NOTES

MISSED STATUTORY DEADLINES AND MISSING AGENCY RESOURCES: REVIVING HISTORICAL MANDAMUS DOCTRINE

*Bobby Kim**

Agency delay has become a chronic issue in administrative law. As Congress increasingly relies on reducing appropriations to implement its agenda, agencies have shouldered the conflicting burdens of meeting preexisting statutory deadlines for agency action, while also adhering to their newly reduced budgets. The result has been delayed agency action across a broad range of policy areas, such as environmental protection, health care, and economic policy.

These delays have spurred suits seeking issuance of the writ of mandamus to enforce statutory deadlines. In adjudicating these suits, courts must navigate the tensions between the clear text of the statute, the recognition that agency resources are necessary to fulfill statutory obligations, and the presumption of judicial deference to agency decisionmaking about how to use those resources. But courts have often issued mandamus to enforce these deadlines, notwithstanding the inability of agencies to meet them. Such enforcement potentially undercuts agency prioritization and expertise, and typically is ineffective at speeding agency action.

This Note argues that early to mid-twentieth-century mandamus doctrine, codified by the Administrative Procedure Act and based in principles of equity, could resolve these tensions. Courts applying the mandamus doctrine during this period considered the goals of effective governance and public administration when determining whether to issue the extraordinary writ of mandamus. Incorporating these considerations into contemporary mandamus doctrine has its challenges. But the historical perspective may encourage greater judicial restraint when issuing mandamus would have harmful public effects.

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INTRODUCTION

Suppose Congress passes a broad statute intended to resolve an imminent and challenging social problem—whether it be environmental protection, healthcare, or economic growth.[1] As per its usual practice, Congress delegates authority to an agency to implement and enforce the

1. All three areas have been subject to litigation or public scrutiny over missed deadlines. See, e.g., Cumberland Cnty. Hosp. Sys., Inc. v. Burwell, 816 F.3d 48, 49–50 (4th Cir. 2016) (Medicare reimbursement); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1169–70 (9th Cir. 2002) (endangered species designation); Forest Guardians v. Babbitt, 174 F.3d 1178, 1181–84 (10th Cir. 1999) (critical habitat designation); In re Barr Lab'ys, Inc., 930 F.2d 72, 73 (D.C. Cir. 1991) (generic drug approval); In re Ctr. for Auto Safety, 793 F.2d 1346, 1347–48 (D.C. Cir. 1986) (fuel economy standards); Sarah N. Lynch, Emails Suggest SEC's Schapiro Delayed JOBS Act Rule Amid Concerns About Legacy, Chi. Trib. (Dec. 1, 2012), https://www.chicagotribune.com/news/ct-xpm-2012-12-01-sns-rt-us-sec-schapirobre8b100v-20121201-story.html [https://perma.cc/38PZ-WK26] (small-to-midsize business growth); infra note 54 (listing additional environmental cases).

statute. Seeking to ensure that the agency meets its legislative goals, Congress inserts numerous clear and unambiguous deadlines throughout the statute for subsequent agency action. However, election season passes, and the new Congress does not share the ambitions of the prior Congress. Rather than undertake the more politically challenging task of repealing or amending the statute, the new Congress decides to drastically reduce appropriations to the agency, while still appropriating barebones funding that allows the agency to function on a much more reduced level. No longer able to meet its original deadlines, the agency is beset by suits from various interested entities. The suits, under the Administrative Procedure Act (APA)[2] and other statutes, seek writs of mandamus against the agency to enforce the deadlines.[3]

This fact pattern is not merely hypothetical; it represents a constant source of agency litigation.[4] Courts face unique challenges in resolving these suits due to the conflicting pressures of adherence to ostensibly clear textual deadlines, deference to an agency's management of its own resources, and recognition that resource constraints reduce agency capabilities.[5] Moreover, although the harm emerges from a lack of congressional appropriations, Congress is traditionally not an appropriate or necessary party to such suits, and courts thus cannot direct remedies toward Congress. As a result, the doctrine of mandamus in such cases has become muddled, with courts increasingly enforcing deadlines on underresourced agencies.[6] Such enforcement generates significant social costs by diverting resources from other high-priority issues, producing hastily promulgated and ineffective rules, and incentivizing unnecessary agency action and maneuvering.[7]

This Note argues that early to mid-twentieth-century mandamus doctrine—codified by the APA and the All Writs Act—provides a basis for courts to *not* issue mandamus, notwithstanding the presence of a statutory deadline. Part I describes the prevalence of agency delay and its policy challenges, particularly for courts tasked with enforcing such deadlines. It then describes current mandamus doctrine, dealing with such situations

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2. 5 U.S.C. § 706(1) (2018) (providing that courts have the power to compel agency action that has been "unlawfully withheld or unreasonably delayed").

3. Black's Law Dictionary defines mandamus as "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu[ally] to correct a prior action or failure to act." Black's Law Dictionary (11th ed. 2019).

4. See supra note 1 (citing instances of agency delay litigation in environmental protection and healthcare contexts).

5. See, e.g., Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 712–13 (D.C. Cir. 1975) (describing how manpower shortages could justify agency delay). For subsequent constraints on the applicability of *Train*, see infra notes 67–84 and accompanying text.

6. See infra section I.B (exploring the longstanding circuit split on whether courts must issue mandamus if agency action is "unlawfully withheld" or "unreasonably delayed" under APA § 706(1) and the availability of an impossibility defense).

7. See infra section I.A.2 (discussing the empirical literature on the ineffectiveness of deadline enforcement).

both inside and outside the context of the APA. Importantly, circuits have split on whether and how to exercise discretion over the issuance of writs of mandamus, with courts generally providing less consideration to equitable concerns, such as effective governance and public administration. Following the discussion of the contemporary context, Part II describes key insights from historical mandamus doctrine concerning the scope of the mandamus inquiry, judicial interpretations of statutory duties, and the relevance of the doctrine in light of the APA. Finally, Part III analyzes two potential ways in which these doctrines could address the deadline conundrum, while noting potential concerns they might raise. It then argues that courts ought to reassert extant principles of effective governance, public administration, and avoidance of "useless" agency action to adjudicate such suits.

I. THE CURRENT STATE OF AGENCY DELAY AND MANDAMUS DOCTRINE

This Part tracks the current state of agency delays, the costs of enforcing deadlines, and the contemporaneous development of mandamus doctrine for these issues. Such litigation pertaining to agency delay in the face of readily ascertainable statutory deadlines will likely become more commonplace, in part due to looming and ongoing deadlines within "command-and-control" congressional statutes, agency recalcitrance to enforce statutes, and general principal–agent dysfunction within Congress's delegation of authority to agencies.[8] This dysfunction is most evident when Congress fails to provide resources and political support.[9] Courts have struggled to craft responsive doctrines that manage these tensions, often choosing to enforce deadlines that reallocate agency resources from higher-priority tasks and incentivize rushed agency decisionmaking.

A. *The Prevalence and Challenges of Agency Delay*

Missed deadlines for agency action due to congressional inaction or dysfunction pose unique challenges for administrative law. This section first focuses on subsequent judicial enforcement of statutory deadlines, with a spotlight on agency delays arising from a lack of congressional appropriations. Next, this section describes some of the questionable maneuvering by agencies that simultaneously face clear statutory

8. See Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 Geo. Mason L. Rev. 501, 529–30 (2015) (describing how statutory deadlines, the relics of historical "command-and-control enthusiasms" of Congress, will likely produce more agency delay cases due to changes in Congress and administrations).

9. See Richard J. Pierce, Jr., Judicial Review of Agency Actions in a Period of Diminishing Agency Resources, 49 Admin. L. Rev. 61, 84 (1997) ("As the gap between assigned missions and appropriated resources increases in the future, courts will confront a variety of similar dilemmas with respect to enforcement of statutory action deadlines in an increasing number of contexts.").

deadlines from an enacting Congress, yet are hamstrung by drastic underfunding for those mandates by a subsequent Congress.

1. *The Rationales for Agency Delay.* — While agency delay has become a relatively common feature of the contemporary administrative state,[10] the undergirding rationales and mechanisms of delay vary.[11] In some cases, newly elected presidential administrations seek to fulfill political promises by undoing or postponing the work of prior administrations.[12] These new administrations may leverage various tools for delaying administrative action, such as executive orders, regulatory action, and budget requests, among others.[13] In other instances, administrative delay arises from agencies or regulated entities themselves through mismanagement, reprioritization, or agency capture.[14] Finally, agencies might purposefully stall or inadvertently delay certain tasks due to a lack of cultivated expertise, agency "drift" over time, or internal policy disagreements.[15]

Alternatively, Congress may act as a dysfunctional principal. This dysfunction is especially apparent when Congress fails to appropriate the necessary funds for agencies to meet statutory obligations and often coincides with a corresponding decline in congressional support for the agency, its activities, or the administration.[16] In these cases, a subsequent

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10. See Jacob E. Gersen & Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev. 923, 927 (2008) ("[D]elay is an increasingly prominent fixture in administrative law.").

11. See Sharece Thrower, Regulatory Delay Across Administrations, Brookings Inst. (July 10, 2019), https://www.brookings.edu/research/regulatory-delay-across-administrations [https://perma.cc/36HL-6LT5] (describing how the Bush, Obama, and Trump Administrations sought to postpone rules that were finalized by their predecessors).

12. Id.; see also Roundup: Trump-Era Agency Policy in the Courts, Inst. for Pol'y Integrity, https://policyintegrity.org/deregulation-roundup [https://perma.cc/56GW-JAUM] (last updated Apr. 1, 2021) (tracking litigation over regulatory action during the Trump Administration, including undue delays).

13. See Michael D. Sant'Ambrogio, Agency Delays: How a Principal–Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging, 79 Geo. Wash. L. Rev. 1381, 1390–98 (2011) (illustrating how the President can delay implementation of regulations through executive oversight via department heads); Thrower, supra note 11 (describing efforts by the Bush, Obama, and Trump Administrations to delay the implementation of agency rules).

14. Sant'Ambrogio, supra note 13, at 1393–98 (describing these and other sources of agency delay); see also Anthony M. Bertelli & Kathleen M. Doherty, Setting the Regulatory Agenda: Statutory Deadlines, Delay, and Responsiveness, 79 Pub. Admin. Rev. 710, 711 (2019) (arguing that "agency leaders map deadlines onto *political* as well as *calendar* time" and that strategic public managers "may permit a delay in calendar days but promulgate rules by key electoral events").

15. See Sant'Ambrogio, supra note 13, at 1393 (identifying internal agency disagreement as one source of delay); see also Kenneth A. Shepsle, Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey, 8 J.L. Econ. & Org. 111, 113–15 (1992) (describing how "[a]n act of Congress is not carved in granite" and that bureaucratic, legislative, or presidential preferences may drift from the enacted statute over time).

16. See Sant'Ambrogio, supra note 13, at 1398 ("[S]ome delays . . . are caused in whole or in part by the failure of Congress to appropriate sufficient funds to get the job done.").

Congress may not share the ambitions of the original enacting Congress, and may seek to withhold resources from the agency rather than undertake the difficult task of repealing or amending the underlying statute.[17] Such "disappropriation," spanning a broad range of hot-button issues,[18] has become more prevalent over the last four decades with the resurgence of antiregulatory sentiment seeking to curtail the administrative state.[19] As a result, cutting appropriations funding has become a prominent tool for obstructing legislative goals and signaling congressional intent.[20] In light of these trends, judicial deliberation over cases involving statutory mandates from an enacting Congress,[21] subsequent reduced appropriations, and ensuing litigation over mandamus are likely to become more common.[22]

2. *The Costs of Deadlines.* — As an inflexible congressional "command-and-control" enforcement mechanism, statutory deadlines—and judicial enforcement of them—can impose numerous social costs. Interspersed throughout the U.S. Code,[23] such deadlines potentially generate: (1) wasted resources from unnecessary agency action and subsequent litigation, (2) resource misallocation by preventing agencies from pursuing projects with greater importance or immediacy, and (3) resource inefficiencies by inducing agencies to hastily produce ineffective or ill-

17. See Gersen & O'Connell, supra note 10, at 936–37 ("The future legislature can always repeal or alter the program, but once regulations have been implemented, some form of status quo bias may make it marginally harder to eliminate them—especially during periods of divided government."); Sant'Ambrogio, supra note 13, at 1398 ("[R]ather than attempt to repeal or significantly amend the underlying statute, [the current Congress] may prefer to let the program wither on the vine by cutting the agency's funding.").

