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THE FOUNDERS' PURSE

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This Article addresses a grave originalist misstep in the new and impending war over the constitutionality of broad delegations of spending power to the executive branch. In an opening salvo, the U.S. Court of Appeals for the Fifth Circuit held that Congress unconstitutionally delegated its power of the purse to the Consumer Financial Protection Bureau. It supported this conclusion with an ambitious but highly selective originalist interpretation of Article I, Section 9's Appropriations Clause. Once the U.S. Supreme Court had the benefit of a more complete historical record, it rejected the Fifth Circuit's interpretation of the Appropriations Clause's original public meaning by a 7-2 vote. This Article grounds the Supreme Court's analysis in a broader historical background on the delegation of spending power. It also illustrates how judges' selective analysis of history can distort the Founding generation's understanding of separation of powers and the respective roles of the legislative and executive branches.

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Originalist claims to constitutional limits on the duration, generality, and source of spending in laws passed by Congress have missed a critical body of contrary historical evidence introduced by this Article. First, records of the Constitutional Convention show that the delegates approved new and durable congressional revenue and spending powers to support the U.S. government and its credit while declining proposals for temporal limitations on Congress's revenue and spending powers. Second, early Congresses repeatedly put these new and durable spending powers to use in laws that bypassed all three proffered limitations on duration, generality, and source of funding. To support U.S. credit while paying down the debt, the First Congress delegated to an agency known as the Sinking Fund Commission indefinite power to self-direct purchases of debt with a generous award that, in current terms, exceeds $400 billion. Within two years, the debt instruments purchased by the Commission generated a significant interest-based surplus, which Congress awarded to the Commission in a dedicated fund drawn outside of annual appropriations. To establish an affordable new federal government, early Congresses also funded a majority of federal officers, including core law enforcement officials and even a new agency, through independently directed fees that were paid by private parties and operated without temporal limits. This history shows that Article I, Section 9 means what it says and requires only that Congress authorize spending through "[a]ppropriations made by [l]aw." Claims to a contrary understanding depend on a selective analysis that ignores key lessons of both text and history.

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INTRODUCTION

It's all the rage for courts to question the constitutionality of statutes that delegate broad discretion to the executive branch. In May 2024, the Supreme Court ruled on the nondelegation doctrine's latest twist and rejected the U.S. Court of Appeals for the Fifth Circuit's holding that Congress unconstitutionally ceded its power of the purse to the Consumer Financial Protection Bureau ("Bureau"). Congress met the letter of the Appropriations Clause when it "ascertained" the "*purpose*," the "*limit*," and the source of the "*fund*" supporting the Bureau's budget "by . . . law."[1] The Fifth Circuit held that this law did not count as an

[1] As explained by Alexander Hamilton, laws containing these minimal parameters meet Article I, Section 9's requirement of "appropriations made by law." Alexander Hamilton, Explanation (Nov. 11, 1795), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-19-02-0077 [https://perma.cc/FF4D-TR3E] (quoting U.S. Const. art. I, § 9).

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"appropriation," however, because (1) it allowed the Bureau broad discretion to self-direct the amount of its budget for an unlimited period of time, and (2) the Bureau drew its funds from an independent source (interest-based earnings of the Federal Reserve System) rather than annual appropriations from the Treasury.[2] This Article introduces previously overlooked evidence to challenge the originalist underpinnings of the Fifth Circuit's opinion. It establishes that the Founding generation never understood the Appropriations Clause to impose heightened requirements as to the duration, specificity, and source of spending in laws passed by Congress.

Once the Supreme Court had the benefit of a more complete historical record, seven Justices rejected the Fifth Circuit's originalist analysis.[3] Justice Thomas's majority opinion emphasized parts of the historical record that the Fifth Circuit missed and concluded that the Fifth Circuit misconstrued the original public meaning of the Appropriations Clause.[4] While the majority left open the possibility of "other constitutional checks on Congress's authority to create and fund an administrative agency,"[5] it gave little indication of how courts should avoid repeating the Fifth Circuit's originalist missteps in future cases. This Article grounds the Supreme Court's analysis in a broader historical record and illustrates how judges' selective use of historical evidence can distort the Founding generation's understanding of separation of powers.

The constitutional objections raised by critics of the Bureau's funding structure boil down to a nondelegation concern: Congress unconstitutionally delegated its legislative power over spending when it granted broad budgetary discretion to the Bureau.[6] These critics have

[2] See Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616, 638–39 (5th Cir. 2022), *rev'd*, 144 S. Ct. 1474 (2024); see also id. at 623 (Congress's decision "to cede its power of the purse to the Bureau[] violates the Constitution's structural separation of powers.").

[3] CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1481 (2024) (rejecting the Fifth Circuit's argument "that appropriations must also 'meet the Framers' salutary aims of separating and checking powers' " (quoting *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 640)).

[4] Id. (finding that "the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification" supported a more limited understanding of the Appropriations Clause).

[5] Id. at 1489.

[6] Adam White, The CFPB's Blank Check—or, Delegating Congress's Power of the Purse, Yale J. on Regul.: Notice & Comment (Nov. 27, 2022), https://www.yalejreg.com/nc/the-cfpbs-blank-check-or-delegating-congresss-power-of-the-purse/ [https://perma.cc/GR8S-JDVS] ("The point could be put even more bluntly than the Fifth Circuit did: Congress delegated away its power of the purse."). The Fifth Circuit held that Community Financial Services waived the nondelegation argument because they "did not raise their appropriations-based

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disagreed over whether the purported constitutional limitations on the delegation of spending power stem from the Appropriations Clause or Article I, Section 1 of the Constitution.[7] The different sources of constitutional limitations also implicate somewhat different lines of analysis. Some arguments assert limits on the duration, generality, and source of funding under the Appropriations Clause, whereas others look to a general nondelegation framework based on the "intelligible principle" test.[8] But in the end, all of these arguments point to constraints on Congress's discretion to delegate decisions about funding to the executive branch. These purported limits have raised further questions about the constitutionality of similarly funded financial regulators such as the Federal Reserve. In addition, they have formed the basis of broader challenges to major spending initiatives ranging from the Biden Administration's forgiveness of student loans to the Federal

nondelegation argument in the district court." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 633 n.6. Community Financial Services nevertheless asserted that "nondelegation principles are directly responsive" to arguments in this case, Brief in Opposition at 33, *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. 1474 (No. 22-448), and raised nondelegation arguments in its merits briefs. See infra notes 7–8.

[7] Brief for Respondents at 16, *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. 1474 (No. 22-448) (arguing that the Bureau's funding "structure nullifies the [Appropriations] Clause"); id. at 27–29 (arguing that the Bureau's funding scheme amounts to an unconstitutional "delegation of legislative power[s]" (quoting Mistretta v. United States, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting))); cf. Michael B. Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for *Clinton v. City of New York*, 76 Tul. L. Rev. 265, 318 (2001) (arguing that the "the question of whether the nondelegation doctrine applies to appropriation laws turns on two different constitutional clauses": the Appropriations Clause and, under the assumption that discretion over spending is an executive and not a legislative power, the Executive Power Vesting Clause); Chad Squitieri, The Appropriate Appropriations Inquiry, 74 Fla. L. Rev. F. 1, 17–18 (2023) (arguing that courts should focus on whether spending powers amount to a "necessary and proper" means of carrying some other constitutionally vested power "into execution" (quoting U.S. Const. art. I, § 8)). The Founding generation conceived of purported limits on delegation of spending power under either the generally applicable Appropriations Clause or the two-year Army Appropriations Clause, rather than under a necessary and proper framework. See infra notes 312–13 and accompanying text (citing Madison's understanding from a debate in the First Congress). The necessary and proper line of analysis is therefore beyond the scope of this Article.

[8] *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 623 (holding that the Bureau's funding law was not a constitutional "appropriation[]" because it omitted these limits); Brief for Respondents, supra note 7, at 15–16 (arguing that the Bureau's spending structure violates the Appropriations Clause because it grants self-determined, "perpetual" funding to an agency with law enforcement power); id. at 29 (arguing that the funding law also "falls short" under the "intelligible principle test" (internal quotation marks omitted) (quoting *Mistretta*, 488 U.S. at 372)).

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Communications Commission's funding of universal service.[9] In light of these developments, it seems that the originalist case for a more rigorous nondelegation doctrine has been extended to limits on Congress's power to delegate broad discretion over spending to the executive branch.

This Article introduces crucial historical context that originalist proponents of limits on Congress's power to structure funding laws have missed: understandings of strong and durable revenue and spending powers that prevailed before, during, and after ratification of the U.S. Constitution. Arguments raised by nondelegation advocates rest on general historical understandings of Congress's power of the purse and assumptions that the U.S. Constitution incorporated earlier English practices of passing specific and temporally limited spending laws.[10] This Article shows that the Constitution's revenue and spending provisions instead emerged from a period in which America broke with English practice: Congress's revenue and spending powers were forged on the heels of a war opposing taxation without representation and in subsequent response to the Confederation Congress's lack of direct revenue power.[11] The general debate over new revenue and spending powers in the Constitution balanced the need for durable congressional powers to sustain the United States government and credit against concerns about

[9] Brief of Michael W. McConnell et al. as Amici Curiae in Support of Respondents at 7, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506) (arguing that the loan forgiveness program violates the Appropriations Clause's requirement that "the President may not spend without specific statutory authorization"); id. at 6 ("Forgiving a loan . . . come[s] under Congress's exclusive spending power."). In *Biden v. Nebraska*, the Court suggested that the major questions doctrine's related clear-statement requirement extended to laws authorizing executive spending. 143 S. Ct. at 2375 ("It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations."); cf. Consumers' Rsch., Cause Based Com., Inc. v. FCC, 88 F.4th 917, 923–24 (11th Cir. 2023) (rejecting nondelegation argument that "there is no limit on how much the FCC can raise" to fund universal service and identifying intelligible principles that limit the agency's funding authority), *cert. denied*, No. 23-743, 2024 WL 2883755 (U.S. June 10, 2024); Christina Parajon Skinner, The Monetary Executive, 91 Geo. Wash. L. Rev. 164, 192–216 (2023) (examining how a shift in "monetary and fiscal powers" from Congress and "to the President" will "likely" degrade "the quality of our modern monetary policymaking . . . and fiscal discipline").

[10] See CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 225–32 (5th Cir. 2022).

[11] Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 20 (1997) (arguing that the "imperial controversy" that "ended with the Declaration of Independence" revealed "striking differences" between "political practices and attitudes" in England and America).

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federalism and the dangers of combining the powers of the sword and the purse.[12]

My broader examination of historical context reveals two main areas in which the Framers rejected the limitations asserted by critics of the Bureau's funding structure. First, with respect to temporal limits on spending, delegates at the Constitutional Convention considered and declined to add an amendment that would have banned perpetual revenue laws. The concerns underlying perpetual revenue implicated broader issues of unchecked military spending and combining the powers of the "sword and the purse" in either the executive or legislative branch.[13] Instead of including general limits on the duration of revenue laws, the Framers imposed limits on appropriations and applied these limits only to money appropriated in support of an army.[14] The initial opposition to perpetual revenue laws never amounted to a key objection during ratification debates, even though Antifederalists vigorously opposed other aspects of Congress's revenue power, such as its ability to levy direct taxes.[15] During debates over revenue and spending powers in the First Congress, James Madison confirmed the lack of any general temporal limit for the Appropriations Clause when he dismissed a colleague's patently erroneous suggestion that the Appropriations Clause imposed a general two-year limitation on spending.[16] The Constitution's revenue and spending provisions ultimately allowed Congress to create a new government with staying power: it could enact durable mechanisms for the United States to collect revenue, pay the debt, support U.S. credit, and enforce its laws.

Second, early Congresses repeatedly used the Constitution's new and durable spending powers to bypass the asserted constitutional limits on duration, generality, and source of spending. Early legislation granted an agency known as the Sinking Fund Commission a self-directed and ultimately dedicated fund.[17] The initial 1790 law authorized a generous fund that supported executive purchases of debt instruments for many years into the future[18] and in today's terms would exceed $400 billion.[19]

[12] See infra Section II.A.
[13] Id.
[14] Id.
[15] Id.
[16] Id.
[17] See infra Section II.B.
[18] See infra Section II.B.
[19] See infra note 329.

