how we understand the law. For example, few statutes authorizing a civil cause of

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exists — as is true today under *Chevron* step one. If a court were to locate a gap, it is unclear what level of deference would be owed to an agency gap-filling regulation. However, even under the less deferential *Skidmore* standard, agencies could point to *Morton* as emphasizing the persuasiveness of an agency's gap-filling interpretation in the specific context of impossibility. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *supra* notes 46–50 and accompanying text.

52 143 S. Ct. 2355 (2023).

53 *Id.* at 2379 (Barrett, J., concurring).

54 *Id.*

55 *Id.*

56 *Id.*

57 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

58 Biden v. Nebraska, 143 S. Ct. at 2378 (Barrett, J., concurring) ("Context is not found exclusively '"within the four corners" of a statute.' Background legal conventions, for instance, are part of the statute's context." (internal citation omitted) (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456 (2003))).

59 Bond v. United States, 572 U.S. 844, 857 (2014).

60 William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1098 (2017).

action make any mention of waiver or res judicata; likewise, few federal criminal statutes create an explicit exception for duress, necessity, or self-defense.[61] Nevertheless, courts regularly and uncontroversially apply those doctrines. "Because textualists want to know the way a reasonable user of language would understand a statutory phrase," Dean John Manning explains, "they must always ascertain the unstated 'assumptions,'"[62] including "unstated exceptions or qualifications [that] may form part of the background against which lawyers understand the workings of a given category of statute."[63] Thus, a textualist should read all statutes as implicitly having been enacted against the background of prior legal doctrines that Congress did not explicitly exclude — in other words, that "do X" is properly read as "do X, subject to existing law."

In the prioritization context, an agency could argue that while a text makes no explicit exception for resource constraints, principles authorizing prioritization can be found in a few contexts throughout the law.

First, the Appropriations Clause[64] and the Antideficiency Act[65] "constrain how federal employees and officers may make or authorize payments without appropriations."[66] In other words, they confirm the basic idea that an agency may not spend more than it has. While the Supreme Court has made clear that an absence of funds does not "cancel [the government's] obligations,"[67] the Antideficiency Act recognizes that a resource-constrained agency must make some temporary compromises in order to balance the books[68] — and a court could draw on that principle in evaluating statutory text.[69]

Second, in the mandamus context — where a plaintiff seeks to compel agency action unlawfully withheld — the D.C. Circuit has explicitly recognized resources as a relevant factor. Then-Judge Kavanaugh, writing in a case about the Yucca Mountain nuclear storage site, explained that it was a "settled, bedrock principle[] of constitutional law" that "the President must follow statutory mandates so long as there is

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61 *Id.* at 1105; *see also* Biden v. Nebraska, 143 S. Ct. at 2378–79 (Barrett, J., concurring) (citing, inter alia, Ruan v. United States, 142 S. Ct. 2370, 2376–77 (2022)) (making a similar argument).

62 Manning, *supra* note 40, at 81 (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT. L. REV. 441, 443 (1990)).

63 *Id.* at 81–82.

64 U.S. CONST. art. I, § 9, cl. 7.

65 31 U.S.C. § 1341.

66 Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1321 (2020) (citing U.S. CONST. art. I, § 9, cl. 7; 31 U.S.C. § 1341(a)(1)(A)).

67 *Id.* (quoting Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 197 (2012)).

68 *See* 31 U.S.C. § 1341(a)(1)(A) ("An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.").

69 *See, e.g.*, Avalos v. United States, 54 F.4th 1343, 1349 (Fed. Cir. 2022) (holding that, because of the Antideficiency Act's prohibition on government spending during a lapse in appropriations, the government does not violate the Federal Labor Standards Act's timely pay obligation when it withholds workers' pay during a government shutdown), *cert. denied*, 144 S. Ct. 557 (2024).

appropriated money available" but that "if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward."[70] Two years later, the D.C. Circuit went further, holding that a district court was required to consider an agency's assertion that a statutory mandate was impossible.[71] These baseline assumptions could reasonably be ported to the statutory interpretation context, precisely because they reflect the context of congressional enactments.