18. See Matthew B. Lawrence, Disappropriation, 120 Colum. L. Rev. 1, 24–39 (2020) (defining "disappropriation" as the "legislative failure to appropriate funds necessary to honor a government commitment in time to honor that commitment" and outlining examples arising from tribal contract support, the Affordable Care Act's cost-sharing reduction payments and risk corridor program, and the Children's Health Insurance Program).

19. See Gillian E. Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 2–4, 51–52 (2017) (noting the reemergence of "political and judicial attacks on national administrative government" and analogizing to opposition to the New Deal).

20. See Eugenia Froedge Toma, Congressional Influence and the Supreme Court: The Budget as a Signaling Device, 20 J. Legal Stud. 131, 131 (1991) ("Congress can use the budget as a device for signaling its own preferences and for rewarding or penalizing the agencies for their activities.").

21. See Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Admin. L. Rev. 171, 172 n.1 (1987) [hereinafter Abbott, The Case Against Deadlines] (tracing the rise of statutory deadlines in part back to environmental statutes passed in the 1970s).

22. See supra notes 8–9 and accompanying text.

23. See Greve & Parrish, supra note 8, at 530 (describing the prevalence of and rationales for deadline commands in statutes).

advised rules.[24] Courts have attempted to craft doctrines that acknowledge these concerns, as evidenced by the general understanding in administrative law that agencies are typically best positioned to manage their resources and that courts ought to defer to agency decisionmaking on those questions.[25] When courts instead enforce congressional deadlines, agencies tend to forego notice-and-comment procedures or engage in rushed rulemaking that inadequately gathers and assesses important information.[26] Empirical studies also conclude that such deadlines fail to deliver benefits in speeding regulatory action that outweigh the associated social costs.[27] Although Congress may include deadlines to communicate its legislative priorities, agency officials and courts often struggle to interpret these signals.[28]

Expansive judicial enforcement of such deadlines may also fail to ensure that the right political branches are accountable for the failures of agencies. In this respect, strict enforcement of statutory deadlines through litigation contributes to the perception of poor performance by agencies.[29] While this may lead to appropriate scrutiny of agencies if they are performing poorly due to their own volition, their mismanagement, or regulatory capture, such enforcement misses the mark when Congress acts as a dysfunctional principal by failing to appropriate the necessary

24. See Alden F. Abbott, Case Studies on the Costs of Federal Statutory and Judicial Deadlines, 39 Admin. L. Rev. 467, 487 (1987) (finding "no evidence that statutory deadlines proved beneficial" and referencing examples of "wasted resource costs," "resource misallocation costs," and "regulatory inefficiency costs" (internal quotation marks omitted)); see also Abbott, The Case Against Deadlines, supra note 21, at 186–200 (discussing waste, misallocation, and inefficiency costs in the context of EPA and OSHA statutory deadlines); Bertelli & Doherty, supra note 14, at 710–13 (describing how deadlines can lead to low-quality rules by limiting "the amount of time for information seeking, consultation and deliberation on a rule").

25. See, e.g., Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 527 (2007) (noting that an agency has "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities"); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.").

26. See Gersen & O'Connell, supra note 10, at 956 ("Deadlines impose significant constraints on agency resources, and, therefore, agencies often forego notice and comment rulemaking . . . for deadline-driven actions.").

27. Id. at 945–49 (noting that the effect of deadlines on speeding agency action was "relatively modest," suggesting that other sources of institutional variation likely affect the implementation of deadlines).

28. See, e.g., Sierra Club v. Thomas, 828 F.2d 783, 789–92, 797–99 (D.C. Cir. 1987) (demonstrating an approach for determining nondiscretionary duties and prioritization from statutory deadlines); see also Abbott, The Case Against Deadlines, supra note 21, at 180–01, 190, 200–04 (illustrating examples of how too many deadlines or impossible-to-meet deadlines undermine prioritization and arguing for alternatives to statutory deadlines, such as requiring agencies to set nonbinding deadlines or "normal" periods of time, statements of goals, or "recommendatory" guidelines).

29. See Pierce, supra note 9, at 88 ("[R]igid adherence to demanding administrative law doctrines . . . will contribute significantly to both the reality and the perception of poor performance by underfunded agencies.").

resources to achieve statutory goals. Enforcement of statutory deadlines in this context may shift blame from Congress to the agencies, providing a misleading picture to the public on which branch—Legislative or Executive—should be accountable for agency failure.[30]

Two cases illustrate how agencies with inadequate resources have maneuvered to address impending deadlines, with questionable policy and legal results. The first example involved outright modification of the duty required by the plain text of the statute. In this instance, Congress provided insufficient funding to the EPA to meet its deadlines for permitting requirements under the Clean Air Act (CAA).[31] In response to these deadlines, the EPA promulgated rules, known collectively as the "Tailoring Rule," that contradicted the plain text of the statute in order to reduce their permitting obligations and thus meet the deadline for action.[32] The Supreme Court eventually struck down this "Tailoring Rule" in *Utility Air Regulatory Group v. EPA*, holding that it deviated from the unambiguous intent of Congress expressed in the CAA.[33]

The second example involved agency "collusion" with Congress to abandon the statutory duty through even greater reductions in administrative resources. In this case, Congress imposed deadlines upon the Fish and Wildlife Service (FWS) under the Endangered Species Act.[34] After initial disappropriation, FWS explicitly asked Congress to cap its funding, believing that would provide a better defense against potential lawsuits seeking to enforce unattainable deadlines.[35] Although the parties to subsequent litigation eventually settled, the outcome demonstrates the potential for holdout problems through multiparty litigation over missed deadlines, and how such holdout problems generate perverse incentives for agencies seeking to shore up their legal defenses.[36]

These examples illustrate the untenable options for agencies facing unachievable statutory deadlines. Such agencies can attempt to modify the duty itself, as in the case of the Tailoring Rule. Alternatively, agencies may attempt to shore up their legal defenses by requesting that Congress decrease their appropriations, thus abandoning their duties even further.

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30. See Kirti Datla, Note, The Tailoring Rule: Mending the Conflict Between Plain Text and Agency Resource Constraints, 86 N.Y.U. L. Rev. 1989, 2022 (2011) (describing the problem of Congress enacting statutes that cause the agencies to fail, the President blaming Congress for the lack of resources, and the ensuing outcome in which "[t]he public has no actor to hold accountable").

31. 42 U.S.C. §§ 7401–7671q (2018).

32. See Greve & Parrish, supra note 8, at 511–16 (describing analogous responses of agencies seeking to "rewrite" a particular statute); Datla, supra note 30, at 1989 (describing the Tailoring Rule).

33. 573 U.S. 302, 325–28 (2014).

34. 16 U.S.C. § 1533(b) (2018).

35. See Datla, supra note 30, at 1990–91.

36. Id. at 1990 n.7 ("The FWS experience, which involved only two major parties, makes it clear that there is a potential for a holdout problem that would only increase as the number of parties challenging an agency increases.").

Finally, agencies can attempt to follow the statute in good faith and likely face litigation anyway.[37] Regardless, these all represent problematic outcomes, particularly given the prevalence of citizen suit provisions in statutes and the ability to seek judicial review under the APA.[38] While citizen suits can be a useful tool for compelling agency action in the face of agency intransigence or bad faith behavior, the use of citizen suits in these situations may exacerbate the deadline challenge, allow private parties to determine agency priorities,[39] and deprioritize the political engagement necessary for ensuring that Congress acts as a functional principal.[40]

B. *The Inconsistency of Contemporary Mandamus Doctrine*

The case law on mandamus in these contexts is divided, reflecting the broader challenge within administrative law of dealing with agency delay.[41] This section will describe the current state of mandamus doctrine in two contexts: (1) the APA and (2) the resource-based "impossibility" defense to failing to meet statutory deadlines. In recent cases, courts issued writs of mandamus even when Congress, as the principal, failed to provide adequate funding to meet statutory duties by the deadline.[42] Courts, however, have historically engaged in a more searching inquiry on

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37. See infra section I.B.

38. For examples of citizen suit provisions, see, e.g., 5 U.S.C. § 702 (2018) (APA); 33 U.S.C. § 1365 (2018) (Clean Water Act); 42 U.S.C. § 6972 (2018) (Resource Conservation and Recovery Act); id. § 7604 (CAA).

39. See Pierce, supra note 9, at 82 (describing how forced compliance through citizen suits "empowers private parties to use the courts to force an agency to reallocate its resources from tasks the agency considers more important").

40. A well-funded agency can have advantages over citizen enforcement. See Mark Seidenfeld & Janna Satz Nugent, "The Friendship of the People": Citizen Participation in Environmental Enforcement, 73 Geo. Wash. L. Rev. 269, 289 (2005) (concluding that citizen enforcers are "constrained by their need to justify their actions to those who provide them with money").

41. See Eric Biber, The Importance of Resource Allocation in Administrative Law, 60 Admin. L. Rev. 1, 10–13 (2008) (describing the general incoherence of the approach of courts in adjudicating agency delay actions); 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, 348 (2013) ("The issue [of resource allocation] remains marked by inconsistencies in the courts, and scholars have noted that academia has also failed to provide helpful guidance."); see also supra note 1 (citing cases on missed deadlines in various agency areas).

42. See, e.g., In re Aiken County, 725 F.3d 255, 266–67 (D.C. Cir. 2013) (holding that the U.S. Nuclear Regulatory Commission had to continue its licensing process, even when the appropriated funds were orders of magnitude insufficient to complete the process); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1176–77, 1180 (9th Cir. 2002) (enforcing strict deadlines for the U.S. Department of the Interior and FWS even when appropriations cuts had contributed to delay).

whether a writ of mandamus is warranted.[43] The contemporary issuance of mandamus remains inconsistent, illustrating the need for a doctrinal approach that is faithful to congressional intent, appropriately assigns responsibility to the political branches, and avoids detrimental policy outcomes from forcing drastically underfunded agency action.

1. *The* TRAC *Factors and* Forest Guardians *Court Split.* — One example of messy doctrine with respect to issuing mandamus over agency delays arises in a longstanding court split over the meaning of APA § 706(1). For context, APA § 706 provides the scope of review for courts reviewing agency action.[44] In contrast to APA § 706(2), which reviews agency *action*,[45] APA § 706(1) reviews agency *inaction* by providing that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed."[46] Congress, in enacting APA § 706, intended to codify those doctrines pertaining to judicial review of agencies at the time of the APA's enactment.[47]

The first test for applying APA § 706(1), articulated by the Tenth Circuit in *Forest Guardians v. Babbitt*, states that courts lack discretion to *not* order an agency to act as per its obligations under the controlling statute if the court finds that such actions are "unlawfully withheld."[48] The courts applying this test have held that the failure to meet a clear statutory dead-

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43. See, e.g., United States ex rel. Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 232 (D.C. Cir. 1936) (finding that issuance of mandamus would require agencies to do a "useless thing").

44. 5 U.S.C. § 706 (2018).