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Within two years, debt instruments purchased with the initial sinking fund award generated surplus interest which Congress allocated to a dedicated fund for the executive branch to apply to repayment of debt.[20] Like funds allocated to the Bureau and Federal Reserve, funds drawn from a stream of interest on government-controlled debt instruments funded the executive through captive revenue generated outside of annual appropriations.[21] This fund allowed the Commission to support U.S. credit by self-directing discretionary open market purchases of U.S. securities and eventually redeeming outstanding debt instruments. The commitment of funds to the Commission was a key feature of the Sinking Fund legislation and was recognized by Secretary Hamilton as "a permanent sinking fund."[22]

Originalist critics of the Bureau's funding have also missed how Congress used durable new revenue and spending powers to fund a majority of federal officers and sometimes even new agencies outside of annual appropriations. Early Congresses routinely funded government officials through independently directed fees that operated without temporal limits. Well-known examples of fee-based funding for customs officials[23] reflect pervasive funding practices in the Founding Era. These early fee-based compensation schemes applied to scores of field officers who comprised "[b]y far the larger number of federal officials" funded by Congress.[24] These officials included U.S. District Attorneys and U.S. marshals charged with significant federal law enforcement duties, and Congress even used fee-based compensation to fund an entirely new agency in the first Patent Board.[25] These early statutes departed from purported nondelegation requirements that funding statutes be limited in

[20] Id.

[21] Id.

[22] Alexander Hamilton, Report on a Plan for the Further Support of Public Credit (Jan. 16, 1795), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-18-02-0052-0002 [https://perma.cc/5FXG-YC4K].

[23] Brief of Professors of History and Constitutional Law as Amici Curiae in Support of Petitioners at 22–27, CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474 (2024) (No. 22-448) [hereinafter Amici Brief] (describing initial laws that created fee-based funding for the customs service and independently determined funding for revenue and postal officials); Brief for Petitioners at 22, *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. 1474 (No. 22-448) (noting early laws providing non-appropriations-based funding for the Post Office and Mint).

[24] Leonard D. White, The Federalists: A Study in Administrative History 298 (1948).

[25] Leading surveys of fee-based compensation include id.; Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, at 262–77 (2013); Jerry L. Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787–1801, 115 Yale L.J. 1256, 1302, 1313–15 (2006).

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duration, specificity, and source. Instead, they authorized standing, fee-based funding, often relied on fees collected from private parties rather than appropriations drawn from the Treasury, and allowed federal officers such as customs collectors and U.S. District Attorneys to self-determine their funding levels by pursuing varying levels of fee-producing enforcement activities.[26] In other cases, the total amount of fees was determined not by Congress but instead by private parties' usage of customs and patent services over which the United States held a regulatory monopoly.

While earlier works have noted how proposals for bans on perpetual revenue laws failed at the Constitutional Convention[27] as well as the Sinking Fund Commission's role in supporting U.S. credit,[28] this Article is the first to analyze how these early understandings of spending power contradict recent arguments for heightened nondelegation requirements under the Appropriations Clause. This Article also builds on earlier discussions of fee-based compensation for customs officials[29] to show that early Congresses awarded indefinite and independently determined fee-based funding regularly and for core law enforcement officials.

Arguments for an appropriations-based nondelegation doctrine also fall outside of the general literature on Congress's power of the purse and nondelegation for three reasons. First, the arguments for a nondelegation doctrine under the Appropriations Clause ignore scholarly consensus that Congress has broad power to delegate public matters including spending authority.[30] Second, nondelegation arguments depart from literature

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[26] See infra Section II.C.

[27] Paul F. Figley & Jay Tidmarsh, The Appropriations Power and Sovereign Immunity, 107 Mich. L. Rev. 1207, 1254 n.381 (2009) (explaining that George Mason's proposal for a "clause . . . restraining perpetual revenue" "never made it into the Constitution" (quoting 2 The Records of the Federal Convention of 1787, at 327 (Max Farrand ed., 1911) [hereinafter 2 Farrand's Records] (James Madison's Notes, Aug. 18, 1787)); Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 148 (2016) (noting that the Framers failed to incorporate George Mason's objection to "perpetual revenue" laws).

[28] Christine Kexel Chabot, Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies, 96 Notre Dame L. Rev. 1, 1 (2020) [hereinafter Chabot, Is the Federal Reserve Constitutional?] (introducing the Commission and its independent structure); Christine Kexel Chabot, The Lost History of Delegation at the Founding, 56 Ga. L. Rev. 81, 128–36 (2021) [hereinafter Chabot, Lost History] (explaining that Congress granted the Commission broad discretion over open market purchases).

[29] See supra note 23.

[30] See infra notes 106–07 and accompanying text (proponents and opponents of a more rigorous nondelegation doctrine agree that this doctrine does not apply to public matters such as spending). Works noting the generality of early spending laws include Lucius Wilmerding,

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showing that violations of the Appropriations Clause have generally arisen when presidents attempt to exert unilateral spending authority without approval from Congress.[31] Third, attempts to establish a new Appropriations Clause violation depend on misapplications of originalist analysis rather than objectively verifiable constitutional limits grounded in text and history. Critics of the Bureau's funding structure have erred by omitting weighty historical counterevidence and placing undue emphasis on the absence of a precise historical analogue.

This Article addresses originalist claims to limits on the duration, generality, and source of spending laws as follows. In Part I, it contrasts the Bureau's statutory funding mechanisms and the Fifth Circuit's analysis with general literature on nondelegation and Appropriations Clause violations. It explains how misapplications of originalist methodology led the Fifth Circuit and even some Supreme Court Justices to exclude significant counterevidence weighing in favor of the Bureau's constitutionality. Part II grounds the Supreme Court's opinion in key historical context that critics of the Bureau's funding structure have missed. Both records of the Constitutional Convention and a large body of early spending laws cut against arguments that the Appropriations Clause imposed nondelegation requirements. This Article concludes that the Founding generation never understood the Appropriations Clause to impose rigorous nondelegation requirements as to the duration, specificity, and source of spending in laws passed by Congress. Critics of the Bureau's funding structure have relied on a flawed analysis that distorts the Founding generation's understandings of separation of powers and fails to realize the constraints central to originalism.

Jr., The Spending Power: A History of the Efforts of Congress to Control Expenditures 20–21 (1943); Gerhard Casper, Appropriations of Power, 13 U. Ark. Little Rock L.J. 1, 10–13 (1990); Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 58 (2017).

[31] See, e.g., Gillian E. Metzger, Taking Appropriations Seriously, 121 Colum. L. Rev. 1075, 1078 (2021) (noting Obama's and Trump's "creative use of appropriations" to "push . . . policy priorities"); Zachary S. Price, Funding Restrictions and Separation of Powers, 71 Vand. L. Rev. 357, 360 (2018) (noting how the "executive branch, in both Republican and Democratic administrations," has "routinely disregard[ed] funding limits"); Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1344 (1988); (claiming "[t]he covert program of support for the Contras evaded the Constitution's most significant check on Executive power"—appropriations); J. Gregory Sidak, The President's Power of the Purse, 1989 Duke L.J. 1162, 1168 (challenging the interpretation of the Appropriations Clause adopted in the Iran-Contra Report).

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I. BACKGROUND ON THE CONSTITUTIONALITY OF SPENDING LAWS

A. The Consumer Financial Protection Bureau's Funding Mechanism

Congress designed the Bureau to possess substantial but not unlimited budgetary independence. The Dodd-Frank Act authorizes the Bureau to draw funds outside of annual appropriations and "from the combined earnings of the Federal Reserve System."[32] The Federal Reserve System itself "is not funded by congressional appropriations," and traditionally its operations have been "financed primarily from the interest earned on the securities it owns—securities acquired in the course of the Federal Reserve's open market operations."[33] In addition, "fees received for priced services provided to depository institutions—such as check clearing, funds transfers, and automated clearinghouse operations—are another source of income" which "is used to cover the cost of those services."[34] The funds that support both the Bureau and the Federal Reserve are based on a captive source of revenue drawn directly from a combination of interest and fee-based earnings and outside of annual appropriations.

The Director of the Bureau self-directs its annual funding from the Federal Reserve: "Each year . . . the Board of Governors shall transfer . . . the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year . . . ."[35] The next subsection of the Act caps the amounts "reasonably necessary" at a limit that "shall not exceed" twelve percent "of the total operating expenses of the Federal Reserve System."[36] As noted by the Solicitor General, the Bureau's budget amounted to $641.5 million for 2022 and "'is modest' in comparison with the budgets of 'other financial regulatory bodies.'"[37]

The Bureau's funding is indefinite in that it requires a stream of yearly transfers from the Federal Reserve and allows the Bureau to place money

[32] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1017(a)(1), 12 U.S.C. § 5497(a)(1). The Act further specifies that payments to the Bureau "shall not be construed to be Government funds or appropriated monies." Id. § 5497(c)(2).

[33] Fed. Rsrv. Sys., The Fed Explained: What the Central Bank Does 4 (11th ed. 2021).

[34] Id.

[35] 12 U.S.C. § 5497(a)(1).

[36] Id.; id. § 5497(a)(2)(A).

[37] Brief for Petitioners, supra note 23, at 30 (quoting S. Rep. No. 111-176, at 163 (2010)).

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transferred from the Federal Reserve in a "Bureau Fund," collect interest on that fund, and have access to the money in the fund "until expended."[38] At the same time, these carryover funds limit amounts the Bureau may include in yearly requests for future years: the Director must "tak[e] into account such other sums made available to the Bureau from the preceding year" when making yearly requests for funds from the Federal Reserve.[39]

Finally, the Act limits Congress's budgetary review by exempting the "funds derived from the Federal Reserve System" from "review by the Committees on Appropriations of the House of Representatives and the Senate."[40] As leading scholars have noted, however, the Bureau remains "subject to considerable oversight from Congress" in other ways.[41] Dodd-Frank requires the Director to appear before three other congressional committees at "semi-annual hearings" and submit "reports" that include "a justification of the budget request of the previous year."[42] In addition, the Bureau must prepare annual financial statements of "sources and application of funds"[43] and allow the Comptroller General to conduct an "annual audit," which reports "sources and application of funds" to Congress and the President.[44] The law further requires the Bureau to "order an annual independent audit of the operations and budget of the Bureau."[45]

Many courts and commentators have found the Bureau's budgetary provisions valid because they are similar to those applicable to independent financial regulators such as the Federal Reserve.[46] The

[38] 12 U.S.C. § 5497(b)(1), (b)(3)(C), (c)(1).

[39] Id. § 5497(a)(1).

[40] Id. § 5497(a)(2)(C).

[41] Adam J. Levitin, The Consumer Financial Protection Bureau: An Introduction, 32 Rev. Banking & Fin. L. 321, 341 (2013); see also Susan Block-Lieb, Accountability and the Bureau of Consumer Financial Protection, 7 Brook. J. Corp. Fin. & Com. L. 25, 54 (2012) (noting that Congress can count on "multiple opportunities for public congressional testimony and related press conferences every year").

[42] 12 U.S.C. § 5496(a)–(b) (requiring appearances before the "Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services and the Committee on Energy and Commerce of the House of Representatives"); id. § 5496(c)(2).

[43] Id. § 5497(a)(4)(b)(iii).

[44] Id. § 5497(a)(5)(A)–(B); id. § 5496a(b).

[45] Id. § 5496a(a).

[46] PHH Corp. v. CFPB, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc) (Congress has "consistently exempted financial regulators" including the Federal Reserve and FDIC "from appropriations" and granted these entities "budgetary autonomy."); cf. id. at 147 (Henderson, J., dissenting) (noting that excluding the Bureau from annual appropriations also deprives the president of "leverage over the CFPB"); Am. Fed'n of Gov't Emps. v. Fed. Lab. Rels. Auth.,

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Federal Reserve's Board of Governors likewise draws funds outside of annual appropriations from "an assessment" that is "lev[ied] semiannually upon the Federal [R]eserve banks"[47] and finances its operations "primarily from the interest earned on the securities it owns,"[48] as well as fees to cover the costs of the provision of certain depository services.[49]

The Federal Reserve also self-directs its funding by drawing a standing, semiannual assessment "sufficient to pay its estimated expenses and the salaries of its members and employees," "together with any deficit carried forward from the preceding half year."[50] There is no absolute limit on amounts assessed other than an amount "sufficient" to meet these expenses and salaries. The Board further controls profits generated by regional Federal Reserve banks by setting the schedule of fees that regional banks may charge for their services.[51]

Further, the Federal Reserve's funding allows the Board to "leave on deposit in the Federal Reserve banks the proceeds of assessments levied upon them to defray its estimated expenses and . . . salaries."[52] Regional Federal Reserve banks may also expend "necessary" operating expenses and retain over $6 billion in surplus before sending further profits to the Treasury.[53] Congress subjected the Federal Reserve to congressional budgetary review by obliging it to "annually make a full report of its operations to the Speaker of the House of Representatives" and to appear before Congress.[54] A separate provision requires the Federal Reserve to conduct an annual independent audit of the "financial statements of each Federal reserve bank and the Board."[55]

Professor Adam Levitin's comparison of the Bureau's structure to that of other financial regulators shows that it is not an outlier. As he notes,

388 F.3d 405, 409, 414 (3d Cir. 2004) ("[Under the Appropriations Clause,] Congress may choose to relinquish its appropriations authority in specific instances by establishing [nonappropriated fund instrumentalities]" or authorizing "continuing appropriations.").