Third, when reviewing agency rulemaking, the D.C. Circuit has suggested that an agency may explicitly disregard a statutory mandate but "only by showing that attainment of the statutory objectives is impossible."[72] Under this so-called "administrative necessity" doctrine, a demonstration of near impossibility due to a shortage of personnel, time, or funds "may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute."[73] However, the standard is high, and it is "a heavy burden to demonstrate the existence of an impossibility."[74]

Finally, for agencies engaged in enforcement actions, prosecutorial discretion can serve as a powerful background principle. The government's briefing in *United States v. Texas* relied[75] on *Town of Castle Rock v. Gonzales*,[76] a case holding that despite a state statute mandating that officers "shall enforce"[77] restraining orders, a court could not require municipal police to do so.[78] Instead, the "deep-rooted nature of law-enforcement discretion" persisted "even in the presence of seemingly mandatory legislative commands."[79] In *United States v. Texas*, DHS analogized immigration enforcement to *Castle Rock*, arguing that Congress had "recogni[zed] that the Secretary [of Homeland Security] is best positioned to determine how to allocate DHS's limited resources"

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[70] *In re* Aiken County, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.) (emphasis omitted).

[71] *See* Am. Hosp. Ass'n v. Price, 867 F.3d 160, 166 (D.C. Cir. 2017) ("We conclude that since the Secretary represented that lawful compliance with the mandamus order was impossible, it was an error of law, and therefore an abuse of discretion, to nonetheless order the Secretary to render that performance without first finding that lawful compliance was indeed possible." (emphasis omitted)).

[72] Sierra Club v. EPA, 719 F.2d 436, 463 (D.C. Cir. 1983) (citing Ala. Power Co. v. Costle, 636 F.2d 323, 359 (D.C. Cir. 1979); Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 713 (D.C. Cir. 1975)).

[73] *Costle*, 636 F.2d at 358; *see also id.* at 358–59 (citing Morton v. Ruiz, 415 U.S. 199, 230–31 (1974)).

[74] *Id.* at 359. Unlike with the mandamus version of the doctrine, no agency has ever succeeded in making the required showing, at least as of 2011. *See* Kirti Datla, Note, *The Tailoring Rule: Mending the Conflict Between Plain Text and Agency Resource Constraints*, 86 N.Y.U. L. REV. 1989, 2007–08 (2011).

[75] *See* Brief for the Petitioners at 28–29, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58), 2022 WL 4278395, at *28–29.

[76] 545 U.S. 748 (2005).

[77] *Id.* at 759 (quoting COLO. REV. STAT. ANN. § 18-6-803.5(3) (West 2022)).

[78] *See id.* at 760 ("We do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." (emphasis omitted)).

[79] *Id.* at 761 (citing City of Chicago v. Morales, 527 U.S. 41, 47 n.2 (1999)).

and that the Court should thus see "'shall' as accommodating background principles of law-enforcement discretion."[80]

The Court has already suggested that principles of prosecutorial discretion have some purchase in administrative law. In *Heckler v. Chaney*,[81] the Court determined that an agency's refusal to institute an enforcement action was "committed to [the] agency's absolute discretion,"[82] in part because of resources: "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including "whether agency resources are best spent on this violation" and "whether the agency has enough resources to undertake the action at all."[83] Eight years later, the Court extended *Heckler*'s reasoning to funding, holding that "an agency's allocation of funds" was "[l]ike the decision [for or] against instituting enforcement proceedings."[84]

A textualist court might be skeptical that doctrines like "administrative necessity" or prosecutorial discretion can overcome otherwise clear text.[85] But the background principle need not triumph over the text. As Baude and Sachs explain, background presumptions "don't supersede new legislation, but coexist with it."[86] Thus, "[w]hen the legislature is silent, the old rules remain in effect."[87] In other words, a statute mandating that an agency perform an action might be perfectly clear, unambiguous, and unconditional when read alone — but, when understood in context, still be subject to default law unless Congress expressly modifies those defaults. Insofar as those defaults encompass some degree of agency discretion, that should be read in as part of the clear statutory mandate.

3. Subsequent Appropriations Legislation. — A third potential way to find prioritization authority is to look to the text of subsequent appropriations statutes. Manning has explained that "textualists (like everyone else) necessarily resort to context even in cases in which the

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[80] Brief for the Petitioners, *supra* note 75, at 30.

[81] 470 U.S. 821 (1985).

[82] *Id.* at 831 (citing, inter alia, United States v. Batchelder, 442 U.S. 114, 123–24 (1979)). *Heckler* emphasized that Congress could limit an agency's enforcement discretion by "setting substantive priorities" or "otherwise circumscribing an agency's power to discriminate among issues." *Id.* at 833. The Court contrasted the statutory language in *Heckler*, which provided "no indication" of when enforcement was required, *id.* at 835, with language in a previous case, which directed that an agency "shall investigate" in certain circumstances, *id.* at 833 (citing Dunlop v. Bachowski, 421 U.S. 560, 563 n.2 (1975)). Extending that logic to the impossibility context, *Heckler* thus teaches that agencies retain discretion absent clear congressional language addressing the prospect of resource constraints.

[83] *Id.* at 831.