45. Id. § 706(2).

46. Id. § 706(1). Although the APA does not define or distinguish "unlawfully withheld" from "unreasonably delayed," courts have adopted a variety of approaches to discern the meaning of the two provisions, reflecting in part the court split between the *TRAC* factors and the *Forest Guardians* analysis. See infra note 49 and accompanying text.

47. The Attorney General's Manual on the Administrative Procedure Act (Manual) conveys the understanding of the drafters that the APA codified mandamus doctrine concerning agencies. Under its description of the "Scope of Review", the Manual describes how "[o]rders in the nature of a writ of mandamus have been employed to compel an administrative agency to act . . . . Clause (A) of section 10(e) was apparently intended to codify these judicial functions." U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947) (citations omitted). The Supreme Court has described the Manual as a "contemporaneous interpretation . . . given some deference by this Court because of the role played by the Department of Justice in drafting the legislation." Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978). Perhaps less helpfully, a Report on the APA from the Senate Committee on the Judiciary noted that § 706(1) "declares the existing law concerning judicial review." S. Rep. No. 752, at 229–30 (1945); cf. Carol R. Misskoff, Note, Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act, 55 Geo. Wash. L. Rev. 635, 636–42 (1986) (arguing for a particular understanding of mandamus under APA § 706(1) from the cases cited in the Manual).

48. 174 F.3d 1178, 1189–90 (10th Cir. 1999) (articulating the bright-line interpretation in APA § 706(1) for court-ordered mandamus in cases involving missed deadlines).

line constitutes an action "unlawfully withheld," rather than "unreasonably delayed."[49] Moreover, the Tenth Circuit held that the word "shall" in APA § 706(1) constrains the discretion of the court.[50] In *Forest Guardians*, the court found that the Department of the Interior failed to comply with a "mandatory, non-discretionary duty unambiguously imposed by the [Endangered Species Act],"[51] and thus, the action was "unlawfully withheld."[52] Therefore, APA § 706(1) required the court to issue mandamus once it had determined that the Department of the Interior had "unlawfully withheld" an action required under the statute.[53] Numerous courts outside the Tenth Circuit have adopted the *Forest Guardians* approach.[54]

The D.C. Circuit's decision in *In re Barr Laboratories, Inc.*[55] provides the second approach by focusing instead on the context surrounding administrative inaction. This case formalized the factors from *Telecommunications Research & Action Center v. FCC* (*TRAC*)[56] for determining whether mandamus on agencies is appropriate to compel agency action that has been "unreasonably delayed" under APA § 706(1).[57] The six *TRAC* factors are: (1) that the time agencies took to make decisions must be governed by a "rule of reason"; (2) if Congress has provided a timetable or other indication of the speed by which it expects the agency to proceed, that such statutory scheme may supply content for this rule of reason; (3) whether human health and welfare are at stake; (4) the effect of expediting delayed action on agency activities of a higher or competing

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49. See, e.g., id. at 1190 ("[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts . . . must compel the agency to act."); W. Rangeland Conservation Ass'n v. Zinke, 265 F. Supp. 3d 1267, 1277 (D. Utah 2017) (citing *Forest Guardians* and arguing that the terms "unlawfully withheld" and "unreasonably delayed" are "mutually exclusive"); South Carolina v. United States, 243 F. Supp. 3d 673, 685–86 (D.S.C. 2017), aff'd, 907 F.3d 742 (4th Cir. 2018) (noting that "the distinction between . . . 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action" and that the presence of such a deadline eliminates judicial discretion).

50. *Forest Guardians*, 174 F.3d at 1187–89.

51. Id. at 1181.

52. Id. at 1191 ("When an agency fails to meet a concrete statutory deadline, it has unlawfully withheld agency action.").

53. Id. at 1193 ("[T]he Secretary violated his non-discretionary duty by failing to designate the critical habitat for the Rio Grande silvery minnow by the statutory deadline . . . . [T]he Secretary unlawfully withheld agency action here, and we are required by § 706 to compel the Secretary to act.").

54. See, e.g., Oxfam Am., Inc. v. U.S. Sec. & Exch. Comm'n, 126 F. Supp. 3d 168, 172–76 (D. Mass. 2015); W. Watersheds Project v. Foss, No. CV 04-168-MHW, 2006 WL 2868846, at *3 (D. Idaho Oct. 5, 2006); Butte Env't Council v. White, 145 F. Supp. 2d 1180, 1184–85 (E.D. Cal. 2001); Ctr. for Biological Diversity v. Badgley, No. 00-1045-KI, 2000 WL 1513812, at *2 (D. Or. Oct. 11, 2000).

55. 930 F.2d 72 (D.C. Cir. 1991).

56. 750 F.2d 70, 80 (D.C. Cir. 1984).

57. *Barr Lab'ys*, 930 F.2d at 74–75.

priority; (5) the nature and extent of the interests prejudiced by delay; and (6) that there is no need for any impropriety lurking behind agency lassitude in order for the court to hold that agency action is "unreasonably delayed."[58]

In contrast to the heavy reliance in *Forest Guardians* on the use of "shall" in APA § 706(1),[59] the *Barr Laboratories* approach noted that "respect for the autonomy and comparative institutional advantage of the executive branch" warranted caution when issuing "equitable relief, particularly mandamus" that overrides an agency's choice of priorities.[60] Moreover, by utilizing the *TRAC* factors, the *Barr Laboratories* multifactor standard characterizes the case of missed statutory deadlines as "unreasonably delayed" action under APA § 706(1),[61] rather than describe it, as in the *Forest Guardians* test, as "unlawfully withheld."[62] The *Barr Laboratories* approach thus preserves discretion for a court determining whether to issue mandamus.[63]

Interestingly, some of those courts that follow the *Forest Guardians* interpretation have subsequently appealed to the "agency resources" defense as a reason to deny the issuance of mandamus, despite the purportedly clear textual mandate of "shall" in APA § 706(1).[64] This subsequent development reveals the internal tension of courts that adhere

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58. Id.

59. Forest Guardians v. Babbitt, 174 F.3d 1178, 1187–89 (10th Cir. 1999).

60. *Barr Lab'ys*, 930 F.2d at 74. *Barr Laboratories* did not explicitly discuss the APA; its only linkage was through its citation of the *TRAC* factors. Still, *Barr Laboratories* could find additional support in the APA through, for example, the presence of 5 U.S.C. § 702, which provides that "[n]othing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702 (2018). In fact, the District Court for D.C. had relied on this provision to moderate the *Forest Guardians* view, albeit in a case that did not explicitly draw from *Barr Laboratories* and was eventually vacated. See Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 118–19 (D.D.C. 2002), vacated sub nom. Ctr. for Biological Diversity v. England, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003).

61. *Barr Lab'ys*, 930 F.2d at 74–75.

62. *Forest Guardians*, 174 F.3d at 1190–91.

63. See Eric Biber, Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction, 26 Va. Env't L.J. 461, 499 n.152 (2008) [hereinafter Biber, Two Sides of the Same Coin] (noting the distinction in discretion between the *Barr Laboratories* and the *Forest Guardians* approaches).

64. See W. Rangeland Conservation Ass'n v. Zinke, 265 F. Supp. 3d 1267, 1294 n.23 (D. Utah 2017) (recharacterizing *Forest Guardians* by noting that, while "the Tenth Circuit has rejected *Barr Laboratories*' application of the 'limited resources' defense . . . , the court believes that the Tenth Circuit would not oppose the consideration of limited agency resources in evaluating the preliminary inquiry of the reasonableness of agency delay"). Here, the court cited Qwest Communications International, Inc. v. FCC, 398 F.3d 1222 (10th Cir. 2005), which was notably a case about judicially imposed deadlines, not statutory deadlines. 398 F.3d at 1238–39; see also Biber, Two Sides of the Same Coin, supra note 63, at 499 n.152 (arguing that the distinction between the two standards may be "mostly of theoretical import" given exceptions in the *Forest Guardians* interpretation for the lack of agency resources).

to the *Forest Guardians* approach, which disaggregates discretionary considerations associated with mandamus doctrine from the APA § 706(1) inquiry. Beyond illustrating the muddled nature of mandamus in the context of the APA,[65] the doctrinal confusion and inconsistency of the *Forest Guardians* interpretation of APA § 706(1) demonstrates how agency resource considerations cast a long shadow on the mandamus inquiry, even when the statutory right is textually evident and unambiguous. This further highlights the need for courts to distinguish between cases in which agencies fail to meet statutory obligations due to subsequent congressional inaction and those instances in which the agencies themselves are to blame for inaction.[66]

2. *The Impossibility Defense.* — Case law concerning resource-based defenses to mandamus is similarly confusing. There is little guidance on whether to allow such a defense if Congress denies the agency sufficient resources to comply with deadlines.[67] Because statutes rarely give permission to agencies or courts to modify statutory deadlines,[68] and because statutes usually do not describe what should happen if an agency misses a deadline,[69] courts have attempted to craft doctrines that define remedies in these cases.

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65. For additional discussion of the confusing treatment of *Forest Guardians* in the Ninth Circuit, see South Carolina v. United States, 243 F. Supp. 3d 673, 687 (D.S.C. 2017), aff'd, 907 F.3d 742 (4th Cir. 2018) (noting that the Ninth Circuit had initially found that no *TRAC* factors are required or permitted once the statute had set a deadline for the agency to take a nondiscretionary action). The Ninth Circuit, however, has also provided that a "statutory violation does not always lead to the automatic issuance of an injunction." Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1176–78 (9th Cir. 2002). Courts have subsequently interpreted *Badgley* to suggest that courts have some latitude to consider equitable considerations despite clear textual mandates. See Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d 965, 970–71 (N.D. Cal. 2013); Ctr. for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143, 1159–60 (N.D. Cal. 2002).

66. Courts should hesitate to grant a resource-based defense outside the context of deficient congressional appropriations due to the perverse incentive it might create for agencies to reallocate funds to create their own resource deficiencies. See supra notes 34–36 and accompanying text.

67. See Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 712–13 (D.C. Cir. 1975) ("Should the Administrator conclude that manpower . . . constraints threaten to delay guidelines . . . , he may attempt to demonstrate to the courts that such conditions require an extension of the deadline . . . ."). For the interaction of the impossibility defense with the APA provisions noted above, see *Forest Guardians*, 174 F.3d at 1192–93 (noting that the interpretation of the APA under the *Forest Guardians* approach eliminates consideration of the impossibility defense, except at a contempt proceeding).

68. There are some exceptions, such as the Freedom of Information Act. See 5 U.S.C. § 552(a)(6) (2018) (providing courts equitable discretion to allow additional time for the agency to meet its deadlines). These provisions have been termed "escape clauses." See Abbott, The Case Against Deadlines, supra note 21, at 177–78 & n.28 (describing time-period statutes that may contain escape clauses).

69. See Gersen & O'Connell, supra note 10, at 964 ("Most statutes that impose deadlines are silent about what should happen if the agency misses the deadline.").

One oft-cited and controversial case in this respect is the decision of the D.C. Circuit in *Natural Resources Defense Council, Inc. v. Train* in 1974.[70] The Natural Resources Defense Council (NRDC) brought a citizen suit against the EPA to enforce the publication of effluent limitation guidelines required under § 304(b)(1)(A) of the Federal Water Pollution Control Act[71] after the EPA missed its deadline for promulgation.[72] The court upheld the district court's decision to incorporate a separate timetable with its decree enforcing publication of the guidelines and determined that it "constituted a reasonable step to facilitate supervision of the decree and to assure early efforts by the delinquent defendant toward eventual discharge of its statutory responsibility."[73] Of particular significance to this Note, however, the court determined that budgetary and manpower limitations, as well as technological challenges, could persuade the court to extend such deadlines beyond the timeline provided in the statute.[74] The court stated that it could equitably exercise its discretion to "give or withhold its mandate in furtherance of the public interest"[75] and that the court should not enforce an order that requires the agency to perform an "impossibility."[76]

Subsequent courts, hesitant to flout seemingly clear statutory mandates, have extensively distinguished comparable cases from *Train*. They have added numerous additional conditions, such as requiring that the agency show it is undertaking "utmost diligence,"[77] that such discretion be curtailed if the "deadline . . . has long since passed,"[78] that the agencies "strictly" comply in "good faith" with the statutory mandate,[79] and that the court not mandate "flat guidelines of its own."[80] Thus, while *Train*, and the associated defense of impossibility, potentially allowed courts to exercise equitable discretion for determining whether agencies are required to meet statutory deadlines while they are hamstrung by

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70. 510 F.2d 692.