[47] 12 U.S.C. § 243.

[48] Federal Reserve System, supra note 33, at 4.

[49] It is also subject to the same statutory qualification that "funds derived from such assessments shall not be construed to be Government funds or appropriated moneys." 12 U.S.C. § 244.

[50] Id. § 243.

[51] Id. § 248a.

[52] Id. § 244.

[53] Id. § 289(a)(1)(A); id. § 289(a)(3)(A).

[54] Id. §§ 247, 247b.

[55] Id. § 248b.

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while the Bureau's "budget is not determined by congressional appropriations, neither are the budgets of other federal bank regulators."[56] The Federal Reserve and the Bureau both rely on self-directed funding drawn from assessments on regional Federal Reserve banks[57] and wield similar portfolios of regulatory authority.[58] These assessments are not subject to market forces.[59] The Bureau's budget is subject to relatively greater oversight than that of other financial regulators, moreover, because it "is the only one subject to a cap or to an annual audit by the Government Account[ability] Office."[60] The Federal Reserve's budget does not have an overall cap, but it is limited by requirements that funding be "sufficient to pay its estimated expenses" and salaries.[61]

B. New Precedent: The Fifth Circuit Declared the Bureau a Structural "Abomination" of Which the Framers Warned

The Bureau's combination of regulatory power and independence has drawn numerous constitutional challenges. The new Dodd-Frank Act "shifted pre-existing regulatory authority that had been scattered among several federal regulators to one federal agency, the CFPB,"[62] and the Bureau's "opponents feared that the lack of political accountability combined with far-reaching regulatory powers would result in an agency that could engage in extreme and onerous regulation that would reduce the profitability of the financial services industry."[63] In two recent opinions, different judges on the Fifth Circuit focused these separation of powers concerns on the Bureau's budgetary independence and held that the Bureau's funding structure violated the original meaning of the

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[56] Levitin, supra note 41, at 341.

[57] 12 U.S.C. § 5497(a)(1); id. § 243

[58] Adam J. Levitin, Those Seeking to Bring Down the CFPB Should Be Careful What They Wish For, Am. Banker (Oct. 28, 2022, 10:38 AM), https://www.americanbanker.com/opinion/those-seeking-to-bring-down-the-cfpb-should-be-careful-what-they-wish-for [https://perma.cc/8M68-GNJ8] (comparing the CFPB's regulatory authority to the Federal Reserve's authority as "a full-fledged bank regulator that engages in rulemaking and enforcement").

[59] Eric Pearson, A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau, 47 Creighton L. Rev. 99, 112 (2013) (Dodd-Frank "virtually assures funding for the CFPB."). Even if private market forces did limit the Bureau's funding, a private check on spending would not remedy the asserted constitutional defect in this case, which turns on Congress's failure to set adequate limits for the Bureau's spending.

[60] Levitin, supra note 41, at 341 (footnote omitted).

[61] 12 U.S.C. § 243.

[62] Block-Lieb, supra note 41, at 29.

[63] Levitin, supra note 41, at 337–38.

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Appropriations Clause. In an initial en banc decision in *CFPB v. All American Check Cashing, Inc.*,[64] a majority of the Fifth Circuit remanded to the district court outstanding constitutional challenges to the Bureau's structure. Judge Edith Jones concurred and argued for an immediate ruling that the Bureau's funding provisions violated the Appropriations Clause. She claimed that the "budgetary independence" delegated to the Bureau was "antithetical to the constitutional origins of the Appropriations Clause; contrary to the Constitution's structural allocation of powers; unsupported by the funding structure of any previous federal agency; and indefensible by the CFPB."[65]

Judge Jones argued that Article I, Section 9's requirements for "appropriations" placed limits on the amount of spending discretion that Congress could delegate to the executive branch.[66] It was "widely accepted before, at, and after the Constitution's ratification," she said, that the Appropriations Clause required Congress to "assume a supervisory role over the executive branch" in its appropriation laws.[67] She noted that "[t]he same history confirms that appropriations for executive operations must be temporally limited to maintain the boundaries between the executive and legislative branches."[68] Judge Jones drew these requirements from a historical overview that spanned power struggles between Parliament (and subsequently colonial legislatures) and the Crown, early state constitutions as well as the Constitutional Convention and ratification, and early practice under the U.S. Constitution.[69]

While these sources generally confirmed Congress's power of the purse, Judge Jones cited only select historical evidence to support her conclusions that Congress is required to retain a supervisory role by controlling the specificity, duration, and source of spending laws. With respect to temporal limits on appropriations, Judge Jones relied on evidence of time-bound appropriations from England,[70] Montesquieu's contemporaneous separation of powers argument against perpetual

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[64] 33 F.4th 218, 220 (5th Cir. 2022). It remanded challenges remaining in the wake of the Supreme Court's decision to invalidate for-cause tenure protections for the Bureau's head in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

[65] *All Am. Check Cashing*, 33 F.4th at 222 (Jones, J., concurring).

[66] Id. at 225 (citing U.S. Const. art. 1, § 9, cl. 7).

[67] Id.

[68] Id.

[69] Id. at 225–31.

[70] Id. at 226–27 ("[P]arliament secured the crown's subservience by . . . imposing time limits on appropriated funds.").

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appropriations,[71] and four statutes in which early Congresses "fund[ed] executive departments through an annual appropriations process."[72] With respect to specificity, Judge Jones again relied on English practice[73] as well as specific U.S. laws that were passed during the Jefferson Administration and in reaction to more general spending laws that had prevailed during the Federalist era.[74] Finally, with respect to the source of funding, Judge Jones's reference to the English rejection of "non-appropriated funding sources" appeared to reflect a restriction on executive spending without legislative approval rather than a restriction on funds sourced outside of the Treasury.[75]

Judge Jones's analysis led her to conclude that the Bureau's self-directed, indefinite, and independently sourced funding violated requirements "enshrined" in the Constitution.[76] First, she found that Congress unconstitutionally "relinquished" direct control over spending by granting the Bureau "unilateral, perpetual authority to requisition up to twelve percent annually from the Federal Reserve's budget."[77] Second, she found that Congress unconstitutionally "forfeited indirect control over the CFPB's budget" because the Bureau could draw "non-appropriated funds levied from banks within the Federal Reserve system" and because Congress "renounced its own power to review the CFPB's budget."[78] Finally, Judge Jones's opinion moved beyond historical criteria when it distinguished other "self-funded" agencies (such as the Federal Reserve) on the ground that these agencies did not possess the same "vast rulemaking, enforcement, and adjudicative authority" as the Bureau.[79]

In *Community Financial Services Ass'n of America v. CFPB*, a subsequent panel of the Fifth Circuit incorporated key elements of Judge Jones's concurrence and vacated the Bureau's 2017 Payday Lending

[71] Id. at 227.

[72] Id. at 230; id. at 230 nn.38–40 (citing Act of Sept. 29, 1789, ch. 23, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190; Act of Dec. 23, 1791, ch. 3, 1 Stat. 226).

[73] Id. at 226–27 ("[P]arliament secured the crown's subservience by . . . specifying how the crown could spend appropriated funds.").

[74] Id. at 230 ("[A]s acrimony between the nascent Federalist and Jeffersonian parties escalated, Congress began increasing the specificity of appropriations to keep a tighter leash on Federalist executive officers.").

[75] Id. at 226–27.

[76] Id. at 238.

[77] Id. at 233.

[78] Id.

[79] Id. at 236–37.

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Rule.[80] The Appropriations Clause argument was one of many structural and statutory challenges levied against the Rule,[81] and neither party devoted much attention to the Appropriations Clause issue in the briefs.[82] In an opinion by Judge Cory Wilson, the court nevertheless rejected all other challenges to the Rule, determined that "one arrow has found its target," and held that Congress's cession of "its power of the purse to the Bureau[] violates the Constitution's structural separation of powers."[83] The Court's decision not only invalidated the Payday Lending Rule but also cast doubt on the constitutionality of the Bureau's similarly funded regulations.[84]

Judge Wilson focused on the "novelty" of the Bureau's "self-actualizing, perpetual funding mechanism."[85] His analysis echoed Judge Jones's earlier concerns about Congress's lack of control over the amount, duration, and source of the Bureau's funding. As a whole, this structure led the Court to label the Bureau's structure "an abomination the Framers warned 'would destroy that division of powers on which political liberty is founded' "[86]: "An expansive executive agency insulated (no, double-insulated) from Congress's purse strings, expressly exempt from budgetary review, and headed by a single Director removable at the President's pleasure is *the epitome* of the unification of the purse and the

[80] 51 F.4th 616, 623, 635 (5th Cir. 2022).

[81] Id. at 623 (rejecting other grounds for reversal based on arguments that the Bureau's rule was arbitrary and capricious, that the plaintiffs were harmed by earlier limitations on the president's removal power, and that the substantive authorizations in the Act amounted to an unconstitutional delegation of legislative power).

[82] This was quite understandable, given that the parties' briefs were filed *before* Judge Jones issued her May 2, 2022, decision in *All American Check Cashing, Inc.* See, e.g., Opening Brief of Appellants at 28–30, Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616 (5th Cir. 2022) (No. 21-cv-50826); Brief of Appellees at 50–52, *Cmty. Fin. Servs. Ass'n*, 51 F.4th 616 (No. 21-cv-50826) (filed Dec. 15, 2021). After Appellant Community Financial Services filed Judge Jones's decision as supplemental authority under Federal Rule of Appellate Procedure 28(j), Appellee filed a response objecting to her historical analysis. Appellee CFPB's Letter in Response to Appellant's Supplemental Authority, *Cmty. Fin. Servs. Ass'n*, 51 F.4th 616 (No. 21-cv-50826) (filed May 5, 2022) ("The Framers left it to Congress to determine the duration of appropriations."). Federal Rule of Appellate Procedure 28(j)'s "350 word" submission limit did not allow Appellee room to present a full-blown historical analysis in its response.

[83] *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 623.

[84] Id.

[85] Id. at 638.

[86] Id. at 640 (quoting 2 The Works of Alexander Hamilton 61 (Henry Cabot Lodge ed., 1904)).

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sword in the executive . . . ."[87] Judge Wilson did not attempt to delineate at what point the Constitution would prevent Congress from delegating discretion over what and when an agency could spend.[88] He instead found the Bureau's "double-insulated" structure so "novel" as to present a clear breach of the Appropriations Clause.[89] Judge Wilson further concluded that the Bureau's indefinite and self-directed budgetary power was "unique" "among [contemporary] self-funded agencies": the Bureau's "perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies on offer."[90]

As noted below, both Fifth Circuit decisions missed a significant body of historical counterevidence showing that the Founding generation did not recognize the purported limits on Congress's appropriation power. Before turning to these historical omissions, the next Section further grounds arguments for a nondelegation doctrine for spending in current understandings of nondelegation and the Appropriations Clause. It explains how the Supreme Court initially struggled with the appropriate originalist framework to use before it rejected the Fifth Circuit's decision in *Community Financial Services*. This background underscores how poorly critics' arguments align with historical understandings of spending laws that prevailed in the Founding Era. It further illustrates the challenges judges face when applying originalism to resolve separation of powers disputes.

C. A Nondelegation Doctrine for Spending?

1. Nondelegation Orthodoxy

The notion that the Constitution imposes nondelegation requirements for spending laws is highly unorthodox. The standard account of the nondelegation doctrine is that it derives from Article I, Section 1 of the

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[87] Id.

[88] Id. at 639 n.14 ("We need not decide whether perpetuity of funding alone would be enough to render the Bureau's funding mechanism unconstitutional. Rather, the Bureau's funding scheme—including the perpetual funding feature—is so egregious that it clearly runs afoul of the Appropriations Clause's requirements.").

[89] Id. at 639.