[84] Lincoln v. Vigil, 508 U.S. 182, 193 (1993) (citing *Heckler*, 470 U.S. at 831).

[85] *See, e.g.*, Texas v. United States, 40 F.4th 205, 225 (5th Cir. 2022) (rejecting the application of *Castle Rock*, noting that applying the case would be "a stretch when . . . the statutory language seems incontrovertibly mandatory").

[86] Baude & Sachs, *supra* note 60, at 1098.

[87] *Id.*

meaning of the text appears intuitively obvious."[88] In the context of resource constraints, Congress's choices to underfund the agency — through budgets duly passed via bicameralism and presentment — offer another data point in understanding the textual requirements given to an agency. To reuse the earlier example, imagine you are told: "You shall go to the store to buy bread." Then, upon being informed that you have no money, the instruction-giver hands you a quarter. A reasonable observer might plausibly conclude that the provision of woefully insufficient funds provides context for how you should read the requirement to buy bread. For example, perhaps instead of a full loaf, you should go to a bakery and buy just a single slice.

Justice Barrett endorsed such an interpretive approach in *Biden v. Nebraska*. In a hypothetical about instructions to a babysitter, Justice Barrett explained that parents who said "[m]ake sure the kids have fun" would not expect a babysitter to take the children on an extravagant overnight trip.[89] Yet other "relevant points of context" might alter that conclusion, like if the parents had given the babysitter a $2,000 budget to spend.[90] In that circumstance, "commonsense principles of communication" could render the extravagant trip a "reasonable view of the parent's instruction."[91] While Justice Barrett's reasoning was regarding the major questions doctrine and a constraint on agency power, the same context-driven reading of text would examine Congress's failure to provide the agency with sufficient resources. Notably, Justice Barrett's hypothetical involved two separate communications — one with the original instruction and the other with the $2,000 budget — much like an organic statute and a subsequent appropriations act.

Babysitters and bakeries may seem like simple examples, but similar levels of impracticality were at issue in *United States v. Texas*. The statute there primarily concerned DHS's duties to deport noncitizens.[92] In its briefing, the government contrasted the 11 million undocumented individuals potentially subject to deportation[93] and the 1.2 million individuals with final deportation orders with the 6,000 officers available to process deportations.[94] Literal compliance with the statutory mandate would "completely overwhelm [DHS's] current capacity"[95] because "the Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by" the statutory requirements.[96] Thus, where Congress had failed to appropriate sufficient resources for

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88 Manning, *supra* note 40, at 80.
89 Biden v. Nebraska, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring).
90 *Id.* at 2380.
91 *Id.*
92 *See* United States v. Texas, 143 S. Ct. 1964, 1968–69 (2023).
93 *See* Brief for the Petitioners, *supra* note 75, at 3.
94 *See* Reply Brief for the Petitioners, *supra* note 32, at 12.
95 Brief for the Petitioners, *supra* note 75, at 29 (alteration in original).
96 United States v. Texas, 143 S. Ct. at 1972.

a quarter-century[97] and "five Presidential administrations have determined that resource constraints necessitated prioritization,"[98] each appropriations act could be understood as a new statute providing additional context about how to read the original statutory mandate.

The D.C. Circuit seemed to adopt a version of this approach in *City of Los Angeles v. Adams*. There, the court analyzed a statutorily mandated FAA grant program for aviation infrastructure.[99] However, in a series of appropriations acts, Congress limited the funding available to the FAA.[100] The court thus concluded: "When Congress modifies a statute by an appropriations measure, or any other amendment, the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint."[101] The D.C. Circuit's analysis attempted to reconcile the original text's meaning with subsequent appropriations.[102]

In sum, by reading a congressional mandate narrowly, and by looking carefully at the interactions between a given statute and both past as well as subsequent enactments, a court might conclude that prioritization is directly permitted by the text. Recognizing, however, that agencies may have trouble convincing some courts that (in effect) "shall" means something other than "shall," the next section turns to whether a textualist court could still find prioritization permissible even if the statutory requirement is mandatory.

B. Prioritization and Literal Enforcement as Equally Valid Textual Readings

Even if a court determines that the plain text of a specific statutory requirement does not itself permit prioritization, a textualist need not conclude that agency discretion is impermissible. In many cases, including *United States v. Texas*, the question before the court is not whether an agency may ignore one specific mandate but instead how it can

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97 *See* Reply Brief for the Petitioners, *supra* note 32, at 2.

98 United States v. Texas, 143 S. Ct. at 1972.

99 City of Los Angeles v. Adams, 556 F.2d 40, 43–44 (D.C. Cir. 1977).

100 *Id.* at 46.