71. 33 U.S.C. § 1314 (2018).

72. *Train*, 510 F.2d at 695–97.

73. Id. at 704.

74. Id. at 713 ("Should the Administrator conclude that manpower or methodological constraints threaten to delay guidelines for particular categories beyond December 31, he may attempt to demonstrate to the courts that such conditions require an extension of the deadline for specific categories.").

75. Id.

76. Id. (internal quotation marks omitted) (quoting Maggio v. Zeitz, 333 U.S. 56, 69 (1948)).

77. Sierra Club v. Thomas, 658 F. Supp. 165, 170–71, 171 n.5 (N.D. Cal. 1987) (internal quotation marks omitted) (quoting *Train*, 510 F.2d at 713).

78. Mo. Coal. for the Env't v. Env't Prot. Agency, No. 4:04 CV 00660 ERW, 2005 WL 2234579, at *2 (E.D. Mo. Sept. 14, 2005) (holding that a deadline for a nondiscretionary task that was several decades overdue sufficiently distinguished *Train*).

79. See New York v. Gorsuch, 554 F. Supp. 1060, 1065 n.4 (S.D.N.Y. 1983).

80. Env't Def. Fund v. Thomas, 627 F. Supp. 566, 569–70 (D.D.C. 1986) (citing *Train*, 510 F.2d at 712–13).

deficient resources, courts typically are loath to recognize impossibility as a defense.[81] If courts grant the defense, they offer a variety of remedies, such as allowing agencies to craft their own deadlines subject to court approval or imposing external deadlines.[82] Finally, following *Train*, the D.C. Circuit distinguished discretionary and nondiscretionary duties from deadlines. The court explained that, unlike inferred deadlines, explicit or "readily-ascertained" deadlines may create a nondiscretionary duty as a clear expression of congressional intent.[83] But this presumption is not necessarily always evident, particularly in the context of multiple subsequent acts of Congress.[84]

Thus, courts have often issued mandamus on agencies, seeking to vindicate statutory rights even when those agencies lack adequate resources from Congress. One example is *In re Aiken County*, in which the D.C. Circuit issued a writ of mandamus to the Nuclear Regulatory Commission (NRC) to continue processing its licensing application from the Department of Energy (DOE) for the Yucca Mountain nuclear waste storage site as per its obligations under the Nuclear Waste Policy Act of 1982,[85] even when appropriations—admitted in earnest by both sides of the dispute—were inadequate by an order of magnitude to complete the licensing process.[86] Then-Judge Kavanaugh reasoned in the decision that "agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a project," holding that there was a legal obligation to continue the licensing process.[87] He concluded that the court had "no good choice but to grant the petition for a writ of mandamus"[88] and emphasized potential separation of powers concerns if the Executive Branch could disregard federal law.[89] The majority further noted that courts may force federal agencies to undertake their duties after multiple warnings from the court.[90] For the

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81. See Gersen & O'Connell, supra note 10, at 965–66 ("Courts . . . appear to exercise this [*Train*] authority rarely.").

82. See Sant'Ambrogio, supra note 13, at 1430–32 (describing the various remedies and their effectiveness).

83. Sierra Club v. Thomas, 828 F.2d 783, 787–92 (D.C. Cir. 1987).

84. See supra section I.A.

85. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101–10270 (2018)).

86. 725 F.3d 255, 266–67 (D.C. Cir. 2013) (issuing the writ of mandamus to the Nuclear Regulatory Commission to continue licensing the Yucca Mountain repository even when all parties agreed that $11 million, the total amount remaining, was wholly inadequate to fulfill the statutory duty); id. at 269 (Garland, C.J., dissenting); see generally Recent Case, In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013), 127 Harv. L. Rev. 1033 (2014) (summarizing *In re Aiken County* and criticizing its approach for overbroad constitutional rhetoric).

87. *In re Aiken County*, 725 F.3d at 259.

88. Id. at 266.

89. Id. at 267.

90. Id. at 267 n.12 ("[T]he Court's majority clearly warned that mandamus would eventually have to be granted if the Commission did not act or if Congress did not change

majority, the warnings aligned the case with the exception in *Barr Laboratories* allowing mandamus in cases of "bad faith" and "utter indifference" by agencies,[91] even though Congress had consistently defunded the Yucca Mountain project since the emergence of the litigation.[92]

Chief Judge Merrick Garland, in his dissent, argued that the court should not issue mandamus requiring the agency to "do a useless thing."[93] He further noted the stark difference between the budget request of approximately $99 million for FY2010 and the $11 million remaining in available funds,[94] and that completing the Yucca Mountain project itself was estimated to cost approximately $50 billion after the licensing phase.[95] The amicus brief from the United States also showed that DOE originally estimated the licensing proceedings to cost approximately $14 million *per month*.[96] Finally, Congress had completely zeroed out funding for the Yucca Mountain project for DOE, the license applicant carrying the burden of proof on the application.[97] Some of the costs for DOE included testimony from over one hundred scientific and technical experts just for the first portion of the licensing proceeding.[98] Ironically, mandamus to continue NRC proceedings thus might have the opposite effect intended by the plaintiffs, resulting in the potential denial of the license application due to limited DOE resources—a potent illustration of the social costs of strict deadline enforcement.[99] Chief Judge Garland concluded that granting mandamus "amounts to little more than ordering the Commission to spend part of those funds unpacking its boxes, and the remainder packing them up again."[100]

In re Aiken County generated significant criticism in the legal literature.[101] These criticisms largely align with prior criticisms of judicial

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the law. . . . [T]he case has by now proceeded to the point where mandamus appropriately must be granted.").

91. Id. (citing In re Barr Lab'ys, Inc., 930 F.2d 72, 76 (D.C. Cir. 1991)).

92. See Richard Harris, Obama Cuts Funds to Nuclear Waste Repository, NPR (Mar. 11, 2009), https://www.npr.org/templates/story/story.php?storyId=101689489 [https://perma.cc/KXZ3-UTKW] (describing the proposed cuts at the beginning of the Obama Administration to the Yucca Mountain waste site).

93. *In re Aiken County*, 725 F.3d at 268–69 (Garland, C.J., dissenting) (citing United States ex rel. Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 232 (D.C. Cir. 1936)).

94. Id. at 269.

95. Id. at 269 n.3.

96. Brief of the United States as Amicus Curiae, Submitted on Invitation of the Court at 6, *In re Aiken County*, 725 F.3d 255, (No. 11-1271), 2012 WL 2366805.

97. *In re Aiken County*, 725 F.3d at 269 n.3 (Garland, C.J., dissenting).

98. Id.

99. Brief of the United States as Amicus Curiae, Submitted on Invitation of the Court, supra note 96, at 8–9.

100. *In re Aiken County*, 725 F.3d at 270 (Garland, C.J., dissenting).

101. See, e.g., Greve & Parrish, supra note 8, at 528–31; Kyle M. Asher, Note, Judicial Review of Agency Delays Caused by a Lack of Appropriations: The Yucca Two-Step, 2015

enforcement of statutory deadlines, including the waste of regulatory resources and undermining agency prioritization, among others.[102] More specifically, the case illustrates the problematic results of strictly treating "readily-ascertained" deadlines as sources of mandamus liability for agencies. In this case, an agency had to continue a licensing process that the licensing applicant had insufficient funding to pursue. *In re Aiken County* also potentially illustrates how an overly narrow textualist focus on statutory rights (as exhibited in the analysis by then-Judge Kavanaugh),[103] in contrast to a broader purposive and pragmatic assessment, can lead to dysfunctional results.

II. THE HISTORICAL ROOTS AND APPLICATION OF MANDAMUS DOCTRINE

Established mandamus jurisprudence certainly did not foreordain the outcome in *In re Aiken County*. Indeed, the history of mandamus doctrine suggests a much greater range of discretion by courts than has been reflected in modern mandamus suits. To support this claim, section II.A first describes the history of mandamus doctrine, noting its early roots in both English and American jurisprudence, up to its development in the Marshall Court in the United States. Section II.B then traces the subsequent evolution of mandamus case law from the Taney Court onward, describing some of the longstanding doctrinal trends that carried forward until the early twentieth century. It shows how the extraordinary writ of mandamus imposed unique demands on the judiciary and how various statutes governing the interaction between courts and the administrative state codified such doctrine.

A. *Early Foundations*

The early history of mandamus doctrine, prior to its adoption and development in the United States during the eighteenth and early nineteenth centuries, evolved from ad hoc confusion to relative clarity.[104] Sir

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Mich. St. L. Rev. 371, 385–87, 413–14; Kupfer, supra note 41, at 358–59; Recent Case, supra note 86, at 1037 (criticizing the decision for overbroad use of separation of powers rhetoric).

102. See Greve & Parrish, supra note 8, at 530 (describing the issuance of mandamus as "unsatisfying"); Kupfer, supra note 41, at 353–55 (noting the possibility of additional ramifications on other priorities of the NRC).

103. See *In re Aiken County*, 725 F.3d at 257–61 (outlining the textual basis for the deadline and the doctrinal basis for enforcing the duty).

104. See Edith G. Henderson, Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century 140 (1963) ("In the first quarter of the eighteenth century it could not yet be said that the law of mandamus was a coherent whole."); Howard W. Brill, The Citizen's Relief Against Inactive Federal Officials: Case Studies in Mandamus, Actions "In the Nature of Mandamus," and Mandatory Injunctions, 16 Akron L. Rev. 339, 349–51 (1983) (describing how mandamus at the beginning of the eighteenth century was not yet fully developed and that a "comprehensive theory of mandamus was not articulated until the middle of the century"); Leonard S. Goodman, Mandamus in the Colonies—The Rise of the Superintending Power of American Courts, 1

William Blackstone, in his *Commentaries on the Laws of England*, stated that the writ of mandamus was rooted in a command from the king to control "any person, corporation, or inferior court," requiring them to do some particular action pertaining to their office and duty consonant with ensuring "right and justice."[105] Originally, the writ was purely a prerogative of the king for preserving peace in the kingdom and was issued at the will of the sovereign.[106] Although the historical origins of the writ of mandamus in early English common law courts are contested,[107] most scholars trace its maturation and "high-water mark"[108] to *James Bagg's Case*, in which the King's Bench issued the writ to restore an individual to municipal office.[109] Eventually, English courts expanded the writ to order officials to carry out additional duties, sometimes without clear logic or reasoning for its extension.[110] These cases involved religious appointments, the execution of wills, colleges, and the restoration to office, among other diverse subjects.[111]

During this period, Lords Coke, Holt, and Mansfield developed the jurisprudence of control over administrative officials. In part, Holt and Mansfield were responding to the lack of effective governance arising from the aftermath of the English Civil War, continued religious strife, and the

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Am. J. Legal Hist. 308, 311 n.13 (1957) (describing the general indiscriminate use of the term "mandamus" in colonial courts).

105. 3 William Blackstone, Commentaries *110. The *Commentaries* by William Blackstone were influential in early American case law and cited frequently by Chief Justice Marshall, including in the seminal first case pertaining to mandamus, *Marbury v. Madison*. See 5 U.S. (1 Cranch) 137, 163–69 (1803).