[90] Id. at 641. Judge Wilson also asserted that "none of the[se] agencies" possessed regulatory authority comparable to that held by the Bureau. Id. The Fifth Circuit departed from a number of other decisions holding that the Bureau's funding structure was analogous to that of other independent financial regulators and thus constitutional. See id. at 641 & n.15.

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Constitution,[91] which vests "all Legislative powers herein granted" in "Congress."[92] The Constitution's allocation of power prevents Congress from transferring the commerce power and other legislative powers granted in subsequent sections of Article I to the executive branch.[93] The nondelegation doctrine focuses on whether capacious laws delegate so much discretion over a particular legislative power that they effectuate an impermissible transfer of this power to the executive.[94]

The text of the Constitution places only minimal constraints on Congress's delegation of spending power. The substantive legislative powers enumerated in Article I, Section 8 implicitly grant Congress the spending power,[95] and the limitations on spending in Article I, Section 9's Appropriations Clause merely require Congress to authorize spending through "[a]ppropriations made by [l]aw."[96] The Supreme Court has rejected a nondelegation doctrine challenge in the context of spending and upheld laws where "particular uses to which the appropriated money is to be put have not been specified."[97] Traditional nondelegation arguments have thus sidestepped appropriation laws and instead focused on substantive authorization laws. Typical debates turn on whether Congress

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[91] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) ("Accompanying [Article I, § 1's] assignment of power to Congress is a bar on its further delegation."); Kristin E. Hickman, Nondelegation as Constitutional Symbolism, 89 Geo. Wash. L. Rev. 1079, 1080 (2021) ("[T]he nondelegation doctrine holds that Article I, Section 1 of the Constitution vests in Congress the legislative powers 'herein granted,' and that Congress may not delegate those legislative powers to the executive branch . . . .").

[92] U.S. Const. art. I, § 1.

[93] Id.; Hickman, supra note 91, at 1080.

[94] Chabot, Lost History, supra note 28, at 94 (noting arguments for substantive constitutional limits on the "amount of discretionary power that a law gives to the Executive").

[95] Andrew Coan & David S. Schwartz, The Original Meaning of Enumerated Powers, 109 Iowa L. Rev. 971, 995 (2024) (noting that Article I, Section 8, Clause 1's authorization to "provide for the . . . general Welfare" is "conventionally understood" to confer spending power and arguing for a broader understanding of this language).

[96] U.S. Const. art. I, § 9, cl. 7; CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1488 (2024) (stating that "the Appropriations Clause presupposes" and places "limitations" on spending powers assigned to Congress elsewhere in the Constitution).

[97] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321–23 (1937) (rejecting "nondelegation" argument that a spending law was unconstitutional); Metzger, supra note 31, at 1158 ("Congress's longstanding practices of permanent and lump-sum appropriations, combined with the historical exemption of government funds from the usual separation of power constraints, makes imposing special delegation constraints on appropriations hard to justify."); Clinton v. City of New York, 524 U.S. 417, 466 (1998) (Scalia, J., concurring in part and dissenting in part) (rejecting nondelegation challenge to line-item veto statute and noting that "the First Congress made lump-sum appropriations for the entire Government—'sum[s] not exceeding' specified amounts for broad purposes" (citation omitted)).

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has provided a sufficient policy determination or intelligible principle to guide substantive execution of the law.[98] The substantive limits established in authorization laws still provide a check on the exercise of regulatory power and require that expenditures of public money align with legislatively determined goals.[99]

Extending nondelegation concerns to appropriation laws would impose a second layer of constraints on Congress's ability to authorize executive action. Congress would be required to limit *both* substantive decisions as well as spending that accompanies those decisions.[100] It is further unclear whether an appropriations-centered nondelegation test would require Congress to resolve policies reflecting the duration, amount, and source of spending under the Appropriations Clause, as suggested by the Fifth Circuit,[101] or whether this analysis would overlap with a possible requirement of an intelligible principle to guide spending, as Community Financial Services Association of America ("Community Financial Services") suggested in its briefs to the Supreme Court.[102] Nevertheless, the concern underlying all of these arguments centers on the appropriate amount of delegation and whether the Constitution imposes limits on Congress's discretion to structure funding laws. The Court's decision in *Community Financial Services* focused on arguments under the Appropriations Clause.[103]

Further constitutional limits for spending laws would call into question existing understandings of boundaries between legislative and executive powers. Laws specifying the amount and duration of spending authority often shape enforcement priorities or levels of enforcement for particular substantive areas of the law. As such, detailed decisions about the

[98] Compare Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (finding that the presence of an "intelligible principle" demarcated whether Congress unconstitutionally "delegated legislative power to the agency"), with Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (arguing that the "Constitution demands" that "Congress, and not the Executive Branch, make the policy judgments" required by regulatory statutes).

[99] Rappaport, supra note 7, at 319 (noting that authorization laws must provide guidance "on the purpose" of regulation and "circumstances when money should be expended").

[100] Id. at 340 (noting additional burden posed by nondelegation requirements for appropriation laws); cf. Chad Squitieri, Towards Nondelegation Doctrines, 86 Mo. L. Rev. 1239, 1239, 1242–43 (2021) (advocating a bespoke set of nondelegation doctrines based on different clauses of the Constitution).

[101] Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616, 635–40 (5th Cir. 2022).

[102] Brief for Respondents, supra note 7, at 29 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

[103] CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1478–79 (2024).

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allocation of funds have not generally been considered exclusive to Congress.[104] According to the Supreme Court, these issues involve executive enforcement decisions that Congress may commit to agency discretion.[105] A more rigorous nondelegation doctrine for spending laws could upset this allocation of powers and limit Congress's ability to authorize lump-sum spending as it has in the past.

The distinction between substantive authorization and spending or appropriation laws also surfaced in the debate over the historical foundations of a more rigorous nondelegation doctrine. When debating whether the Constitution requires Congress to resolve all (important) policy decisions related to legislative powers delegated under Article I, Section 8, both advocates[106] and opponents[107] of a more rigorous doctrine have generally agreed that these heightened requirements would not apply to public matters such as spending. Professor Michael Rappaport has argued that both a "formalist nondelegation doctrine" requiring Congress to resolve all policy questions[108] and a "modern nondelegation doctrine" applying the intelligible principle requirement[109] would exclude requirements that Congress specify spending matters of the "*type*

[104] Rappaport, supra note 7, at 329 ("British spending practice suggests that the Framers understood executive power to include the authority to exercise discretion under appropriation laws.").

[105] Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion."); see also Heckler v. Chaney, 470 U.S. 821, 828–30 (1985) (finding that the FDA's decision to decline an enforcement action was a matter committed to agency discretion under Section 701 of the APA).

[106] See Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1555 (2021) (arguing that an "important subjects" theory of delegation gives "more leeway to delegate authority over public rights than over private rights"); Jennifer Mascott, Early Customs Laws and Delegation, 87 Geo. Wash. L. Rev. 1388, 1391–93 (2019) (examining early customs laws in which Congress generated "the rules and policies imposing new limitations . . . on private actors").

[107] Chabot, Lost History, supra note 28, at 88 ("[T]he theory and practice of delegation in the Founding Era never reflected a particularly high constitutional bar."); Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 280 (2021) ("[T]he Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power . . . ."); Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288, 1288–89, 1316 n.106 (2021) (arguing that early delegations included matters affecting private as well as public rights).

[108] Rappaport, supra note 7, at 271–72.

[109] Id. at 283, 367–68.

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traditionally addressed in appropriation laws."[110] He has urged a two-tiered doctrine that would instead apply heightened nondelegation requirements only to laws affecting private interests.[111] The recent nondelegation debate sparked by Justice Gorsuch's dissent in *Gundy v. United States* also focused on delegation of power to regulate private parties.[112] Critics of the Bureau who insist on greater statutory constraints on the duration, specificity, and source of public spending have thus urged an unexpected and largely undertheorized twist in current nondelegation doctrine.

Lack of briefing on historical spending practices[113] also led the Fifth Circuit to miss a body of well-established literature on early U.S. appropriations. These works disprove assertions that the original meaning of the Appropriations Clause requires specific spending authorizations.[114] In asserting that the Appropriations Clause requires more specific spending authorizations, Judge Jones relied on laws passed during the Jefferson Administration and failed to recognize the import of initial laws making general and annual appropriations "for the Support of

[110] Id. at 320. In *Biden v. Nebraska*, the Court extended the major questions doctrine's related clear-statement requirement to laws governing provision of "monetary benefits" without acknowledging Professor Rappaport's conclusion that nondelegation concerns do not apply to laws involving spending. See Christine Kexel Chabot, Appropriating Major Questions, Yale J. on Regul.: Notice & Comment (July 5, 2023), https://www.yalejreg.com/nc/appropriating-major-questions-by-christine-kexel-chabot/ [https://perma.cc/5ZHG-KGL7]; cf. Metzger, supra note 31, at 1161 (noting an ostensible "clear-statement" requirement that "appropriations must be express and not implied").

[111] Michael B. Rappaport, A Two-Tiered and Categorical Approach to the Nondelegation Doctrine, *in* The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine 195, 196 (Peter J. Wallison & John Yoo eds., 2022) ("[T]he Constitution imposes a strict prohibition on" delegation of "rules that regulate the private rights of individuals in the domestic sphere."). Professor Rappaport also suggested that limitations on the duration of appropriation laws make up for their lack of specificity. Rappaport, supra note 7, at 343 (arguing that annual appropriations "are much less dangerous than more permanent delegations"). However, his historical analysis focuses on early general appropriation laws and omits the standing and self-directed spending laws discussed below. Id. at 342 n.278.

[112] Wurman, supra note 106, at 1538 (noting originalist argument that "any rule governing private conduct or altering private rights is 'legislative'" (quoting Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting)).

[113] See supra note 82 and surrounding text.

[114] At oral argument, Justice Kagan noted that Respondent's argument for "specification of a number" to govern spending was "profoundly ahistorical." Transcript of Oral Argument at 93–94, CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474 (2024) (No. 22-448).

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Government" during the Washington Administration.[115] Judge Jones's position contradicts leading historical accounts of the general spending authority in initial appropriation laws passed by early Congresses. These accounts explain that the first three appropriation acts (part of the subset relied upon by nondelegation advocates) were "brief" and allocated general sums to five or fewer uses.[116] Professor Gerhard Casper likewise notes that initial appropriation laws awarded only "aggregated" expenditures for "a sum not exceeding" certain amounts, with underlying detail sketched out in estimates prepared by Secretary Hamilton.[117]

The initial appropriation laws themselves also authorized self-directed funding, and in 1790 afforded the President broad discretion to self-direct funding for contingent charges of government: he could "draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government."[118] Congress was not thought to incorporate a "principle of appropriations specificity" into its "statutory text" until 1792,[119] and even by 1797, Rep. Albert Gallatin still "fought for appropriations specificity" to counter what he "saw as

[115] CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 230–32 (5th Cir. 2022). A 1793 report by Secretary Hamilton shows that the four general expenditure laws cited by the Fifth Circuit were only part of all appropriations and were passed alongside twenty-one other appropriation laws. 3 Annals of Cong. 1257–60 (1849) (noting Sept. 29, 1789; Mar. 26, 1790; Feb. 11, 1791; and Dec. 23, 1791 laws covering general or sundry expenditures for support of government as well as twenty-one additional appropriation laws passed between 1789 and 1792). Some of the significant appropriation laws that the Fifth Circuit omitted included: Act of July 1, 1790, ch. 22, § 1, 1 Stat. 128, 128–29 (authorizing withdrawal of up to $40,000 in yearly foreign affairs expenses for "outfit" and "salaries of ministers plenipotentiary"); Act of Aug. 4, 1790, ch. 34, §§ 1, 22, 1 Stat. 138, 138–39, 144 (appropriating funds from duties for payment of interest on debt and allocating proceeds from future sales of land in western territories to repayment of debt); 3 Annals of Cong. 1257–58 (1849) (noting appropriation of over $2 million to pay interest on debt in both 1791 and 1792); Act of Aug. 12, 1790, ch. 47, §§ 1, 4, 1 Stat. 186, 186–87 (authorizing purchases of "debt of the United States" out of "surplus of the [revenue] as shall remain after satisfying the several purposes for which appropriations shall have been made by law" plus up to $2 million in loans); 3 Annals of Cong. 1257–58 (1849) (noting appropriation of surplus of over $1 million for "reduction of the Public Debt"); Act of Mar. 3, 1791, ch. 28, § 15, 1 Stat. 222, 224 (making provision for "protection of the frontiers" and appropriating a sum "not exceeding" $312,686.20); and Act of May 2, 1792, ch. 27, § 15, 1 Stat. 259, 262 (appropriating an additional $673,500.00 for "protection of the frontiers").