101 *Id.* at 50. As described above, the D.C. Circuit ultimately sided with the city. It did so, however, because Congress had created a formula for allocating the funds that applied regardless of the amount allocated. *Id.* Thus, the court did not have to answer the question of how to reconcile the different pieces of legislation in the absence of such a formula.

102 *Id.* at 49. Admittedly, the Supreme Court has clearly articulated a "doctrine disfavoring repeals by implication," Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978), and that doctrine "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure," *id.* (quoting Comm. for Nuclear Resp. v. Seaborg, 463 F.2d 783, 785 (D.C. Cir. 1971) (alterations in original)). As a result, it would be improper for an agency to assume that a lack of necessary funding simply eliminates a statutory mandate. But the D.C. Circuit's opinion in *Adams* did not say that an agency may interpret a budget providing insufficient funding as a repeal sub silentio. Instead, it reasoned that an agency may reasonably prioritize in light of the limits on its resources. *See Adams*, 556 F.2d at 49–50. An agency acting to prioritize among competing statutory mandates does not deny that each is binding; instead, it seeks to calibrate the priority and vigor with which each one is enforced.

balance among multiple requirements competing for scarce resources. In those situations, a court has a trickier problem than the pure statutory interpretation question: it must resolve a question of seemingly contradictory statutory provisions.

That is because literal enforcement of a statutory mandate in this context suffers from a serious textual problem: mandating enforcement in one case necessarily negates a separate and equally valid statutory mandate. Telling an agency that a "shall" provision must be unconditionally enforced requires the agency to reallocate resources and thus underenforce something else — either a different statute or the same statute regarding other parties. Choosing to read one "shall" provision as mandatory implies a "shall not" requirement in the competing statutory texts.

For a concrete example, once again take *United States v. Texas*. There, the Immigration and Nationality Act[103] mandated that DHS "shall remove" from the country certain categories of noncitizens,[104] but the Biden Administration's administrative guidance prioritized deportation efforts for individuals whom it deemed threats to national security, public safety, or border security.[105] The Administration thus determined that it would less rigorously enforce the "shall" provisions as to a large number of otherwise-eligible individuals who did not fall into those three categories. In defense of the guidance, DHS argued that Texas's literal "interpretation could not and would not lead to enforcement against all" covered noncitizens given the agency's limited resources.[106] Instead, the government would have to "devote its available personnel and resources to the first covered noncitizens it happens to encounter — even when others pose greater threats to our Nation's security."[107]

Had Texas prevailed, DHS would have simply deployed its deportation capacity on a first-in-time basis — and once agency resources were committed, DHS would have been unable to pursue any other enforcement actions. Under Texas's reading of the statute, DHS would then have been in violation of the very same statutory provisions with respect to any other removal-eligible noncitizens it subsequently encountered.[108] And because total enforcement capacity would have remained unchanged, judicial invalidation of the Administration's guidance may not

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[103] 8 U.S.C. §§ 1101-1537.

[104] *See* Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022) (quoting 8 U.S.C. §§ 1226(c)(1), 1231(a)(1)(A), 1231(a)(2)).

[105] *See* Brief for the Petitioners, *supra* note 75, at 3.

[106] *See* Reply Brief for the Petitioners, *supra* note 32, at 13.

[107] *Id.* at 13–14.

[108] *See id.* at 10 n.* (noting the government's position that, "'[a]s a matter of government resources, DHS may be unable to send agents to make an arrest' — without suggesting that DHS would thereby violate any judicially enforceable duty" (alteration in original) (internal citations omitted) (quoting Brief for the Petitioners at 10, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363), 2018 WL 2554770, at *10)).

have substantially changed the number of individuals removed from the country, only the composition of that group. Thus, a court would be in effect adding a new statutory provision: the statute's requirements are particularly mandatory with respect to the first individuals DHS encounters but less mandatory with respect to everyone else. To the extent that DHS's original prioritization guidance is atextual, that criticism is equally true when the same prioritization is done implicitly by a court.

The D.C. Circuit has adopted somewhat similar logic in at least one decision where an agency failed to meet a statutorily imposed deadline due to a lack of resources. *In re Barr Laboratories, Inc.*[109] involved a pharmaceutical company seeking to compel the FDA to meet a statutory deadline for drug approval.[110] The court explained that even though the "FDA's sluggish pace violate[d] a statutory deadline,"[111] any court order "putting [petitioner] at the head of the queue simply [would] move[] all others back one space and produce[] no net gain."[112] Relief would merely "impose offsetting burdens" on other applicants who were "equally wronged by the agency's delay."[113] Thus, the underlying problem was a lack of funds, "a problem for the political branches to work out."[114] Because the court could only "reorder[]" the applicant list but not address the resource constraints, it declined to interfere with the agency, which was "in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way."[115] Though rooted in purposivist thinking and equitable discretion, not textualism, *Barr* illustrates the force of the prioritization logic. Judicial attempts to enforce specific statutory provisions cannot be viewed in a vacuum when resource constraints mean that any relief comes at the expense of another party with an equally valid textual claim to relief.