106. Brill, supra note 104, at 351.

107. See Richard E. Flint, The Evolving Standard for the Granting of Mandamus Relief in the Texas Supreme Court: One More "Mile Marker down the Road of No Return", 39 St. Mary's L.J. 3, 10 n.22 (2007) (summarizing the debate over whether the mandamus power came from the Magna Carta or *James Bagg's Case*).

108. See Allen Dillard Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 B.C. L. Rev. 43, 81 (1997); see also Flint, supra note 107, at 10 n.22 (listing scholarly articles that agree on the origin of mandamus doctrine).

109. (1615) 77 Eng. Rep. 1271, 1272; 11 Co. Rep. 93 b, 94 a (KB). The most pertinent excerpt from *James Bagg's Case* flagging the expansive nature of the writ was when Lord Coke provided that:

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

Id. at 1277–78; 11 Co. Rep. at 98 a (citation omitted).

110. Henderson, supra note 104, at 127–42 (describing how mandamus doctrine eventually developed into a series of "otherwise completely baffling cases in which mandamus is used in new fact situations without any articulate *ratio decidendi*").

111. Id.

Stuart–Parliament struggle.[112] Eventually, certain strains of contemporary mandamus doctrine began to emerge in the eighteenth century, with cases such as *The Queen v. Heathcote* laying the foundation for the principle that mandamus would not be issued if there was another remedy[113] and *Rex v. Barker*[114] holding that, if a person is dispossessed of a right to a service, the court ought to issue mandamus upon reasons of "justice . . . and public policy, to preserve peace, order, and good government."[115] In contrast with recent doctrinal trends that narrowly focus on the vindication of statutory rights, early mandamus doctrine had a distinctly *public* orientation, reflected in an inquiry that issued mandamus when doing so would preserve then-prevalent ideals of good governance.

In its development in the United States, state and federal courts largely mirrored the English common law[116] and used mandamus to control administrative, corporate, and judicial activity.[117] Although the writ was accessible to plaintiffs from the early years of the United States, it was and continues to be characterized by its "extraordinary" nature, used only when traditional remedies do not provide adequate relief.[118] Some of the most common examples in the early history of the mandamus exhibited its distinctly public nature. These cases included instructing an inferior court to hear a case or perform other tasks, directing private corporations to carry out their responsibilities to the public, and providing a remedy for public interests undermined by administrative action.[119]

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112. See Harold Weintraub, English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus, 9 N.Y.L.F. 478, 493–94 (1963) (describing how, after Coke, the "later moulders of common law, Holt and Mansfield" refined mandamus through the Stuart–Parliament struggle).

113. (1712) 88 Eng. Rep. 620, 623; 10 Mod 48, 54–56 (QB). This principle was later fully clarified in The King v. Bank of Eng., (1780) 99 Eng. Rep. 334; 2 Dougl. 525 (KB), in which the court denied mandamus because there was a remedy already that provided "complete satisfaction equivalent" to that of mandamus. Id. at 335; 2 Dougl. at 526.

114. (1762) 97 Eng. Rep. 823; 3 Burr 1265 (KB).

115. Id. at 824; 3 Burr at 1266.

116. See Goodman, supra note 104, at 311 n.13 (charting the colloquial uses of "mandamus" in the colonial period); see also Samuel Slaughter Merrill, Law of Mandamus 3 (1892) ("The states of the American Union have adopted the English common law, but generally of a period when the writ of *mandamus* had been but little used, and the principles . . . had not been formulated.").

117. See Frank H. Sloss, Mandamus in the Supreme Court Since the Judiciary Act of 1925, 46 Harv. L. Rev. 91, 91 (1932) (noting how early state and federal courts used mandamus to control administrative, corporate, and judicial action).

118. See, e.g., Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (describing a writ of mandamus as a "drastic and extraordinary" remedy "reserved for really extraordinary causes" (internal quotation marks omitted) (quoting Ex Parte Fahey, 332 U.S. 258, 259–60 (1947))).

119. See Brill, supra note 104, at 351 (describing the various early cases involving mandamus).

The history of mandamus review in the Supreme Court of the United States began with the seminal case of *Marbury v. Madison*.[120] Although President John Adams had appointed William Marbury to the position of Justice of the Peace of the District of Columbia, Adams's successor, President Thomas Jefferson, refused to deliver Marbury's commission or recognize him as a legitimate officeholder. Marbury brought an action under Section 13 of the Judiciary Act of 1789, petitioning the Court to issue a writ of mandamus for his appointment.[121] Chief Justice Marshall noted that the Judiciary Act of 1789 conferred upon the Court the power to issue writs of mandamus, but he declared this section unconstitutional for authorizing a proceeding that exceeded the grant of original jurisdiction in Article III of the Constitution.[122] Thus, the Court was unable to exercise jurisdiction over Marbury's claim.[123]

Among its many outcomes, *Marbury* established the distinction between ministerial and discretionary duties in U.S. mandamus jurisprudence. More specifically, federal courts, if duly authorized by statute, could compel the Secretary of State via mandamus to engage in particular ministerial duties,[124] but as an "agent[] of the executive," in a policymaking capacity, the Secretary of State would not be liable to mandamus.[125] This categorization of ministerial and discretionary duties has long since become a key element of the mandamus inquiry, with duties arising from statutory deadlines being no exception.[126]

The Court further expounded upon the distinction between ministerial and discretionary duties in *Kendall v. United States ex rel. Stokes*.[127] There, the petitioners sought certain credits and allowances for transporting the government's mail, pursuant to contracts that they had signed with the former Postmaster General.[128] Following a dispute with a subsequent Postmaster General over the payment amounts, Congress passed a private bill directing the solicitor of the Department of Treasury to resolve the dispute through an audit and ordering the Postmaster General to comply with the findings.[129] After the solicitor determined the results in favor of the petitioners, the Postmaster General nonetheless

120. 5 U.S. (1 Cranch) 137 (1803).

121. Id. at 154–55.

122. Id. at 174–80.

123. Id.

124. Id. at 164–71 (providing that such duties exist when the officer is "directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid").

125. Id. at 166 (stating that, if agents of the executive merely "act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable").

126. See supra note 83 and accompanying text.

127. 37 U.S. (12 Pet.) 524 (1838).

128. Id. at 608–09.

129. Id.

refused to comply, prompting the petitioners to seek the issuance of mandamus. The Supreme Court affirmed the holding of the Circuit Court of D.C. to issue mandamus, finding that the duty was purely ministerial and that there were no other means for compelling performance of the duty.[130]

These two cases established some of the limited precedents by which the Court determined how to issue mandamus. Scholars have described these initial mandamus cases under the Marshall Court as an "interventionist tide,"[131] with *Kendall* as the "high-water mark for Chief Justice Marshall's robust vision of mandamus review."[132] Although the distinction between ministerial and discretionary duties would endure, subsequent courts would further shape mandamus doctrine in a manner suggesting broader deference to executive action and a more searching consideration of equities.

B. *Nineteenth- and Early Twentieth-Century Mandamus Jurisprudence*

During the nineteenth and early twentieth centuries, the interventionist tide largely receded, reflecting the special nature of mandamus as an extraordinary writ that required more searching review. Mandamus cases in the Supreme Court from the beginning of the Taney Court until the passage of the APA tended to characterize the duties at issue on the discretionary end of the ministerial–discretionary spectrum.[133] This section describes two means by which courts emphasized the unique and equitable nature of the writ. The first approach was judicial deference to executive interpretation of ambiguous statutes, which courts deemed to be a discretionary act. The second approach was an evaluation of the "usefulness" of issuing mandamus, which courts grounded in broader principles of effective governance and public purpose.

1. *Executive Discretion in Statutory Interpretation.* — The first case during this period that could reveal insights for the statutory deadline conundrum is *Decatur v. Paulding*.[134] Bearing some similarity to the challenge of interpreting multiple actions by Congress with respect to agency duties, *Decatur* involved two separate pension provisions enacted by Congress (albeit on the same date), both of which could have provided

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130. See id. at 614 ("There is no room for the exercise of any discretion, official or otherwise: all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act.").

131. Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908, 951 (2017).

132. Id. at 950.

133. See Louisiana v. McAdoo, 234 U.S. 627, 634 (1914) (describing the cases up until the instant case in terms of the ministerial and discretionary distinction, with the ministerial cases being *Marbury*, *Kendall*, and United States v. Schurz, 102 U.S. 378 (1880)).

134. 39 U.S. (14 Pet.) 497 (1840).

a pension to the widow of Stephen Decatur, a naval officer killed in action. The issue was whether the widow could recover from both provisions.[135]

Chief Justice Taney held that determining which pension provision to utilize was a discretionary duty.[136] In his reasoning, he described how executive officials were continually exercising judgment and discretion in "expounding the laws and resolutions of Congress."[137] The Court further reasoned that, although it was not bound to accept the interpretation of the official, the nature of mandamus—which, at the time, also incorporated a jurisdictional question prior to the codification of federal question jurisdiction—denied the Court that ability when the law had granted the Secretary the authority to exercise discretion to disburse funds.[138] *Decatur* did not overturn *Kendall* but instead distinguished the case, noting that the act at issue in *Kendall* was entirely ministerial, or "required to be done by the head of an executive department."[139] In contrast, the determination of the appropriate pension provision was within the discretion of the officer, who had to "exercise[] his judgment upon the construction of the law" while managing the pension fund.[140]

The Court's review for ambiguity, as an indicator of the line between mandatory and discretionary executive action, would continue to characterize mandamus cases after *Decatur*. Consider the Court's decision in *Gaines v. Thompson* in 1868.[141] Even though *Gaines* pertained to a writ of injunction, the case nonetheless drew heavily from mandamus case law and reaffirmed the lessons of *Decatur*.[142] There, the Court again encountered a situation in which the validity of the plaintiff's land interests depended on "the careful consideration and construction of more than one act of Congress,"[143] and the Court concluded that interpretation of those provisions was "far from being a ministerial act under any definition given by this court."[144] Other cases during this period confirm that the act of interpretation itself implied an intrinsic discretionary function.[145]

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135. Id. at 513–14.

136. Id. at 515.

137. Id.

138. Id. at 515–16.

139. Id. at 516–17.

140. Id. at 515–16.

141. 74 U.S. (7 Wall.) 347 (1868).

142. See John Dickinson, Administrative Justice and the Supremacy of Law in the United States 65 n.82 (1927) (describing *Gaines* as a legacy of *Decatur,* embodying the "Jeffersonian doctrine that the principle of separation of powers forbids judicial interference with the duties of the other departments by means of mandamus").

143. *Gaines*, 74 U.S. (7 Wall.) at 353.

144. Id.

145. See, e.g., United States v. Raum, 135 U.S. 200, 204–05 (1890) (describing deference to executive interpretation of the law); United States ex rel. Dunlap v. Black, 128 U.S. 40, 48 (1888) ("The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law . . . .").

The writ of mandamus demanded its own deference,[146] and the late Justice Scalia argued that these early mandamus cases provided the basis for judicial deference to agency interpretations of statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[147] The implication of the inquiry in the mandamus context was that courts should treat the resultant duty as discretionary, rather than mandatory, if the statute was ambiguous in light of the totality of congressional action. This approach plausibly provides a basis for judicial deference to the executive in mandamus suits over deadlines, particularly when subsequent congressional action renders such deadlines ambiguous as to whether they are ministerial or discretionary.

2. *Effective Governance, Purpose, and "Usefulness".* — During this period, mandamus jurisprudence turned distinctly equitable in nature, such that clear statutory rights gave way to equitable principles rooted in ideals of governance and public administration.[148] This focus on equitable principles expanded the mandamus inquiry, resulting in a more purposive and searching analysis. In part, this approach reflected the reticence of courts to issue mandamus[149] due to its unique history as an extraordinary writ.[150] Although the court would initially ask whether the right at issue was "peradventure clear,"[151] the court would retain the discretion to determine whether granting mandamus would comport with the purpose of the statute and broader notions of effective government.