[116] Wilmerding, supra note 30, at 20–21; accord Chafetz, supra note 30, at 58.

[117] Casper, supra note 30, at 10–11 (quoting Act of Sept. 29, 1789, ch. 23, 1 Stat. 95); accord Rappaport, supra note 7, at 335–36 (noting these permissive and lump sum features of initial spending laws).

[118] Act of Mar. 26, 1790, ch. 4, § 3, 1 Stat. 104, 105.

[119] Casper, supra note 30, at 13.

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Federalist abuses" under earlier lump-sum appropriation laws.[120] As Casper recounts, moreover, Gallatin "won the 1797 battle" but "lost the war for the remainder of the Federalist period," as later Congresses reverted to the "old formula" of more general appropriations in at least the military arena.[121]

Casper takes away from "these developments . . . an ongoing process of shaping governmental structures in the absence of clear and convincing customs."[122] To him, "partisanship" rather than constitutional interpretation prompted "discovery" of "specificity as a separation of powers concept" and often gave way to the understanding that a "knowing legislator" could "appropriate[] power in addition to money."[123] Subsequent scholars have explained that early Congresses lacked the resources and inclination to impose specific spending parameters in appropriation laws.[124] Specificity was a matter committed to Congress's discretion rather than a constitutional requirement fixed by the Appropriations Clause.[125]

2. Traditional Appropriations Concerns and Normative Arguments for a Stronger Congressional Role

Given this background, it's no surprise that the main thrust of existing appropriations literature has focused on an ostensibly different question: whether the President has the power to spend public money without Congress's approval. Modern scholarship has illuminated how public law doctrine has marginalized appropriations and focused on power struggles in which Congress and the President disagree over how to spend public

[120] Id. at 16–17 (noting Rep. Gallatin's desire to prevent the Treasury Department from "appropriat[ing] to one object money which had been specifically appropriated for any other object" (quoting 6 Annals of Cong. 2040 (1797))).

[121] Id. at 17–18.

[122] Id. at 18.

[123] Id.

[124] Chafetz, supra note 30, at 282–83 (noting that the lack of standing committees led the "earliest Congresses [to rely] heavily on the executive branch" and "delegate[] significant spending discretion").

[125] Rappaport, supra note 7, at 338 ("Congress treated the question of how much [spending] discretion to confer as a matter of policy, not constitutional law."); Michael W. McConnell, The President Who Would Not Be King 105 (2020) (noting that the "first budget of the United States" appropriated "one lump sum" for the "domestic expenses of government," whereas later Congresses used specific appropriations, and that the "Constitution permits either approach, but Congress, not the President, decides"); Chafetz, supra note 30, at 58 (in the U.S., early appropriation laws were "brief and not very specific").

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money.[126] Leading discussions focus on disputes ranging from the Reagan Administration's clandestine sale of arms to fund the Nicaraguan Contras[127] to President Obama's attempt to divert appropriations to fund cost-sharing under the Affordable Care Act to President Trump's attempt to effectuate an "emergency" transfer of "billions of dollars appropriated for other purposes to . . . construction" of a border wall.[128] While unilateral presidential spending has some precedent,[129] these debates over presidential overreach address the most basic appropriations question: "*who* has the power to determine how public moneys will be spent."[130]

This general debate leaves unaddressed nondelegation concerns about the scope of spending power delegated by Congress: What should happen if Congress authorizes executive spending but delegates broad discretion over amounts spent?[131] As Professor Josh Chafetz's study of Congress's spending power has noted, ongoing power struggles between Congress and the president in the area of appropriations tend to focus on two additional questions about the parameters of the delegated spending power: First, "[*w*]*hat* exactly is contained in the appropriations power? Should appropriations statutes simply provide broad outlines and sum totals, or should they involve minute details?"[132] Second, "there is the question of *when* appropriations happen,"[133] as a "long-term or indefinite appropriation significantly increases executive power" and eliminates the need for "the president to negotiate with Congress each year" over

[126] Metzger, supra note 31, at 1078–80.

[127] Stith, supra note 31, at 1344 (claiming "[t]he covert program of support for the Contras evaded the Constitution's most significant check on Executive power"—appropriations); Sidak, supra note 31, at 1168–70 (challenging the interpretation of the Appropriations Clause adopted in the Iran-Contra Report).

[128] Metzger, supra note 31 at 1077–78 (noting Obama's and Trump's "creative use of appropriations" to "push . . . policy priorities"); Price, supra note 31, at 360 (noting how the "executive branch, in both Republican and Democratic administrations," has "routinely disregard[ed] funding limits"); cf. Chafetz, supra note 30, at 66–72 (discussing Congress's budgetary power to shut down the government or reduce funding for federal agencies).

[129] Sidak, supra note 31, at 1178 (noting "Washington's unappropriated spending to suppress the 1794 Whiskey Rebellion"); cf. Price, supra note 31, at 421 (explaining that Washington "sought (and received) after-the-fact congressional ratification, thus at least implicitly acknowledging Congress's ultimate control over resources for such executive functions").

[130] Chafetz, supra note 30, at 60.

[131] Id. at 62 ("An appropriations provision can be understood simply as a specific delegation of spending authority.").

[132] Id. at 60.

[133] Id. at 61.

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funding.[134] As Chafetz makes clear, however, these questions have generally been resolved through interbranch negotiations and political power struggles rather than constitutionally (or judicially) imposed limits on delegation of spending power. According to Chafetz, "with the exception of spending on the army[,] the U.S. Constitution is silent on the duration of appropriations"[135] and "allows for indefinite appropriations in all contexts other than the army."[136]

Critics of the system have suggested that an overly broad delegation as to what is spent and when it is spent may at some point cross a constitutional line. As with general nondelegation claims, Congress may delegate so much discretion that one could argue that the president and not Congress is actually the one to exercise Congress's Article I power to authorize spending. This issue lies at the heart of constitutional objections to the Bureau's funding mechanisms. The argument is that the Dodd-Frank Act does not count as an *appropriation* because the law delegated the Bureau too much discretion over what and when it can spend.[137]

While this argument builds on points advanced in a 1988 article by Professor Kate Stith,[138] Stith's argument did not appear to go so far. She distinguished appropriation requirements from heightened nondelegation requirements that might apply to substantive authorization laws,[139] and she did not attempt to delineate a clear boundary between laws that violated Appropriations Clause requirements and other types of "open-ended" funding that would remain proper.[140] Thus, it is doubtful whether Stith's argument, which originally critiqued the more extreme problem created by the Reagan Administration's covert and congressionally disapproved funding of the Contras, should also be read to invalidate self-sustaining funding for administrative agencies at levels not set by Congress. The Second Circuit subsequently applied Stith's analysis when it ruled that the Bureau's funding did not violate the Appropriations

[134] Id. at 62.
[135] Id. at 61.
[136] Id. at 58.
[137] Brief for Respondents, supra note 7, at 30–34.
[138] Stith, supra note 31, at 1383 (explaining that spending authorizations would run afoul of constitutional accountability requirements if they "create[] spending authority without amount or time limitations and fail[] to subject such authority to periodic legislative review").
[139] Id. at 1385 n.209 ("The argument presented here is consistent with broad legislative delegation . . . of agency powers."); id. at 1385 (disclaiming a proposed "reinvigoration of the 'nondelegation doctrine' ").
[140] Id. at 1382 (allowing for open-ended funding that would render the "postal delivery . . . self-sustaining" and with a "size . . . determined by market forces").

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Clause.[141] Finally, as a methodological matter, Professor Stith did not attempt to ground her normative constitutional arguments in originalist evidence of text and history.[142] The next Section outlines how originalism further shapes the constitutional analysis.

3. Unconstrained Originalism?

Critics of the Bureau's funding structure assert that Article I, Section 9's requirement of "[a]ppropriations" imposes heightened nondelegation obligations. On its face, this argument contradicts the understanding that was "long ago explained by Secretary Hamilton": according to him, the Appropriations Clause required nothing more than a "previous law" to "ascertain[]" the "*purpose*, the *limit*, and the *fund*" out of which an expenditure would be drawn.[143] The turn to originalism has been complicated, however, by the Fifth Circuit's reliance on selective evidence of original meaning as well as the Supreme Court Justices' different views on the historical proof required in this case. These failures of methodology have undermined originalism's claim to objective constraint and turned what should have been historical consensus into a judicial battleground.

Fifth Circuit Judges Wilson's and Jones's opinions both turned on assumptions that the Framers never would have approved a spending law that gave the executive branch so much discretion over funding. Understandings of the Founding generation carry great weight for originalists,[144] especially given the minimal textual requirements of the Appropriations Clause itself. While Judges Wilson and Jones relied on

[141] CFPB v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 183 (2d Cir. 2023), *cert. denied*, No. 22-1233, 2024 WL 2709347 (U.S. May 28, 2024).

[142] At best, Stith drew on scattered historical references that show a variety of early congressional practices regarding appropriations. Sidak has challenged the historical foundations of Stith's broader argument "that the President is prohibited from making any 'expenditure of any public money without *legislative* authorization.' " Sidak, supra note 31, at 1222–23 (quoting Stith, supra note 31, at 1345).

[143] Lucius Wilmerding, The Spending Power: A History of the Efforts of Congress to Control Expenditures 3 (1943) (quoting 7 Alexander Hamilton, Explanation, *in* The Works of Alexander Hamilton 81, 86–87 (Henry Cabot Lodge, ed., 1886)). Provisions of Dodd-Frank granting the Bureau a capped amount of the combined earnings of the Federal Reserve to apply to consumer financial regulation easily meet these requirements.

[144] See, e.g., Randy E. Barnett & Lawrence B. Solum, Originalism After *Dobbs*, *Bruen*, and *Kennedy*: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 439 (2023) (noting the importance of the "general historical background in which provisions were framed and ratified" through "early implementation of the relevant [constitutional] provisions").

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standard originalist sources (from the backdrop of English and colonial history to early state constitutions and early U.S. spending laws),[145] their historical analysis was highly selective. They failed to recognize that practices such as annual appropriation laws may reflect congressional discretion rather than a constitutional requirement, and they never considered, much less attempted to distinguish, a significant body of counterevidence showing different practices in which the Founding generation repeatedly rejected rigorous nondelegation requirements for spending laws.

Judges Jones and Wilson fell short of originalism's fundamental requirement that judges engage in comprehensive analysis of the historical record and determine meaning as a matter of empirical fact.[146] Such determinations are not second nature to legally trained judges, as they call for a broader historical inquiry than is provided by legal analysis of select precedent in favor of a particular position.[147] Judges are also unlikely to have sufficient time to engage in comprehensive historical analysis, especially when (as happened here) they decide complex historical issues without the benefit of additional briefing.[148] Given these constraints, it was almost inevitable that the Fifth Circuit's analysis of only select parts of the historical record would lead to an inaccurate understanding of history and, thus, original meaning.[149]

The Fifth Circuit should have requested additional briefing to facilitate a more comprehensive review of historical spending practices. By the time the case reached the Supreme Court, additional analysis of the text and history weighed heavily in favor of the Bureau: the Solicitor General grounded the government's arguments for reversal of the Fifth Circuit in these sources.[150] The Constitutional Accountability Center filed a brief for professors of history and constitutional law as amici curiae in support

[145] Id.

[146] Id. at 479 (noting that originalism's "Fixation Thesis" rests on an "empirical claim about meaning"); Andrew Coan & David S. Schwartz, Interpreting Ratification, 1 Am. J. Const. Hist. 449, 534 (2023) (noting the "importance and power of contextual enrichment to resolve indeterminacies in the text's semantic meaning").

[147] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 19 (1982) (describing "difference of methods" involving comprehensive historical analysis and reliance on a limited set of precedents).

[148] See supra note 82 and surrounding text.

[149] See Barnett & Solum, supra note 144, at 439 (urging jurists to "avoid cherry-picking evidence that favors a preferred outcome").

[150] See Brief for the Petitioners, supra note 23, at 10 (arguing that "[t]ext, history, and precedent establish the constitutionality of the CFPB's funding mechanism").

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of the Bureau[151]—but not a single group filed a countervailing amicus brief for law or history professors in support of the Fifth Circuit's originalist analysis.[152]

Given this turn of events, *Community Financial Services* presented an opportunity for the Court to correct the Fifth Circuit's erroneous historical analysis and forge consensus on important aspects of originalist methodology as well as constitutional limits on delegation of spending power. But at oral argument, the Justices still seemed to disagree about how to apply an originalist or historically informed framework. Two areas of uncertainty were (1) the burden of proof, and (2) how closely historical funding structures needed to track challenged attributes of the Bureau's funding structure.