One response might be that an Article III court is empowered only to decide the issues before it.[116] Thus, if the challenged agency action is on its face contrary to law, that ends the inquiry. A court cannot hypothesize about what an agency might do in the future. However, that analysis wrongly assumes that a court could find agency action to be contrary to law without first grappling with the statutory interpretation question. For example, a court could determine that, due to limited resources, a plaintiff's interpretation that "shall" is mandatory requires

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109 930 F.2d 72 (D.C. Cir. 1991).

110 *Id.* at 73–74.

111 *Id.* at 73.

112 *Id.* at 75.

113 *Id.* at 73.

114 *Id.* at 75.

115 *Id.* at 76.

116 *See, e.g.*, Chafin v. Chafin, 568 U.S. 165, 172 (2013) ("Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" (alteration in original) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam))).

underenforcing another equally forceful statutory mandate. The court would then be faced with two interpretations, both of which depart from the text. The court thus has a clear statutory ambiguity that must be resolved using traditional tools of statutory interpretation.

Having identified that statutory ambiguity, courts should defer to an agency's interpretation permitting prioritization. This is justified by traditional principles of deference under either *Chevron*[117] or *Skidmore*. Under *Chevron*'s step-two analysis, the Supreme Court has emphasized that agencies with complex tasks should be "given every reasonable opportunity" to make rules to resolve "intensely practical difficulties."[118] Resource constraints fall firmly into this category. By contrast, under *Skidmore*, the agency could persuade the court in light of its "specialized experience and broader investigations and information."[119] Agencies can persuasively apply their expertise to matching a complex statute with practical realities.

II. POLICY JUSTIFICATIONS

No doubt many textually minded jurists might recoil at the prospect of permitting agencies to appear to flout the letter of the law. Two considerations might assuage those concerns. First, significant pragmatic considerations weigh in favor of considering resource constraints when interpreting Congress's intent — and, specifically, many of the policy justifications that textualism traditionally seeks to advance. Prioritization by agencies offers regulated parties greater predictability and political accountability as compared to the unthinking enforcement of impossible requirements. Second, recognizing that prioritization could become a Trojan horse for agencies to ignore Congress whenever they have a political or policy disagreement with a statute, section II.B sets out limiting principles that would cabin the tactic's use to situations where the specter of impossibility genuinely looms.

A. Prioritization Advances Textualism's Goals

Two policy justifications counsel in favor of preferring prioritization to unguided enforcement: predictability and appropriate deference to the political branches. Enabling agencies to explicitly prioritize avoids the inherent uncertainty of helter-skelter enforcement while simultaneously placing prioritization decisions in the hands of the politically

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[117] Were the Supreme Court to overrule *Chevron*, the analysis in this section should still hold. In a post-*Chevron* world, a reviewing court could not defer to an agency's statutory interpretation but would have to resolve the ambiguity of the competing statutory mandates for itself. At that point, an agency prioritization decision might well have significant persuasive effect under *Skidmore* and *Morton*.

[118] Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 502 (2002) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968)).

[119] United States v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).

accountable executive branch. Moreover, because textualism is often justified as advancing these same goals of predictability and political accountability, agency prioritization fits coherently within a textualist approach to statutory interpretation.

1. Predictability. — First, textualists often emphasize that sticking to the text promotes the "linguistic expectations of the regulated" in a way that advances the predictable application of the law.[120] Yet statutes are not the only thing an informed citizen would consult to understand the law. Were an agency to issue guidance, formally or informally, about its prioritization approach, that would equally inform a citizen about what to expect.[121] By contrast, were an agency to be prohibited from prioritizing, that would be more likely to leave a citizen in the dark about what to expect. The agency, unable to prioritize, would try and fail to advance all its mandates, leaving the citizen unsure which ones would be enforced on any given day. As a result, an outsider simply reading the statute books and cataloging the various mandates would develop a mistaken impression of what the government would or could do — and have a far less clear picture than if the agency had been permitted to adopt and share a policy-based approach.

Where the relevant statutory mandate is to provide a benefit, the lack of legal authority to prioritize could generate another unpredictable situation: races to the courthouse. For example, imagine a government grant program — like the FAA's in *Adams* or the BIA's in *Morton* — where funds owed to eligible grantees exceed available resources. All potential beneficiaries would be incentivized to seek urgent judicial relief in the hopes that their claims would be processed first, before funds, available personnel, or other resources ran out.