Thus, even if the right at issue was textually committed, courts would not order mandamus if it would be in violation of the "spirit" of the

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146. See Bamzai, supra note 131, at 947–48 ("[T]he standard [of review] was a function of the writ used—and the remedy sought—rather than the interpretive theory that the Court was applying.").

147. 467 U.S. 837 (1984). Justice Scalia likened *Chevron* deference to early mandamus case law. See Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 111–12 (2015) (Scalia, J., concurring) ("[T]he rule of *Chevron* . . . was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.'" (quoting United States v. Mead Corp., 533 U.S. 218, 243 (2001) (Scalia, J., dissenting))). But see Bamzai, supra note 131, at 947 (arguing that early mandamus case law was instead meant to distinguish between the standard for obtaining the writ and the standard for cases brought without the writ).

148. See, e.g., Arant v. Lane, 249 U.S. 367, 371 (1919) (noting that mandamus is not issued as a matter of right, but in the exercise of equitable principles, and concluding that sound public policy prevented issuance of mandamus in that instance); Louisiana v. McAdoo, 234 U.S. 627, 632 (1914) (refusing mandamus on the basis that the action affects a discretionary duty and would "clog the wheels of government"); United States ex rel. Redfield v. Windom, 137 U.S. 636, 644 (1891) (describing case law denying mandamus of even a "purely ministerial act" if it will "affect the rights of persons who are not parties thereto").

149. See supra note 118 and accompanying text.

150. See supra section II.A.

151. United States ex rel. Chi. Great W. R.R. Co. v. Interstate Com. Comm'n, 294 U.S. 50, 63 (1935).

statute.[152] Consider the case of *Duncan Townsite Co. v. Lane*, decided by the Supreme Court in 1917. The case concerned a fraudulent certificate pertaining to an allotment of land under the Choctaw–Chikasaw agreement of July 1, 1902.[153] The relator, unaware of the fraud, had purchased the certificate and insisted upon its associated statutory rights, which provided that such certificates were "conclusive evidence of the right of any allottee to the tract of land described therein."[154] There, the Court not only cabined this provision through nontextualist interpretation,[155] but more importantly noted that mandamus "issues to remedy a wrong, not to promote one" and "not to direct an act which will work a public or private mischief or will be *within the strict letter of the law but in disregard of its spirit*."[156] Lower courts, particularly the D.C. Circuit, further expounded this discretionary and equitable principle for decades after *Duncan Townsite Co.*[157] Such a purposive lens lies in stark contrast with textualist approaches to statutory interpretation[158] and demonstrates that a narrow focus on the vindication of legal rights, absent consideration of equity, deviates from the principles of mandamus doctrine at the time of the passage of the APA. Early mandamus case law within the states,[159] which directly shaped federal mandamus doctrine,[160] also found that the existence of a formal right would give way if it did not comport with the purposive ends of the statute.[161]

Twentieth-century mandamus case law on the "usefulness" of a mandamus action demonstrated that courts also considered broader effects on

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152. Duncan Townsite Co. v. Lane, 245 U.S. 308, 312 (1917).

153. Id. at 309–11.

154. Id. at 311 (citing Agreement Between the United States and the Choctaws and Chickasaws, Pub. L. No. 57-228, § 23, 32 Stat. 641, 644 (1902)).

155. Id.

156. Id. at 311–12 (emphasis added).

157. See, e.g., United States ex rel. Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 232 (D.C. Cir. 1936) (noting that, while mandamus is a legal remedy, its issuance is based on equitable principles); United States ex rel. June v. Hines, 61 F.2d 676, 677 (D.C. Cir. 1932) (same); Wilbur v. United States ex rel. Barton, 46 F.2d 217, 221 (D.C. Cir. 1930) (same).

158. See, e.g., Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 24–28 (2012) (describing the early history and influence of textualism); Diarmuid F. O'Scannlain, "We Are All Textualists Now": The Legacy of Justice Antonin Scalia, 91 St. John's L. Rev. 303, 304–09 (2017) (describing the rise of textualism).

159. For a broad picture of the numerous equities considered in state mandamus cases in the late nineteenth century, see generally Merrill, supra note 116.

160. See, e.g., *Duncan Townsite Co.*, 245 U.S. at 312 n.1 (citing case law from New York, Pennsylvania, and Michigan to demonstrate that mandamus is governed by equitable principles).

161. See, e.g., State ex rel. McBride v. Phillips Cnty. Comm'rs, 26 Kan. 419, 425 (1881) (denying mandamus related to reordering an election for the relocation of a county seat because it would contravene the spirit of the law); State ex rel. Shiver v. Comptroller Gen., 4 S.C. 185, 228–33 (1873) (arguing that mandamus should be denied if it has harmful public effects).

governance and the public purpose in their mandamus inquiry.[162] *Duncan Townsite Co.* and similar subsequent case law defined mandamus doctrine until the passage of the APA in 1946.[163] According to this strain of cases, a clear textual right was insufficient for mandamus; plaintiffs also had to demonstrate that the action would provide cognizable benefits beyond mere redress of symbolic grievances and that mandamus would not undermine effective public administration.[164] Courts, under this mandamus doctrine, engaged in a more searching inquiry into the public nature of issuing mandamus beyond the redress of statutory rights.

Thus, if the effects of mandamus were voidable, either through the discretionary judgment of the agency or because necessary components for the remedy were absent,[165] then courts would hesitate to issue the writ because doing so would be "useless." If issuance of mandamus might have harmful public effects, either by interfering with agency processes or impairing the rights of third parties,[166] courts would similarly be reticent to issue mandamus.

One historical counterargument to this narrative, however, lies in the notion that issuance of mandamus was traditionally a power of the courts of common law and not the courts of chancery, which possessed equity jurisdiction.[167] While this characterization is indeed accurate, certain writs like mandamus became more equity-like in the United States during the turn of the twentieth century, particularly in the postbellum period.[168] This

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162. For examples of this inquiry with respect to mandamus over agencies, see, e.g., United States ex rel. Turner v. Fisher, 222 U.S. 204, 209 (1911) (noting that mandamus on the Secretary of the Interior would be a "useless thing"); *Ickes*, 84 F.2d at 232 (denying a writ of mandamus for the Secretary of the Interior to approve a permit for property rights when a state court had denied rights to the water at issue); United States ex rel. Palmer v. Lapp, 244 F. 377, 380 (6th Cir. 1917) (denying a writ of mandamus against an appointing officer because the effects of the writ would have been "fruitless" due to the officer's discretionary ability to avoid its effects). This inquiry was also evident in cases involving supervisory mandamus over lower courts. See, e.g., Phillips v. McCauley, 92 F.2d 790, 791 (9th Cir. 1937) (holding that a writ of mandamus on a lower court to evaluate a writ of habeas corpus would be "useless" if the lower court would have to deny the writ anyway); Boulder v. Lewis, 21 F.2d 910, 912 (8th Cir. 1927) (denying a writ of mandamus seeking to compel a judge to grant an appeal by the city pertaining to property interests due to the court's inability to grant relief); In re Welch Mfg. Co., 201 F. 519, 520 (1st Cir. 1913) (denying a writ of mandamus seeking to compel the district court to direct answers from one of the witnesses because such evidence would inevitably be struck on appeal).

163. See supra notes 148, 157, and 162.

164. See supra notes 148, 162.

165. See supra note 162.

166. See supra notes 148, 157, and 161.

167. See Goodman, supra note 104, at 308 (describing the role of mandamus in early common law courts).

168. For an extensive study of this transformation, see James E. Pfander & Jacob P. Wentzel, The Common Law Origins of *Ex Parte Young*, 72 Stan. L. Rev. 1269, 1318–33 (2020) (describing the "absorption of the common law" by equitable remedies). The culmination was best encapsulated by the Supreme Court in Duncan Townsite Co. v. Lane, 245 U.S. 308

transformation began in state courts first utilizing equitable injunctive relief to make up for the jurisdictional deficiencies of mandamus actions in the antebellum period, before the two lines of jurisprudence—equitable injunctions and the common law writ of mandamus—began to overlap with one another.[169] Similarly, the "usefulness" inquiry also continued in a transsubstantive manner in state courts before and after the passage of the APA.[170] This early history of mandamus in both state and federal courts eventually culminated in cases such as *Duncan Townsite Co.* and several other Supreme Court cases involving administrative action,[171] reflecting a merger of common law and equity that was broader than mere mandamus jurisprudence.[172]

3. *Relevance of the Doctrine.* — Mandamus doctrine following the "early years" of mandamus did not lose relevance with the initial codification of the modern All Writs Act in 1911, the APA in 1946, or the Mandamus and Venue Act in 1962.[173] The initial codification of the All Writs Act of 1911[174]

(1917), when the Court stated that, "[a]lthough classed as a legal remedy, [the] issuance [of mandamus] is largely controlled by equitable principles." Id. at 312.

169. See Pfander & Wentzel, supra note 168, at 1319–24 (noting that state courts used injunctive relief expansively in an equitable manner in the mid-nineteenth-century antebellum period to cover gaps in otherwise traditional mandamus relief and that federal courts soon followed in that trend).

170. The areas of state law pertaining to a "usefulness" or "futility" inquiry on mandamus span a broad range of areas, including criminal law, election law, property law, city administration, and the judiciary. In other words, the issuance of mandamus was not a subject-matter-specific action but was transsubstantive. See, e.g., Wilson v. Blake, 147 P. 129, 130 (Cal. 1915) (canvassing election results); People ex rel. Molchan v. City Council of Streator, 101 N.E. 599, 599 (Ill. 1913) (bar licensing); Ziegler v. Brown, 63 N.W.2d 677, 680 (Mich. 1954) (property condemnation); Quandt v. Schwass, 282 N.W. 206, 209 (Mich. 1938) (city council resolution); State ex rel. Cranfill v. Smith, 48 S.W.2d 891, 892 (Mo. 1932) (railway condemnation); In re Lindgren, 133 N.E. 353, 353 (N.Y. 1921) (inclusion of ballot nominees); State ex rel. Killeen Realty Co. v. City of E. Cleveland, 160 N.E.2d 1, 4 (Ohio 1959) (building permit); Rhodes v. McDonald, 172 S.W.2d 972, 972 (Tex. 1943) (certification of dissenting opinion); State ex rel. Close v. Meehan, 302 P.2d 194, 198 (Wash. 1956) (city ordinance); State ex rel. Bothell v. Woody, 156 P. 534, 535 (Wash. 1916) (town ordinance).

171. Early inklings of this mixed approach began to appear in the Supreme Court in the postbellum period, albeit not as explicitly as in *Duncan Townsite Co.* See, e.g., Litchfield v. Reg. & Receiver, 76 U.S. (9 Wall.) 575, 577 (1870) (characterizing the ability of courts to use either mandamus or injunctions to enforce the duties of executive officers); see also Pfander & Wentzel, supra note 168, at 1328–29 (describing the growing "interchangeability of legal and equitable remedies," including how *Gaines* reflected that overlap).

172. Pfander & Wentzel, supra note 168, at 1318–33 (describing the relationship of equity to the writs of certiorari, mandamus, and prohibition).

173. In *Norton v. Southern Utah Wilderness Alliance*, Justice Scalia noted that both the All Writs Act and the APA inherited the traditions of mandamus practice. 542 U.S. 55, 63 (2004) ("In this regard the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. § 1651(a).").