On the first issue of the burden of proof, Community Financial Services was the plaintiff and thus had the general burden of showing it is subject to regulation by an unconstitutionally funded agency. But the Justices' questions suggested uncertainty about who had the burden of proving a historically informed definition of "appropriation."[153] At least one commentator has suggested that the government needed to support its position with proof of a close historical analogue under an analysis inspired by the burden-shifting framework for Second Amendment rights[154] in *New York State Rifle & Pistol Ass'n v. Bruen*.[155] This possibility seemed to align with a line of questions in which Justice Alito pressed the government to provide the "historic" and "single best example of an agency with" the Bureau's "combination of features."[156]

[151] See Amici Brief, supra note 23, at 2–3.

[152] See CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474 (2024).

[153] Compare Transcript of Oral Argument, supra note 114, at 44 (Jackson, J.) (noting "concern[] that there might be burden-shifting"), with id. at 77 (Alito, J.) (asserting that his questions went to the "limiting principle" rather than "burden-shifting").

[154] Squitieri, supra note 7, at 21 (urging a "similar analysis in *Community Financial*"); id. at 23 (arguing that the government must support spending laws outside the annual appropriations "safe harbor" by meeting a "heavy burden of offering a historical analog[ue]"); see also Brief of Amici Curiae State of West Virginia et al. in Support of Respondents at 8, *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. 1474 (No. 22-448) (citing Squitieri, supra note 7, at 7 for the argument that the CFPB's funding may not be a "necessary and proper" exercise of Congress's power).

[155] 142 S. Ct. 2111, 2132–33 (2022).

[156] Transcript of Oral Argument, supra note 114, at 31 (Alito, J.); id. at 32 (asking for the "best example of an agency that draws its money from another agency that, in turn, does not get its money from a congressional appropriation in the normal sense of that term but gets it from the private sector").

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While it is doubtful that *Bruen*'s burden-shifting framework for Second Amendment rights would apply directly to the separation of powers dispute at issue in *Community Financial Services*, Justice Jackson voiced "concern" about the possibility of "burden-shifting."[157] In particular, the text of the Appropriations Clause contemplates that Congress (and the President) may pass laws authorizing spending through "[a]ppropriations made by [l]aw."[158] Implicit in Article I, Section 9 is an understanding that the Constitution assigns Congress the discretion to pass appropriation laws.[159] As noted by Justice Jackson, this structure suggests that appropriation laws passed by Congress are constitutional unless they contravene further constitutional limits and that persons challenging the spending legislation have the burden of proving that the constitutional term "appropriation" imposes additional limits on spending laws.[160] At oral argument, Community Financial Services' counsel struggled to articulate, much less prove, what these limits might be.[161]

A second area of uncertainty was just how exact historical evidence of analogous spending laws must be in order to pass muster. On the latter point, Justice Kagan asked the Solicitor General how the Court should think about history: "[I]s it more important that all the parts have been used, or is it more important that the entire thing has an exact precedent?"[162] Justice Kagan's questions reflect broader concerns raised by demands for proof of relatively precise legislative analogues.[163] As a general matter, Professor Leah Litman has explained that legislatures may fail to pass directly analogous laws for reasons wholly unrelated to

[157] Transcript of Oral Argument, supra note 114, at 44 (Jackson, J.).

[158] U.S. Const. art. I, § 9, cl. 7.

[159] Id.; *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1488 ("[T]he Appropriations Clause presupposes Congress' powers over the purse" and places a "limitation" on those powers.).

[160] Transcript of Oral Argument, supra note 114, at 45–46 (Jackson, J.) (recognizing that the "Appropriations Clause" gives "the legislature the prerogative of the purse," and that "we have a statute in which the legislature has exercised" its prerogative to pass an appropriation law, so Respondents' "burden would have to be to determine that those limits exist somewhere in the law").

[161] Justice Thomas ultimately asked counsel for Community Financial Services to complete the sentence, "Funding of the CFPB . . . violates the Appropriations Clause because?" Id. at 86. Counsel completed it by saying that "Congress has not determined the amount that this agency should be spending." Id.

[162] Id. at 39 (Kagan, J.).

[163] Leah M. Litman, Debunking Antinovelty, 66 Duke L.J. 1407, 1482–83 (2017) (noting "administrability concerns" stemming from "different levels of generality" that could be used to determine whether a statute is "novel" with respect to "past practices").

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constitutional requirements.[164] Such failures are unlikely to provide conclusive proof that the Constitution forbids a particular form of legislation.

With respect to separation of powers, this problem is compounded by the fact that structural choices often reflect matters of discretion rather than constitutional requirements.[165] Government actors may decline to make certain discretionary choices for reasons that have nothing to do with requirements imposed by the Constitution. For example, initial Congresses may not have enacted specific appropriation laws because they lacked standing committees that would enable them to pass a more detailed budget.[166] This failure to enact appropriation laws with more specific parameters for spending should not be considered evidence that specific appropriation laws are unconstitutional.

More generally, an analysis that looks back in time to compare the body of laws enacted to the infinitely greater set of laws that were never enacted necessarily implicates messy empirical and historical questions. These questions are ill-suited to traditional legal analysis, especially for structural arrangements that derive primarily from statutes rather than common law. And yet, judicially created tests of original meaning like the one in *Bruen* require judges to employ traditional legal and precedential reasoning[167]: judges must determine whether a current regulation is supported by a "relevantly similar" historical precedent or analogue.[168]

[164] Id. at 1428 (outlining many reasons why "legislative novelty will rarely reflect prior Congresses' assumption that a statute was unconstitutional"); accord Jacob D. Charles, The Dead Hand of a Silent Past: *Bruen*, Gun Rights, and the Shackles of History, 73 Duke L.J. 67, 111 n.282 (2023) (citing Litman, supra note 163, at 1427); see also Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism 65 (2022) ("It seems even more dubious to rely on the absence of a practice in the first Congresses to establish a constitutional limit.").

[165] See Litman, supra note 163, at 1441 ("[G]iven the sheer number of policies that [Congress] could conceivably pursue, Congress may not have tried out all forms of constitutionally permissible regulation.").

[166] Chafetz, supra note 30, at 282–83 (noting lack of standing committees).

[167] William Baude & Robert Leider, The General-Law Right to Bear Arms, 99 Notre Dame L. Rev. 1467, 1493 (2024) (arguing that, in *Bruen*, what the Court describes "is simply the common-law method!").

[168] In *Bruen*, the Court drew this standard from an article that expressly distinguishes legal reasoning by analogy from empirical forms of analysis. Compare N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022) (citing Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 (1993)), with Sunstein, supra, at 790 ("Compared with . . . empirical social science, [analogical reasoning] is at best primitive" and not adequately "attuned to facts."); see also Joseph Blocher & Eric Ruben, Originalism-By-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 108 (2023) (arguing that

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Courts further exacerbate problems created by mixing and matching a historical mode of analysis with a legal mode of analysis when they eliminate key guardrails for analogical reasoning. The concern arises when judges equate historical practice with legal precedent and demand alignment with historical practice for its own sake.[169] This move risks an analysis that proceeds in the absence of a well-defined theory of what aspects of that practice may or may not be "relevantly similar" under the Appropriations Clause.[170] To illustrate the potential problems, consider President Washington's decisions to appoint (with senatorial consent) only men and never women to the Supreme Court. There was no precise Founding-era antecedent for Sandra Day O'Connor's appointment as the first female Justice, and yet no one would argue that earlier, discretionary appointments of male Justices reflected an understanding that the Constitution prohibited the appointment of women: a constitutionally irrelevant aspect of earlier appointments practices. By the same token, the Justices should not rest their decisions on the fact that early Congresses never chose to enact a carbon copy of the features combined in the Bureau's funding structure (or, as the Solicitor General noted at oral argument, create a Founding-era agency with the same acronym as the Bureau[171]). These historical omissions are insufficient to support an understanding that the Framers would have understood the Bureau's structure to violate the Constitution.

Demands for relatively precise historical antecedents give rise to criticisms that judges are relying on "selective history served up to justify a preferred political outcome."[172] Justice Alito's focus on the "single best

Bruen's "originalism-by-analogy differs in important ways from standard approaches to historical reasoning"). While *Bruen*'s requirement of "a well-established and representative historical *analogue*" for the firearm regulation at issue, 142 S. Ct. at 2133, may in "modest" terms also fall "within an originalist framework," see Barnett & Solum, supra note 144, at 472, this framework distorts analysis of distinct separation of powers issues.

[169] Sunstein, supra note 168, at 756–57 ("Patterns are made, not simply found. Whether one case is analogous to another depends on substantive ideas that must be justified.").

[170] *Bruen*, 142 S. Ct. at 2132 (quoting Sunstein, supra note 168, at 773).

[171] Transcript of Oral Argument, supra note 114, at 33 (noting problems with an argument that the Bureau "is the only agency that has the acronym CFPB").

[172] Noah Rosenblum, The Case That Could Destroy the Government, The Atlantic (Nov. 27, 2023), https://www.theatlantic.com/ideas/archive/2023/11/securities-and-exchange-commission-v-jarkesy-supreme-court/676059/ [https://perma.cc/9LGM-GFE2]; see also Darrell A. H. Miller & Joseph Blocher, Manufacturing Outliers, 2022 Sup. Ct. Rev. 49, 70 ("By dismissing so much of the historical evidence . . . the Court [in *Bruen*] confuses an exercise in discretion for a process of discovery.").

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example"[173] (i.e., a precise historical analogue) for the Bureau's funding structure omitted scores of other data points bearing on early understandings of appropriation requirements. When the government offered an "awfully close" analogue in the first Customs Department,[174] Justice Alito demanded even more precision: he asked for the "best example of an agency that draws its money from another agency that, in turn, does not get its money from a congressional appropriation in the normal sense of that term but gets it from the private sector."[175] As Solicitor General Prelogar explained, the problem with Justice Alito's follow-up question was that additional factors based on a second agency and a private source of funds were irrelevant to the current constitutional dispute.[176]

Justice Alito's questions suggested that a narrow focus on history and tradition might allow the Court to sustain the Fifth Circuit's finding of unconstitutionality. His questions tracked the two variants of analogical reasoning noted above, as he first demanded a relevantly similar historical analogue and then moved on to request an irrelevantly similar historical analogue. The effect of his questions was to substantially narrow the scope of evidence relevant to the constitutional inquiry and to exclude other more general evidence that might support a different conclusion. This line of questioning excluded not only a highly comparable funding structure for the Customs Department, but it also seemed to rule out the Sinking Fund Commission's highly comparable award of generous, indefinite, and self-directed funding drawn from interest-based earnings distributed outside of the Treasury.[177] Justice Alito's approach was so restrictive that it seemed to present a "use of history and tradition"[178] unrelated to the Constitution's original public meaning. The result supported by Justice Alito's approach is troubling because, like the Fifth Circuit, it focuses on evidence that is *not* in the historical record and

[173] Transcript of Oral Argument, supra note 114, at 31.

[174] Id. at 39 (Kagan, J.) (noting the Solicitor General's argument that the "Customs Department comes awfully close" to the funding structure of the Bureau).

[175] Id. at 32.

[176] Id. at 32–33. This is because the Federal Reserve plays a purely "ministerial role" in funding the Bureau, id. at 44, and because the interest- and fee-based sources of funds given to the Federal Reserve and Bureau were captive and could not be evaded by private market forces, see id. at 32–33.

[177] See infra Section II.B.

[178] See Barnett & Solum, supra note 144, at 455 (explaining that "Justice Alito's opinion for the Court in *Dobbs* is a decided mix of originalist and non-originalist use of history and tradition").

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ignores the evidence that is. Justice Alito's approach would exclude important background such as understandings from the Constitutional Convention as well as laws in which early Congresses repeatedly approved key aspects of the funding structures being attacked by the Bureau's critics.

Unlike laws that were not passed, the body of laws that were passed by early Congresses provides important evidence of original public meaning. According to the Supreme Court, "the practice of the First Congress is strong evidence of the original meaning of the Constitution,"[179] especially given that many members of this body "had taken part in framing that instrument."[180] Leading originalist scholars have likewise emphasized that "early implementation of the relevant [constitutional] provisions" reflects original public meaning.[181] Early laws that repeatedly approve structural attributes which critics claim to be unconstitutional suggest that the Founders had a different understanding of the Constitution than the critics. As noted below, the Supreme Court's ultimate resolution of the case recognized this concern and benefited from the large body of historical counterevidence supporting the Bureau's funding structure.