For the litigants, this imposes significant transaction costs, with litigation expenses effectively deducted from the promised government benefits. In the extreme, it could turn government grant programs into something akin to bankruptcy proceedings, with each individual clamoring to get their claim paid first. Especially as many government benefit programs operate to aid the least well-off, advantaging those with ready access to legal representation could raise serious distributional concerns. The D.C. Circuit raised this issue in the Freedom of Information Act[122] context, declining to enforce a statutory deadline when the agency's failure to comply was due to a resource shortage.[123]

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120 Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2202 (2017).

121 To the extent that audiences matter in how we read statutory text, see generally David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137 (2019), a statute that says an agency "shall" perform an action is obviously directed at the agency itself. By contrast, an implementing regulation that articulates a prioritization approach may be directed at other users of legal information, including regulated parties, agency employees, and regular citizens.

122 5 U.S.C. § 552.

123 *See* Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 615 (D.C. Cir. 1976).

Otherwise, worried the court, "we would soon have a listing based on priority in filing lawsuits."[124]

For the agency, there is also the risk of a small pool of funds generating inconsistent or conflicting judgments, forcing immediate appellate review and generating needless litigation. And these risks go beyond programs that confer a direct benefit. For example, Texas's preferred remedy in its eponymous case was vacatur of the Biden Administration's immigration guidance.[125] If, for example, the guidance was enjoined only within Texas, one could imagine other like-minded states racing to secure court orders requiring DHS to aggressively enforce the immigration laws in their jurisdictions before enforcement personnel and tools became fully committed elsewhere. Ad hoc enforcement, unguided by policy, could thus produce far less predictable outcomes for individuals and regulated parties.

2. Political accountability. — Another common argument for textualism is that its refusal to "rely[] upon unenacted legislative intentions or purposes to alter the meaning of a duly enacted text" properly respects the political branches.[126] "If courts felt free to pave over bumpy statutory texts," they might fail to enforce "legislative compromises essential to a law's passage and, in that way, thwart rather than honor 'the effectuation of congressional intent.'"[127] For example, the Fifth Circuit's opinion in *Texas v. United States*[128] emphasized that the use of "mandatory and precatory terms indicates conscious choices by Congress."[129] Whatever truth that might have as a general matter, cases about resource constraints pose the question not of whether Congress or the Executive should decide but rather whether the courts or the Executive should decide. Since Congress's desired outcome is impossible, a court must instead choose between a judge's text-driven vision or an agency's policy-driven approach.[130] In that context, the textualist impulse to defer to the political

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[124] *Id.* ("We do not think that Congress intended, by fixing a time limitation on agency action and according a right to bring suit when the applicant has not been satisfied within the time limits, to grant an automatic preference by the mere action of filing a case in United States district court.").

[125] *See* United States v. Texas, 143 S. Ct. 1964, 1968 (2023).

[126] Manning, *supra* note 40, at 73.

[127] New Prime Inc. v. Oliveira, 139 S. Ct. 532, 543 (2019) (Gorsuch, J.) (quoting Bd. of Governors of the Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986)).

[128] 40 F.4th 205 (5th Cir. 2022) (denying stay for Texas's DHS nonenforcement challenge, which was subsequently heard by the Supreme Court in United States v. Texas, 143 S. Ct. 1964).

[129] *Id.* at 225.

[130] Some scholars argue that upholding seemingly clear statutory mandates forces Congress to face the political consequences of what it enacts. Under this theory, Congress should not be able to shirk responsibility for lofty statutory aims paired with limited means to achieve them. *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 5, 40–48 (2008) ("[P]ublic choice considerations support the general judicial trend to enforce explicit statutory duties and mandates against agencies even where there could be severe intrusions into the agency's authority to allocate its resources." *Id.* at 5.). This theory applies with equal force to prioritization. While the political blame may be shifted from the legislature to the Executive,

branches should counsel in favor of permitting prioritization. Compared to the judiciary, the agency is "more politically accountable."[131]

Taken together, agencies could reasonably argue that enforcing clear statutory mandates even in the face of resource constraints effectively nullifies a different set of statutory requirements or overreads the text. Especially if presented with two competing statutory interpretations, a court has good reason to prefer prioritization. It is consistent with standard doctrines of judicial deference to agencies, and it upholds many of the underlying principles animating textualism in the first place.