174. 28 U.S.C. § 1651 (2018). The short text of the provision states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and

reaffirmed mandamus doctrine.[175] Importantly, the APA codified the state of mandamus doctrine at the time of its passage.[176] Similarly, the Court has interpreted the Mandamus and Venue Act, which provided jurisdiction to the district courts to compel officers of the United States to perform their duties, as an explicit codification of mandamus doctrine.[177] These statutes did not, for the most part, modify the background principles of the writ of mandamus.[178] Rather, the statutes and their later exposition by the Court suggest that the doctrine in section II.B should weigh heavily on contemporary mandamus analysis.

A pragmatic approach also comports with many of the principles driving administrative law at the time of the APA's enactment. During the drafting and passage of the APA, New Deal Progressivism had fomented judicial deference to the institutional expertise and complexity of the administrative state, albeit with some resistance.[179] Statutory interpretation correspondingly shifted from textualism to a more pragmatic and purposive bent,[180] which manifested throughout administrative law, including case law pertaining to mandamus of agency action.[181] If the APA sought to codify doctrines of mandamus prevalent at the time, then it codified bodies of case law reflecting a pragmatic approach toward the writ.

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principles of law." Id. § 1651(a). Note, however, that mandamus actions of reviewing courts are distinguishable from "actions in the nature of mandamus," which are provided to district courts through the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361. That short statute provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Id.

175. See Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81 (2004) (describing the codification of the writ).

176. See *Norton*, 542 U.S. at 63; supra note 47.

177. Heckler v. Ringer, 466 U.S. 602, 616–17 (1984) ("The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty.").

178. One exception may be in the interpretation of APA § 706(1) and the debate over a court's discretion to issue mandamus. See supra section I.B.1.

179. See, e.g., Martin Shapiro, APA: Past, Present, Future, 72 Va. L. Rev. 447, 447–54 (1986) (describing the early progressivism that gave rise to the passage of the APA and how judicial oversight over agencies was initially constrained).

180. See Nicholas R. Parrillo, Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950, 123 Yale L.J. 266, 271–72, 276–80 (2013) (describing the growth in the use of legislative history in courts throughout the 1940s); Robert J. Pushaw, Jr., Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation, 51 Ga. L. Rev. 121, 133–56 (2016) (outlining the general history in the use of textualism versus purposivism).

181. See supra section II.B.2.

III. PRAGMATIC APPROACHES TOWARD MANDAMUS

Given the potential growth in litigation over missed deadlines arising from resource constraints, mandamus doctrine should accommodate greater analytical flexibility and pragmatism to avoid misallocating resources, forcing hastily written rules and regulations, and incentivizing redundant agency action. This section analyzes two potential routes for doing so: (1) by interpreting deadlines as *aspirational*, and thus discretionary, in light of subsequent congressionally imposed resource constraints and (2) by reviewing the "usefulness" and public character of issuing mandamus. While historical mandamus jurisprudence could support both approaches, a deeper inquiry of the usefulness of mandamus, and its effect on governance and public equities, is more promising than interpreting deadlines differently.

Section III.A describes the "aspirational deadline" approach, noting that it is not wholly foreign to administrative law. It then describes indicators of an "aspirational" deadline, ultimately acknowledging that such an approach is neither normatively desirable nor doctrinally adequate for addressing the problem of missed deadlines due to insufficient resources. Section III.B describes the "usefulness" inquiry of mandamus jurisprudence and its distinctly public character. Such an approach would provide greater discretion to courts evaluating whether to issue the writ.

A. *Aspirational Deadlines*

One possibility for building more flexibility into mandamus doctrine and alleviating the social costs of imprudently enforcing deadlines is to simply interpret deadlines as "aspirational" in light of subsequent congressional action. While this might help resolve some of the policy problems from deadline enforcement, it may also tread too far from legislative intent. The following section explores the doctrinal basis for interpreting deadlines as "aspirational" and the merits of this approach.

1. *The Background of Aspirational Deadlines.* — The concept of "aspirational deadlines" is not foreign to administrative law. Indeed, parties have litigated the question of whether certain deadlines are "aspirational" in cases seeking to determine the legal effects of agency actions that did not meet deadlines.[182] Generally, in these cases, courts forgive agency delay.[183] Unless a "hammer provision"[184] in the statute

182. See, e.g., Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991, 995 (D.C. Cir. 1996) (establishing aspirational deadlines in the case of a mandamus action).

183. See, e.g., Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 112 (8th Cir. 1997) ("Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action.").

184. See Kevin J. Hickey, Cong. Rsch. Serv., R45336, Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking 6–7 (2018) (noting examples of hammer provisions); Gersen & O'Connell, supra note 10, at 955–56 (describing hammer provisions); M. Elizabeth Magill, Congressional Control over Agency Rulemaking: The Nutrition

explicitly outlines the consequences for missing the deadline, delayed agency actions are not denied their legal effect merely because they occur after the deadline.[185] Moreover, remedies to agency delay already implicitly operate on the assumption that certain deadlines are aspirational; in other words, the deadlines do not really mean what they say.[186] Legal scholars have also alluded to the possibility of interpreting certain deadlines as "aspirational" in light of insufficient funding from Congress.[187]

Although cases that interpret deadlines as "aspirational" in conjunction with mandamus actions are rare, the D.C. Circuit made this move in *Action on Smoking & Health v. DOL* in 1996.[188] There, the petitioner, Action on Smoking & Health, sought a writ of mandamus to compel the DOL to issue a rule regulating secondhand smoke in the workplace in accordance with its regulatory deadline.[189] Although the administered statute contained a "seemingly strict timetable for rulemaking"[190] and included the binding language of "shall,"[191] the court nonetheless sided with the DOL in concluding that the deadline was aspirational.[192] To support its regulatory interpretation, the court drew from its understanding that there was discretion implicit in the statute due to its broad delegation of authority.[193] Moreover, the statutory language had authorized the agency to prioritize its actions under the statute.[194] Finally, the court noted that a missed deadline does not necessarily indicate an "abuse of discretion."[195] In short, there is a plausible doctrinal and scholarly basis for interpreting certain deadlines as "aspirational."

2. *Interpreting Aspirational Deadlines.* — This background suggests that courts can interpret certain statutory deadlines as aspirational when subsequent congressional action evinces conflicting intent as to statutory

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Labeling and Education Act's Hammer Provisions, 50 Food & Drug L.J. 149, 150 (1995) (describing hammer provisions in the Nutrition Labeling and Education Act).

185. See, e.g., Int'l Union v. Chao, 361 F.3d 249, 254 (3d Cir. 2004) (noting that the failure to act within a deadline is not in and of itself an abuse of discretion); *Action on Smoking & Health*, 100 F.3d at 993 (same).

186. See, e.g., Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 986–87 (9th Cir. 1994) (requiring the agency to propose its own deadline for subsequent action); Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d 965, 972 (N.D. Cal. 2013) (allowing an agency and regulated party to agree to stipulate a new deadline rather than force immediate action on the agency).

187. See Cass R. Sunstein & Adrian Vermeule, The Law of "Not Now": When Agencies Defer Decisions, 103 Geo. L.J. 157, 180–81 (2014) (arguing that there may be an implicit understanding of deadlines as aspirational, rather than firm, in light of resource constraints).

188. 100 F.3d 991.

189. Id. at 991–92.

190. Id. at 993.

191. Id.

192. See id. at 995.

193. See id. at 994.

194. See id.

195. Id. at 993.

duties and forces agencies to choose between competing priorities. Part II described general principles in early twentieth-century mandamus jurisprudence that could guide courts in determining whether a deadline is aspirational,[196] particularly with respect to conflicting congressional pronouncements.[197] The doctrine from this period reflected judicial deference when the executive branch was interpreting issues affecting its authority to prioritize delegated duties.[198] Similarly, courts could engage in a more deferential inquiry when congressional signals on the relative priority of statutory duties have become ambiguous. An appropriations act that severely reduces resources for a task with a deadline could plausibly establish that deadline as aspirational, rather than mandatory.[199]

Of course, courts could also still find and enforce unambiguous mandatory deadlines. Drawing on the previous case law, courts could find "unambiguity" when there are hammer provisions that establish clear consequences when deadlines are missed.[200] Alternatively, a broad delegation of powers or discretionary authority in the statute may suggest that the deadline itself is similarly discretionary.[201] As for appropriations acts, courts could inquire into the levels of funding provided versus the funding necessary to sustain the program, the legislative history of the appropriations bill, and whether funding cuts reflect broader congressional goals or particularized intent toward the program under consideration. This interpretive move generally aligns with a purposive approach to statutory interpretation, in contrast to a focus on narrowly enumerated and textually defined statutory rights.[202] In essence, this approach would suggest that courts should interpret deadlines dynamically with these broader agency objectives in mind.[203] Interpreting deadlines as aspirational goals, rather than as binding mandates, could

196. Cf. In re Barr Lab'ys, Inc., 930 F.2d 72, 74–75 (D.C. Cir. 1991) (describing the multifactor test for determining whether to issue mandamus).

197. See supra section II.A.

198. See United States v. Mead Corp., 533 U.S. 218, 241–42 (2001) (Scalia, J., dissenting) (describing the origins of deference to executive interpretation in mandamus jurisprudence). But see Bamzai, supra note 131, at 951–53 (arguing that such an interpretation does not adequately account for the jurisdictional nature of the mandamus inquiry).

199. Indeed, a similar argument has been utilized by agencies defending against mandamus actions, typically with little success. See Final Brief for Respondents at 39, 45–48, In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013) (No. 11-1271), 2012 WL 460268 (arguing that "Congress's deliberate decision not to appropriate funds here shows that it does not intend for NRC (or DOE) to continue the Yucca proceeding at this time").

200. See supra notes 184–185 and accompanying text.

201. See, e.g., supra note 193 and accompanying text.

202. Cf. *In re Aiken County*, 725 F.3d at 260 (focusing on the fact that "Congress speaks through the laws it enacts" and what the statute does and does not provide).

203. For an example of such an approach, albeit not explicitly grappling with appropriations statutes, see supra notes 188–195 and accompanying text.

potentially alleviate many of the social costs of strictly enforcing statutory deadlines.

However, given the expansive nature of purposive interpretation,[204] construing deadlines as aspirational could also encourage judicial activism, especially if those subsequent congressional actions are appropriations acts, as is customary in an agency resource challenge. As noted by then-Judge Kavanaugh in *In re Aiken County*, judicial engagement with this issue raises potential separation of powers concerns.[205] Too lax of an interpretive approach usurps the power of Congress to set deadlines in the first place,[206] and would thus undermine legislative supremacy.[207]

More specifically, relatively robust case law constrains the bounds of interpretation for appropriations acts.[208] Courts hesitate to interpret appropriations acts as modifying or repealing statutes by implication because doing so would lead to the "absurd result" of requiring Congress to exhaustively examine every possible implication of appropriations bills.[209] Moreover, such acts often lack clear textual indicators of congressional intent.[210] Because of these challenges, the Supreme Court established a presumption against interpreting appropriations acts as amendments or revisions of statutes absent an express statement indicating otherwise.[211] Casting statutory deadlines as "aspirational" would certainly implicate this body of case law. While courts have distinguished the canon against implied repeals through examples of clear congressional intent to amend,[212] and academic literature has questioned the assumptions of the presumption,[213] courts probably would not find that appropriations acts transform

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204. See Scalia & Garner, supra note 158, at 9–28 (describing the general inability to cabin purportedly purposive approaches to statutory interpretation).

205. *In re Aiken County*, 725 F.3d at 259 (contending that allowing the agencies to ignore deadlines within statutes would usurp the power of Congress).

206. This Note assumes that such deadlines are constitutional. Some scholars have noted that such deadlines could be constitutionally problematic because they may interfere with Article II authority under the Take Care Clause. They ultimately conclude, however, that the argument is unlikely to be persuasive. Gersen & O'Connell, supra note 10, at 966–70.