4. The Supreme Court's Response

A more complete historical record led the Supreme Court to reverse the Fifth Circuit's decision in *Community Financial Services* by a 7-2 vote.[182] Justice Thomas's majority opinion focused on original public meaning and the "narrow question" of whether the Bureau's standing and self-directed "funding mechanism complies with the Appropriations Clause."[183] His analysis of how the Bureau's funding mechanism "satisfies the Appropriations Clause" drew support from Justices across

[179] Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659 (2020).

[180] Bowsher v. Synar, 478 U.S. 714, 723–24 (1986) (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)).

[181] Barnett & Solum, supra note 144, at 439; see also Litman, supra note 163, at 1468–72 (noting additional, non-originalist grounds for presuming that laws passed by Congress are constitutional).

[182] CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1480–81 (2024).

[183] Id. at 1479. See generally Christine Kexel Chabot, Saving the Consumer Financial Protection Bureau (and the Constitution) from the Courts, Yale J. on Regul.: Notice & Comment (May 20, 2024), https://www.yalejreg.com/nc/saving-the-consumer-financial-protection-bureau-and-the-constitution-from-the-courts/ [https://perma.cc/N44P-CMCN].

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the ideological spectrum.[184] At the same time, the majority opinion left open the possibility of "other constitutional checks on Congress' authority to create and fund an administrative agency"[185] and offered little guidance as to how judges might avoid misapplying originalism in future cases.

Justice Thomas began his analysis with the text of the Appropriations Clause.[186] He emphasized the possible limitations created by the clause's requirement of an "appropriation" passed by law. Drawing from Founding-era dictionary definitions of this term, he found that the "ordinary usage" of the term "appropriation" imposed fairly minimal requirements: it demanded only "a law authorizing the expenditure of particular funds for specified ends."[187] Justice Thomas's narrow focus on the definition of "appropriation" downplayed other significant textual evidence supporting a minimalist reading of the Appropriations Clause.[188] As noted below, it also speaks volumes that the Framers included an express two-year limit on appropriations for the Army in Article I, Section 8, Clause 12 while omitting a similar temporal limit for general appropriations in Article I, Section 9, Clause 7.[189] But in the end, both textual arguments support the same conclusion: the text of the Appropriations Clause does not contain an implicit temporal limit on spending.

Justice Thomas also aligned his textual analysis with a lengthy Founding-era history. He began with pre-constitutional history in England, the colonies, and the states,[190] and he concluded that "early legislative bodies exercised a wide range of discretion" whether or not to impose temporal limits or requirements that the executive expend a specific amount.[191] Justice Thomas relied upon many of the same secondary sources and quotations relied upon by the Fifth Circuit.[192]

[184] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1490.
[185] Id. at 1489.
[186] Id. at 1480–81.
[187] Id. at 1482.
[188] Id. at 1487 (noting this textual argument only in rebuttal).
[189] See infra notes 237–38 and surrounding text.
[190] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1482–84.
[191] Id. at 1484.
[192] For example, both Justice Thomas's opinion and Judge Jones's concurring opinion in *All American Check Cashing* cited Blackstone and Maitland and recognized the need for the King and his ministers to "come, cap in hand, to the House of Commons" for annual approval of certain funding. Id. at 1483 (quoting George M. Trevelyan, The English Revolution 1688–1689, at 180–81 (1938)); CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 226 (5th Cir.

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Unlike the Fifth Circuit, however, Justice Thomas articulated a more nuanced view of Parliament's role after the Glorious Revolution. He recognized that Parliament's "newfound fiscal supremacy" was not absolute and that "Parliament did not micromanage every aspect of the King's finances."[193] Parliament granted the Crown power to spend "'any Sum not exceeding' a particular amount,"[194] for example, and in the United States early "state legislative bodies often opted for open-ended, discretionary appropriations."[195]

The Fifth Circuit's analysis of pre-constitutional history hinged on Parliament's move to "a more rigid practice of appropriating for specific purposes," but it failed to address the counterexamples discussed by Justice Thomas.[196] While Justice Thomas's majority opinion made no mention of the Fifth Circuit's omissions, it criticized Justice Alito's dissent for a similarly selective analysis. According to the majority, Justice Alito presented a "rendition of history [that] largely ignores the historical evidence that bears most directly on the meaning of 'Appropriations' at the founding."[197] For example, his "dissent [did] not meaningfully grapple with the many parliamentary appropriations laws that preserved a broad range of fiscal discretion for the King," including "'sums not exceeding' appropriations."[198]

The majority further emphasized Congress's discretion in structuring post-ratification appropriation laws. Early Congresses regularly used "lump-sum" and "sums not exceeding" laws that gave the executive

2022) (same). Judge Wilson adopted Judge Jones's historically informed conclusion that the Appropriations Clause imposes "affirmative[] obligat[ions]" on Congress in his subsequent opinion in *Community Financial Services Association of America v. CFPB*, 51 F.4th 616, 637 (5th Cir. 2022) (citing *All Am. Check Cashing*, 33 F.4th at 231 (Jones, J., concurring)).

[193] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1483; see also Chafetz, supra note 30, at 56 ("[T]he post-Revolutionary Parliament" moved "much more heavily toward annually granted and specifically appropriated supply.").

[194] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1483.

[195] Id.

[196] *All Am. Check Cashing*, 33 F.4th at 226.

[197] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1488.

[198] Id. at 1488–89. The majority and dissent disputed the import of other pre-constitutional evidence such the Crown's discretion to spend funds for a civil list as well as state executives' discretion over funding authorized by state legislatures. Compare id. at 1483 (majority opinion) (spending for "the civil list" was not "time limited"), with id. at 1499–1500 (Alito, J., dissenting) (claiming that Parliament diminished the Crown's discretion over the civil list by 1782); compare id. at 1483–84 (majority opinion) (listing examples of "open-ended" appropriations passed by state legislatures), with id. at 1502 n.13 (Alito, J., dissenting) (disputing how much control these state funding laws awarded to state executives).

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significant discretion over precise amounts spent.[199] Justice Thomas highlighted laws that allowed customs and postal officials who worked in "early executive agencies . . . to indefinitely fund themselves directly from revenue collected."[200] He further noted that these structures "were not an American innovation; they emulated the colonial precursors to the Customs Service and Post Office."[201] While the majority dismissed Justice Alito's attempts to distinguish early funding laws for customs and postal officials, it failed to acknowledge that these laws were completely omitted from the Fifth Circuit's analysis.[202]

Justice Thomas's rejection of the Fifth Circuit's interpretation of the Appropriations Clause commanded a decisive majority. And yet he failed to address key missteps in the Fifth Circuit's originalist analysis. While the Supreme Court benefited from historical counterevidence that was initially raised in briefs to the Court,[203] the Bureau did not have an opportunity to brief these points in full to Judge Wilson before he reached his decision in *Community Financial Services*.[204] If the Fifth Circuit had allowed further briefing before finding a violation of the Appropriations Clause, it seems that it might have avoided the historical errors identified by the Supreme Court. The majority did not acknowledge this possibility.

In addition, the majority missed an opportunity to more fully address methodological problems reflected in the Fifth Circuit's and Justice Alito's selective analysis of post-ratification spending laws. Justice Thomas's opinion also relied on a subset of early spending laws, and it would have been helpful to hear a further explanation of why the subset of post-ratification laws cited by the majority were more instructive than those cited by the Fifth Circuit or Justice Alito. While both sets of laws

[199] Id. at 1484–85 (majority opinion).
[200] Id. at 1485.
[201] Id. at 1486.
[202] Id. at 1489 (making no mention of the Fifth Circuit's analysis and explaining that "it is unclear why these differences matter under the dissent's theory").
[203] See, e.g., Amici Brief, supra note 23, at 22–24 (introducing the leading example of indefinite, fee-based funding for customs officers).
[204] Judge Wilson's opinion followed on the heels of Judge Jones's extended historical analysis in *All American Check Cashing*, and the Bureau never had an opportunity to fully address counterevidence responsive to either Judge Jones's analysis, see supra note 82 and surrounding text, or to the handful of Founding-era authorities that Defendant-Appellant All American Check Cashing buried in two footnotes in the final reply brief it filed with Judge Jones, see Defendants-Appellants' Supplemental En Banc Reply to CFPB Supplemental En Banc Response Brief at 17 nn.4–5, CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218 (5th Cir. 2022) (No. 18-60302).

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were grounded in pre-constitutional history,[205] neither opinion gave much thought to the Constitutional Convention and the extent to which the Appropriations Clause was understood to incorporate some or all of these pre-constitutional practices.[206] Justice Alito claimed that the annual appropriation laws he and the Fifth Circuit relied upon represented the "dominant" post-ratification practice.[207] Even if these laws were in some sense dominant,[208] however, it is not clear why dominance would matter. A dominant practice would not show that the Constitution precluded Congress from adopting varied funding structures in other laws.[209] Indeed, if the Constitution were limited to dominant Founding-era practices, Congress's initial and dominant practice of using lump-sum spending laws would rule out Justice Alito's argument based on the more specific spending laws passed by later Congresses.[210] Instead, the variety of spending laws passed by early Congresses supports Congress's discretion to enact a range of practices and undermines arguments that the

[205] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1486 (fee-based funding structures for customs and postal officers "were not an American innovation"); id. at 1496 (Alito, J., dissenting) ("[T]he appropriations requirement" established by delegates to the Constitutional Convention was an "important safeguard" that "arose from centuries of 'British experience.'" (quoting *All Am. Check Cashing*, 33 F.4th at 224 (Jones, J., concurring))).

[206] The majority included a paragraph describing how "the principle of legislative supremacy over fiscal matters engendered little debate" at the Convention. Id. at 1484 (majority opinion). The dissent alluded to the Convention but supported its discussion with citations to congressional debates in 1796 and 1798 as well as the debate over ratification. Id. at 1500 (Alito, J., dissenting). This Article provides a more complete discussion of the Convention, as well as understandings that emerged from a rejected proposal to include temporal limits on collection of revenue, in Part II.A., below.

[207] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1500 (Alito, J., dissenting).

[208] Justice Alito's assertion that "agencies were generally funded by annual appropriations from the Treasury," id. at 1495 (footnote omitted), cited only to the following statement by Professor Stith: "From the First Congress, operating funds have usually been appropriated annually." Stith, supra note 31, at 1354 n.53. But Professor Stith never attempted a comprehensive historical analysis or addressed the widespread use of standing, fee-based funding discussed in this Article. See infra Section II.C; White, infra note 376, at 298 (explaining that in the Founding Era "[b]y far the larger number of federal officials were compensated" outside of annual appropriations and "by fees for services rendered"). As these omissions illustrate, Justice Alito failed to ground his claim of dominance in the historical record.

[209] Justice Alito's position also contradicted strong textual evidence that the Framers included temporal limits for Army appropriations but not general appropriations. See infra notes 237–38 and surrounding text.

[210] Compare *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1484 ("Many early appropriations laws made annual lump-sum grants . . . ."), with id. at 1500 (Alito, J., dissenting) ("In the mid-1790s, appropriations laws became even more specific.").

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Appropriations Clause allowed only specific and temporally limited spending laws.[211]

Nor were the post-ratification laws relied on by the majority one-offs which might have been justifiably ignored. The discretionary spending structures in these laws are instead firmly grounded in the broader historical context introduced by this Article. This broader historical context establishes an apparent "variety" in the "structure" of "[e]arly appropriations"[212] and dooms critics' arguments for a more narrow and rigid set of appropriations requirements. The majority offered the best account in light of all of the evidence in the historical record,[213] whereas Justice Alito and the Fifth Circuit could prevail only by focusing on some of the relevant historical evidence and by ignoring significant counterevidence. This type of selective historical analysis is a recipe for future error.

The narrow approach adopted in Justice Alito's dissent was joined only by Justice Gorsuch.[214] Justice Alito argued that "the term 'Appropriations,' as used in the Constitution, is a term of art whose meaning has been fleshed out by centuries of history."[215] But his analysis of history and tradition depended on ignoring inconvenient parts of the historical record. In addition to his omissions of pre-constitutional evidence,[216] Justice Alito distinguished key post-ratification practices relied on by the majority as insufficiently analogous to the Bureau's funding structure. According to Justice Alito, customs officers with indefinite and independently directed fees had to return excess funding, while the Bureau could "keep and invest surplus funds"[217] and "had built up an endowment worth nearly $340 million."[218] As the majority pointed out, however, Justice Alito failed to explain why the retention of surplus

[211] See supra text accompanying note 166.