B. Limiting Principles

A truly open-ended grant of agency authority to ignore statutory mandates when they become difficult to implement could risk undermining basic rule of law principles. In *Texas v. United States*, the Fifth Circuit accused DHS of "a disingenuous attempt . . . to claim it acts within the bounds of federal law while practically disregarding that law."[132] The government disputed that accusation, but in its Supreme Court briefing, it claimed that the statutory mandates at issue merely "exhort[ed] the Executive Branch" and that "shall" simply "signals a congressional preference."[133] These claims seem to suggest a potentially cavalier attitude toward statutory text that may well concern textualist-minded lawyers and judges. A few limiting principles might assuage any such concerns.

First and most obviously, the agency must actually face congressionally mandated constraints, either in competing statutory mandates or in enforcing the wide scope of a single mandate.[134] In *Sierra Club v. EPA*,[135] the EPA sought to water down an air-pollution mandate from the Clean Air Act,[136] arguing that the statutory requirement was too difficult to enforce.[137] The D.C. Circuit rejected this argument, holding that the EPA's showing of impossibility fell "far short"[138] in part because

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political backlash to underenforcement of a statute should equally prompt pressure for change regardless of whether underenforcement occurs via planned prioritization or a more random approach.

131 Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring in the judgment) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984)). Scholars have also emphasized the importance of the politically accountable agency being free to set its own priorities. *See* Pierce, *supra* note 5, at 86 ("[R]igid judicial enforcement of deadlines would not and could not induce a resource-starved agency to comply with all statutory deadlines. Instead, it would empower private parties to require the agency to reallocate its resources from tasks the agency considers more important to tasks it considers less important.").

132 Texas v. United States, 40 F.4th at 226.

133 *See* Reply Brief for the Petitioners, *supra* note 32, at 12.

134 For this reason, an agency could not use resource constraints to justify violating a statutory prohibition (for example, "an agency shall not do X"), unless for some reason that negative command was impossible to implement.

135 719 F.2d 436 (D.C. Cir. 1983).

136 42 U.S.C. §§ 7401–7671q.

137 *See Sierra Club*, 719 F. 2d at 463.

138 *Id.*

other choices the agency made during the rulemaking process had increased the administrative burden.[139] Having itself made implementation more difficult, the agency could not subsequently argue that implementation was impossible. Otherwise, any agency could gin up reasons to not enforce a disfavored statute simply by adding onerous requirements of its own making. To borrow a phrase from equity, no one may take advantage of their own wrong.[140]

Admittedly, as *Sierra Club* demonstrates, agencies might find some judicial skepticism about how "impossible" impossible really is. Government departments are complex organizations with many responsibilities, suggesting that an agency could always reallocate resources from other tasks. Yet the D.C. Circuit implicitly answered that objection in *Sierra Club*, judging the impossibility of the task within the four corners of the rulemaking. In other words, the court did not expect the agency to cease performing all other functions not explicitly mandated by statute. Instead, it asked whether the specific congressional command was possible to carry out given the agency's existing constraints and funding levels.[141] Because actions within the rulemaking itself had contributed to the impossibility, it rejected the EPA's arguments.

Second, the agency must genuinely seek to implement the statute: resource constraints cannot be a get-out-of-jail-free card. Courts have articulated this principle in different ways. In *Sierra Club*, it was described as a "good faith" requirement: the court noted that the EPA's supposed difficulties were "mere predictions, rather than conclusions drawn from good faith efforts at enforcement."[142] This would require not just an actual attempt to implement Congress's wishes but also that agencies deploy the full force of their resources to tackle a problem. Applied to the *Morton* case about the BIA's welfare spending, this rule would have held that the BIA could not restrict the pool of eligible beneficiaries while leaving some of Congress's appropriated funds unspent. Likewise, in *United States v. Texas*, it would have required the Biden Administration to demonstrate that all relevant officers were working to enforce the statute as part of the agency's prioritization efforts.

Alternatively, courts have sometimes required prioritization decisions to accord with the statute's stated purpose. In *Dandridge v. Williams*, a case about allocating scarce welfare funds, the Supreme Court held that a state receiving federal grants could cap the per-family benefit, despite statutory language suggesting that the benefit should be linked to the size of the family.[143] While the Court primarily relied on

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[139] *Id.* at 463–64 (noting that "there nevertheless may be less taxing ways to enforce the law" and listing examples, *id.* at 463).

[140] *See, e.g.*, Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232–33 (1959) ("[W]e need look no further than the maxim that no man may take advantage of his own wrong." *Id.* at 232.).

[141] *See Sierra Club*, 719 F.2d at 463–64.

[142] *Id.* at 463.