207. See Pierce, supra note 9, at 93–94 (arguing that deviation too far from legislative deadlines would impinge on ideals of legislative supremacy).

208. Much of the contemporary case law on appropriations bills and their implications occurred after the passage of the APA. However, the general prohibition against implied repeals has a much longer historical track record. See Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936) (rejecting the notion of implied repeals); Wood v. United States, 41 U.S. 342, 365 (1842) (same).

209. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189–91 (1978).

210. See id.

211. Id.

212. See, e.g., Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) ("Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly.").

213. See Mathew D. McCubbins & Daniel B. Rodriguez, Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon, 14 J. Contemp. Legal

the meaning of an earlier deadline. This was evident when the majority in *In re Aiken County* cited *Tennessee Valley Authority v. Hill*,[214] one of the seminal cases on repeals by implication, to rebut the claim that appropriations acts shed a new light on the original statute authorizing the construction of the Yucca Mountain repository.[215]

In sum, interpreting deadlines as aspirational has a plausible, but ultimately insufficient, basis. To be sure, courts or agencies themselves may have already functionally grafted new deadlines onto statutes, occasionally in defiance of the plain text.[216] These new deadlines may also be poorly devised, given that agencies are potentially conflicted in setting their own deadlines, and courts lack insight into the demands on agencies and their use of resources.[217] But construing subsequent appropriations acts as amending the authorizing statute strains the bounds of acceptable statutory interpretation and possibly renders those deadlines meaningless.[218] Critics might persuasively argue that such an interpretation is merely judicial amendment of the statute.[219]

B. *Reviving a Focus on Equity*

As previously noted, courts have long characterized mandamus as an extraordinary writ. To temper the use of mandamus doctrine, courts engaged in a searching inquiry of the practical effects, as well as the public and governmental equities, of its issuance.[220] Although this Note does not cover all of the examples of courts exercising their discretion through mandamus,[221] it expands on the governance- and public-administration-related inquiries that were prevalent during the late nineteenth century and early twentieth century.[222] In contrast to a narrow focus on vindicating statutory rights, an approach grounded in public equity could guide courts to more pragmatic remedies when they discover violations of statutory deadlines.

1. *Usefulness and Futility.* — Courts have generally underanalyzed the usefulness of any proposed mandamus remedy in recent mandamus

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Issues 669, 708–13 (2005) (arguing that the canon should be based on a more holistic and normative assessment of the legislative process).

214. 437 U.S. 153.

215. In re Aiken County, 725 F.3d 255, 260 (D.C. Cir. 2013).

216. See supra note 82 and accompanying text.

217. For a discussion of the potential gravity of such actions, especially when human health and safety is at stake, see In re International Chemical Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992), which held that there is a point at which "enough is enough" and that no more postponement would be permitted.

218. See supra notes 208–215 and accompanying text.

219. See supra note 207 and accompanying text.

220. See supra section II.B.2.

221. For an extensive description of nineteenth-century mandamus case law, see generally Merrill, supra note 116.

222. See supra section II.B.

suits.[223] Despite its rarity in recent mandamus decisions, this line of inquiry was a mainstay of early twentieth-century mandamus case law, which focused not only on the timely execution of public duties but also on minimizing the disruption to governance and public administration mechanisms.[224] While courts may have found that there was a violation of a statutory right that plausibly triggered mandamus, they nonetheless declined to issue the writ because it would accomplish little. Such an analytical inquiry would allow courts to acknowledge violations of statutory provisions but also recognize that the social costs of mandamus outweigh the benefits of its issuance.

Historically, this governance- and public-focused ethos of mandamus doctrine manifested in many ways. As section II.B notes, one example was the frequent determination that mandamus would be "futile" or produce a "useless thing."[225] The contexts for this intervention varied across both federal and state courts, encompassing situations involving lower courts, private entities, and governmental actors and agencies.[226] For control over lower courts in particular, courts have often reviewed failures to meet deadlines for judicial action, demonstrating that they are no strangers to flexibly and pragmatically assessing "usefulness" within their own branch.[227] Moreover, courts are familiar with this analysis from other contexts; the inquiry echoes the concept of redressability that informs constitutional standing.[228]

Likewise, there were many case-specific rationales for the "uselessness" inquiry, demonstrating its analytical flexibility. Courts found uselessness when there were other valid defenses to the assertion of the right,[229] if the benefits of the right were undermined by other intervening

223. See, e.g., In re Aiken County, 725 F.3d 255, 266–67 (D.C. Cir. 2013) (holding that the U.S. Nuclear Regulatory Commission had to continue its licensing process, even when the appropriated funds were orders of magnitude insufficient to complete the process); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1176–77, 1180 (9th Cir. 2002) (enforcing strict deadlines for the U.S. Department of the Interior and FWS even when there were insufficient resources and agency prioritization of duties).

224. See supra section II.B.

225. See supra notes 162–166, 170 and accompanying text.

226. See supra notes 168–172 and accompanying text.

227. For a recent example, see, e.g., In re United States ex rel. Drummond, 886 F.3d 448, 450 (5th Cir. 2018) (discussing the writ of mandamus in the context of a discretionary judicial deadline for lower court action).

228. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) (noting that, while every plaintiff might believe a favorable judgment will make them happier, psychic satisfaction alone is not enough to redress an injury).

229. See, e.g., United States ex rel. Turner v. Fisher, 222 U.S. 204, 206–08 (1911) (denying issuance of mandamus when there was a valid defense of fraud to a due process claim of removing names from a list of freedmen); State ex rel. Cranfill v. Smith, 48 S.W.2d 891, 892–94 (Mo. 1932) (denying issuance of mandamus to submit an ordinance because the ordinance would have been unconstitutional anyway).

factors,[230] or if the action was purely for symbolic effect with little material benefit.[231] Often, these cases focused on mandamus that would produce mere gesturing with little substance and reflected an ethos of effective governance by seeking "performance not only of public duty, but of a *useful* public duty."[232] Similarly, because agencies might continue to hold significant discretion over other parts of a project and thus judicial enforcement of a subsidiary deadline would not entail actual relief,[233] a court could likely deem that the broad discretionary authority of the agency to manage resources effectively renders mandamus futile in those circumstances.

As for instances of drastically reduced appropriations, requiring mandamus of agencies to undertake actions without resources would generate empty gestures by definition, as agencies would at best only engage in the formalities of their statutory duties without meaningful engagement. This was most evident in the case of *In re Aiken County*, when the lack of sufficient appropriations arguably constituted a sufficient intervening factor to undermine the usefulness of any act of mandamus to process the license.[234] Courts should exercise their judgment on whether mandamus would actually achieve the results that parties seek in accordance with their traditional powers to craft equitable remedies.[235]

2. *Effective Governance.* — This Note briefly comments on how courts could leverage the foundations of mandamus doctrine in ideals of effective governance and public administration. As previously noted, mandamus doctrine at the time of the passage of the APA and the All Writs Act was grounded in basic principles of the contemporary administrative state,[236] with a heavy focus on governmental equities. Courts should revive this focus on public administration. These principles included general deference to agency prioritization and expertise,[237] and the notion that private

230. See, e.g., United States ex rel. Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 232 (D.C. Cir. 1936) (denying a writ of mandamus for the Secretary of the Interior to approve a permit for property rights when a state court had denied rights to the water at issue).

231. See, e.g., Quandt v. Schwass, 282 N.W. 206, 209 (Mich. 1938) (holding that mandamus should be denied because the proceeding would not have appropriately vindicated such rights); State ex rel. Bothell v. Woody, 156 P. 534, 535 (Wash. 1916) (stipulating that issuing mandamus to force a mayor to sign an ordinance that would add nothing to the statute is useless and mandamus should not issue for a "vain or useless act").

232. Wilson v. Blake, 147 P. 129, 131 (Cal. 1915).

233. Examples of this dynamic include timelines in statutes for proposed rulemakings. Although deadlines might require agencies to issue a notice by a particular date, agencies continue to exercise discretion in some instances over the actual issuance of a rule.

234. In re Aiken County, 725 F.3d 255, 269 (D.C. Cir. 2013) (Garland, C.J., dissenting); see also supra notes 93–103 and accompanying text.

235. See Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 622 (1944) (describing the flexibility by which courts can craft remedies in cooperation with the work of administrative agencies).

236. See supra section II.B.3.

237. See supra note 179 and accompanying text.

parties should not freely set agency priorities in contravention of sound public policy.[238] Indeed, the Court described this concern in contemporaneous case law by noting its fear of wantonly granting mandamus actions that would "clog the wheels of government."[239] Like the usefulness inquiry, these fears are also familiar to courts. In a sense, they bear similarities to doctrinal prohibitions on private delegation, which also implicate broader public accountability concerns.[240]

There may be cases, however, in which private enforcement is desirable from a governance perspective. While it may be difficult to divine a "neutral" conception of effective governance, courts could nonetheless ground their governance inquiry in the broader purpose of the statute, which is an approach that aligns with historical mandamus case law.[241] For example, certain mandamus actions—such as those at issue in *In re Aiken County*—would have the distinct effect of *reducing* the probability that the agency under consideration could successfully implement the statute.[242] Moreover, since most authorizing statutes aim to serve the general public interest, courts could also evaluate if mandamus would undermine the interests of unrepresented third parties and instead vindicate parochial private interests.[243] Finally, courts could look to internal administrative law to develop an understanding of how writs of mandamus absent agency resources might interfere with effective public administration to achieve statutory goals.[244] These concepts of governance and public administration provide an opportunity for courts to engage in a more searching review of whether issuing such writs of mandamus would serve the public interest.

CONCLUSION

Mandamus suits over missed agency deadlines will be a growing fixture of agency-related litigation, in part due to intermittent resource constraints from Congress. Courts should be cognizant of the possible social costs from deadline enforcement, but also should remain faithful to congressional intent. On the one hand, blanket issuance of mandamus in light of any textual deadline is likely to rush agency decisionmaking, institute perverse incentives for agency action, undercut the broader

238. See supra section II.B.2. For an example of the perverse incentives from allowing private parties to set agency priorities when Congress has cut appropriations, see supra notes 34–40 and accompanying text.

239. Louisiana v. McAdoo, 234 U.S. 627, 632 (1914).

240. See, e.g., Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 62 (2015) (Alito, J., concurring) (describing the accountability concerns with allowing private parties to undertake delegated responsibilities).

241. See supra section II.B.2.

242. See supra note 99 and accompanying text.

243. See supra notes 148, 157, and 161.

244. For further development of this idea, see Gillian E. Metzger & Kevin M. Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239, 1295 (2017) (discussing potential judicial options for encouraging the development of internal administrative law).

purposes of the statute, and fail to hold Congress accountable for poor agency performance. On the other hand, failing to issue mandamus might undermine the general presumption of congressional supremacy in lawmaking. Nowhere is this tension more evident than in the split in the interpretation of APA § 706(1) with respect to "unreasonably delayed" and "unlawfully withheld" actions, and the treatment of the agency resource defense.

In light of these conflicting policy concerns, contemporary mandamus jurisprudence remains unclear, with a growing trend of a narrow focus on vindicating statutory rights. The solution for the conundrum lies in exploring the roots of historical mandamus jurisprudence, its unique features that led to its characterization as an "extraordinary" writ, and the early twentieth-century case law that was codified through the APA and the All Writs Act. Although courts could plausibly leverage such case law to interpret statutory deadlines differently in light of subsequent congressional action, such an approach is unlikely to overcome the presumption against implied repeals. Instead, the more promising route is to revive the historical mandamus inquiry into the nature of agency action and its public and administrative equities. By returning mandamus doctrine to its roots in equity, courts would gain the flexibility to manage the policy challenges of issuing writs of mandamus in the contemporary administrative state.