[143] *See* Dandridge v. Williams, 397 U.S. 471, 476–78 (1970).

the "limitations on state resources" and the "considerable latitude" the statute afforded the state,[144] the opinion also matched the state's approach against the statute's preamble and its articulation of Congress's "wishe[s]."[145] Courts could follow a similar approach with resource-constrained agencies, especially since textualists generally accept written statements of purpose as "permissible indicator[s] of meaning."[146]

Third, the agency must be able to point to genuine resource tradeoffs, not mere political disagreements. That is true even if agencies could permissibly use their policy preferences in determining how to prioritize. Cases that have recognized the role of resource tradeoffs still have made clear that "the President may not decline to follow a statutory mandate or prohibition simply because of policy objections."[147] And in light of skepticism about resource constraints too readily overriding statutory text, courts may look searchingly at agency explanations before granting a reprieve from an otherwise-clear mandate.[148] The D.C. Circuit's administrative necessity doctrine might serve as a model, for it requires that the agency "bear[] the 'heavy burden to demonstrate the existence of an impossibility'"[149] in order "to prevent an agency from shirking its duties by reason of mere difficulty or inconvenience."[150]

Fourth, courts could require that prioritization decisions that run counter to seemingly clear statutory mandates follow a specified process. The Supreme Court took this approach in *Morton*. It held that, even assuming the Secretary could prioritize among recipients of BIA funds, "the determination of eligibility cannot be made on an *ad hoc* basis."[151] Instead, because of the "legitimate expectations" of needy grant recipients, the BIA was required to publish a rule in the Federal Register.[152] To further ensure that prioritization contributes to predictability and clarity for users of the law, courts could also go further and mandate a notice-and-comment process. In that world, because an agency must commence a

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144 *Id.* at 478; *see also id.* at 479 ("Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family.").

145 *Id.* at 478; *see id.* at 478–79.

146 Bittner v. United States, 143 S. Ct. 713, 722 n.6 (2023) (Gorsuch, J.) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 217 (2012)).

147 *In re* Aiken County, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.).

148 This might also raise the question of whether an agency's assertion of resource constraints is pretextual. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) ("We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. . . . Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.))).

149 Am. Hosp. Ass'n v. Price, 867 F.3d 160, 168 (D.C. Cir. 2017) (quoting Ala. Power Co. v. Costle, 636 F.2d 323, 359 (D.C. Cir. 1979)).

150 *Id.*

151 Morton v. Ruiz, 415 U.S. 199, 232 (1974).

152 *Id.* at 236; *see also id.* at 234–36.

new rulemaking and explain itself when it seeks to change its position,[153] a notice-and-comment requirement could guard against dramatic swings between administrations. Such a rule might also have a built-in pro-enforcement bent. Any administration could fully enforce a statute without engaging in a rulemaking; the burden would be on a future administration seeking to underenforce via prioritization to justify the departure.

Lastly, the final check on agency prioritization decisions is Congress. Any attempt to deviate from or otherwise underenforce a statutory mandate would be subject to congressional override. If Congress does not approve of a given prioritization strategy, it could choose to provide additional resources, narrow the statutory mandate, or simply articulate a prioritization methodology of its own. Alternatively, Congress could explicitly clarify that a given mandate is unconditional. In that circumstance, an agency would be hard-pressed to convince a court that it had nevertheless been explicitly or implicitly granted discretion.

CONCLUSION

Today, few statutes contain language that addresses the potential constraints that agencies face. Instead, Congress readily and freely enacts seemingly simple statutory mandates without providing the necessary resources to enforce them. That trend seems unlikely to go away in an era of strained budgets and competing demands for resources. As a result, agencies will have to find a way to reconcile their authorizing statutes with the practical realities that they face. This Note has sought to outline how an agency could reasonably defend, on textualist grounds, its choice to prioritize among competing statutory requirements.

When an agency cannot achieve what either Congress or all regulated parties wish for it to do, the only question remaining is what the agency can, or should, do instead. That dilemma — facing DHS in *United States v. Texas*, the FAA in *Adams*, the BIA in *Morton*, and undoubtedly countless other agencies in similar situations — offers a choice between literalism and pragmatism. Justice White once commented that "one cannot ask [an] agency to do the impossible."[154] More recently, and perhaps echoing Justice White, Justice Alito offered two Terms ago that "no one suggests that DHS must do the impossible."[155] It remains to be seen, however, just what that commitment entails. And, perhaps more importantly, it remains to be seen how the Court will reconcile that pragmatism with its commitment to textualism.

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[153] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." (citing United States v. Nixon, 418 U.S. 683, 696 (1974))).

[154] NLRB v. Savair Mfg. Co., 414 U.S. 270, 289 (1973) (White, J., dissenting).

[155] Biden v. Texas, 142 S. Ct. 2528, 2550 (2022) (Alito, J., dissenting).