[212] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1486.

[213] Barnett & Solum, supra note 144, at 439 ("The overall aim of a rigorous originalist methodology is the reconstruction of the communicative content of the constitutional text and the reasons for its adoption that best explains all of the relevant evidence considered as a whole.").

[214] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1493 (Alito, J., dissenting).

[215] Id. at 1496.

[216] See supra notes 197–98 and surrounding text.

[217] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1504 (Alito, J., dissenting).

[218] Id. at 1495.

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funds (or the asserted difference in the breadth of the agencies' substantive mandates) crossed a constitutional line.[219]

In addition, Justice Alito's objection to the Bureau's retention of surplus funding missed important counterevidence introduced by this Article. Early Congresses repeatedly granted the Sinking Fund Commission significant discretion to retain and direct surplus funds for an indefinite period of time. In 1790, the First Congress granted the Sinking Fund Commission indefinite power to self-direct a generous initial fund that in today's terms exceeds $400 billion.[220] By 1792, Congress augmented the Commission's funding by pledging a "firm[]" and "inviolabl[e]" award of surplus income generated by interest on securities the Commission had purchased.[221] Finally, in 1795, Congress expressly exempted the Sinking Fund Commission's funding from "The Surplus Fund" of "unexpended" money that executive officers would otherwise be required to return to the Treasury.[222] Justice Alito's constitutional objection to retention of surplus funds was apparently unknown to the Founding generation.

Justice Alito's hyper-selective analysis raises serious methodological concerns about how judges might apply history and tradition in future cases. His anti-novelty arguments[223] and objection that "the Government was unable to cite any other agency with a funding scheme like this"[224] exacerbate all of the above-noted concerns with applying originalism-by-analogy to legislatively created structures.[225] Justice Alito's approach is so restrictive that it appears to exceed even *Bruen*'s originalist requirement that the government supply "a well-established and representative historical analogue" but "not a historical twin."[226]

[219] The majority found it "unclear why [the] differences" Justice Alito identified in post-ratification examples of the customs and post office would "matter under the dissent's theory." Id. at 1489 (majority opinion).

[220] See infra note 329 and surrounding text.

[221] See Act of May 8, 1792, ch. 38, § 7, 1 Stat. 281, 283 and text accompanying note 349.

[222] See Act of Mar. 3, 1795, ch. 45, § 16, 1 Stat. 433, 437 and discussion surrounding notes 307–08.

[223] Justice Alito repeatedly objected to the Bureau's "novel," "unprecedented," and "never before seen" funding structure. *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1493, 1494, 1505 (Alito, J., dissenting).

[224] Id. at 1503.

[225] See supra notes 163–78 and surrounding text.

[226] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) (emphasis omitted). Justice Alito's analysis also seemed to ignore Justice Jackson's concerns about subjecting the government to a misplaced burden of proof. See supra note 157 and surrounding text.

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Prominent public meaning originalists have warned that judges will misconstrue the Constitution if they reduce its meaning to a potentially unrepresentative or mistaken subset of original applications or "constitutional references."[227] As I have explained, Justice Alito appeared to embrace "an even more fraught variant of an original applications problem," because his analysis suggested that a funding structure must have a prior, "original *identical* application . . . before it can be considered constitutional."[228] Justice Alito seems to have proposed a requirement that is unattainable for any legislative structure that lacks an exact Founding-era replica. He would tether the Constitution to traditional historical practice without regard for original public meaning. Justice Alito's approach should not be considered originalist.

Justice Kagan outlined a more accommodative and tenable approach to history in a concurrence joined by Justices Sotomayor, Kavanaugh, and Barrett.[229] Like the majority, Justice Kagan agreed that the Bureau's funding scheme "would have fit right in" with the "significant variety" of appropriations laws enacted during the Founding Era.[230] Justice Kagan expressly rejected Justice Alito's selective approach and noted "[w]hether or not the CFPB's mechanism has an exact replica, its essentials are nothing new."[231] She further emphasized how the majority's position aligned with the longer arc of history and "[t]he way our Government has actually worked, over our entire experience."[232] While the Bureau was the only contemporary agency addressed by the majority, Justice Kagan's opinion clarified that the Constitution's allowance for "flexible approaches to appropriations" applied to other contemporary and similarly situated financial regulators including the Federal Reserve.[233]

Justice Kagan's approach may signal an important methodological consensus for future cases with closely contested historical records. It

[227] See Lawrence B. Solum, Original Public Meaning, 2023 Mich. St. L. Rev. 807, 841–43; Christopher R. Green, Originalism and the Sense-Reference Distinction, 50 St. Louis U. L.J. 555, 591 (2006).

[228] Chabot, supra note 183.

[229] *Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1490–92 (Kagan, J., concurring).

[230] Id. at 1490.

[231] Id. at 1492.

[232] Id.

[233] Id. at 1491–92. Justice Alito failed to offer a convincing distinction between the Bureau's funding structure and that of the Federal Reserve. He took great pains to characterize the Federal Reserve Board as "a unique institution with a unique historical background," id. at 1504 n.16 (Alito, J., dissenting), but he never clarified a constitutional sense in which the Bureau's funding differed from the near-identical funding structure for the Federal Reserve.

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encourages judges to ground contemporary structures in a wider range of historical practices from the Founding Era and beyond. Even judges following a more limited originalist framework would need to account for a wider range of Founding-era practices and avoid cherry picking evidence that represents a narrow subset of practices supported by the historical record.[234] The judicial modesty implicit in Justice Kagan's historical approach further aligns with points raised in Justice Jackson's separate concurrence, which underscored the role that judges should play in constitutional interpretation. As Justice Jackson noted, "When the Constitution's text does not provide a limit to a coordinate branch's power, we should not lightly assume that Article III implicitly directs the Judiciary to find one."[235] Justice Kagan's and Justice Jackson's opinions further align with leading scholars' concerns about the limitations of originalism and the need for judges to engage in "interpretive modesty" when applying sparse constitutional text to separation of powers disputes.[236]

Community Financial Services presented a relatively easy case once the Court had the benefit of a more complete historical record. The ease with which the Justices in the majority and concurring opinions united in their overall result underscores how far the Fifth Circuit and Justice Alito went astray. The discussion below grounds the majority's analysis in a broader historical context and confirms that the Constitution affords Congress discretion to enact a variety of spending structures.

II. THE FOUNDERS' POWER OF THE PURSE

A. A Broad Appropriation Power Emerged from the Constitutional Convention

The text of Article I, Section 9 of the U.S. Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the

[234] Id. at 1492 (Kagan, J., concurring).

[235] Id. at 1492 (Jackson, J., concurring).

[236] Heidi Kitrosser, Interpretive Modesty, 104 Geo. L.J. 459, 466 (2016) (explaining that "only the thinnest strand of the plausible contested meanings" of the Constitution "should be deemed interpretively settled"); see also Richard H. Fallon, Jr., The Chimerical Concept of Original Public Meaning, 107 Va. L. Rev. 1421, 1483–86 (2021) (listing examples of recent cases in which Justices have "over-claimed in asserting the capacity of historical materials to establish determinative linguistic meanings of constitutional provisions").

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Receipts and Expenditures of all public Money shall be published from time to time."[237] It stands in contrast to express temporal limits on spending imposed in Article I, Section 8. That section of the Constitution authorizes Congress "[t]o raise and support Armies" and specifies that "no Appropriation of Money to that Use shall be for a longer Term than two Years."[238] The use of an express two-year time limit in Article I, Section 8 is inconsistent with an understanding that the unqualified "appropriations" power in Article I, Section 9 contains an implicit temporal limitation. Further, the decision to require a statement of expenditures "from time to time" rather than annually underscored the discretionary nature of timing surrounding Congress's spending decisions. This is, no doubt, why a leading historical account of appropriations in the United States found that "the meaning of the clause is clear" as "[i]t was long ago explained by Secretary Hamilton": the Appropriations Clause required nothing more than a "previous law" to "ascertain[]" the "*purpose*, the *limit*, and the *fund*" out of which an expenditure would be drawn.[239]

Records of the Philadelphia Convention underscore the Framers' textual choices: the Framers granted Congress strong general revenue and spending powers and rejected amendments that would impose general limits on a perpetual revenue power. Instead of general limits on the duration of revenue laws, the Framers imposed limits on appropriations and applied them only to money appropriated in support of an army. The Constitution created these powers against the backdrop of the Confederation Congress's lack of similar revenue and spending powers and the Americans' break with the British revenue system after the Revolution. As recounted by Professor Michael Klarman, after "[f]ighting a war in opposition to the British Parliament's efforts to tax the colonies, Americans were naturally reluctant to delegate taxing authority to the Confederation Congress."[240] "Over the course of the 1780s," however, the "lack of independent revenue-raising authority" became a "glaring omission" in the Confederation Congress's powers.[241] Appropriations

[237] U.S. Const. art. I, § 9, cl. 7.

[238] Id. § 8, cl. 12.

[239] Wilmerding, supra note 30, at 3 (quoting Alexander Hamilton, Explanation, *in* 7 The Works of Alexander Hamilton 81, 86 (Henry Cabot Lodge ed., N.Y.C. & London, G.P. Putnam's Sons 1886)); Metzger, supra note 31, at 1086 n.36 (recognizing that Wilmerding "provid[es] a history of disputes over federal expenditures from the Framing").

[240] Klarman, supra note 27, at 16.

[241] Id.

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clauses in state constitutions sometimes required state legislatures to approve executive funding,[242] but there was no overarching power requiring states to support federal funding. In writings leading up to the Philadelphia Convention, James Madison noted the "[f]ailure of the States to comply with the Constitutional requisitions" as a key "vice" of the Confederation.[243] Records of the Philadelphia Convention reflected concerns that revenue-raising powers such as a "productive impost" tax were "not attainable under the confederation"[244] and that the Confederation Congress lacked power to make "[r]equisitions for men and money."[245] The Framers forged new revenue and spending powers against this backdrop.

Delegates who urged stronger revenue powers emphasized the need to pay off foreign debt and maintain U.S. credit, as well as the need for military spending that could be used to protect the U.S. from foreign enemies. Edmund Randolph, who introduced the Virginia Plan,[246] urged that a "national government must be established" to counteract the "present deplorable situation" in which great debts to France went "unpaid" and in which America had "insufficient" resources to "repel a foreign enemy."[247] New York's Alexander Hamilton argued that the "three great objects of government, agriculture, commerce and revenue, can only be secured by a general government."[248] Connecticut's Roger Sherman asserted that the "national debt" and "the want of power somewhere to draw forth the National resources, are the great matters that press."[249]

The primary opposition to these new revenue powers focused on federalism and the dangers of unfettered military spending. Initial federalism concerns focused on whether a new national revenue power would intrude on states' power to collect revenue as well as the expense

[242] Casper, supra note 30, at 7 (noting that Maryland, Pennsylvania, and South Carolina required legislative approval of appropriations while other state constitutions were "silent on the matter").

[243] Mary Sarah Bilder, Madison's Hand: Revising the Constitutional Convention 45 (2015).

[244] 1 The Records of the Federal Convention of 1787, at 19 (Max Farrand ed., 1911) [hereinafter 1 Farrand's Records] (James Madison's Notes, May 29, 1787).

[245] Id. at 26 (James McHenry's Notes, May 29, 1787).

[246] Bilder, supra note 243, at 13.

[247] 1 Farrand's Records, supra note 244, at 262–63 (Robert Yates's Notes, June 16, 1787).

[248] Id. at 329 (Rufus King's Notes, June 19, 1787).

[249] Id. at 341 (James Madison's Notes, June 20, 1787); accord id. at 347 (Robert Yates's Notes, June 20, 1787) (noting "the great difficulty now is[] how we shall pay the public debt").

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of a second set of federal officers.[250] The representative nature of revenue and spending laws gained particular salience alongside proposals for small states to gain an equal vote in the Senate.[251] In response to concerns that an equal vote in the Senate would grant small states disproportionate power over revenue and appropriation laws, a July 3, 1787 committee report proposed limiting the Senate's power over both revenue and appropriation laws. For revenue: "[A]ll bills for raising or apportioning money, and for fixing salaries of the officers of government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second . . . ."[252] And for appropriations: "[N]o money shall be drawn from the public treasury, but in pursuance of appropriations to be originated in the first branch."[253] Despite Madison's doubts that the limitation on the Senate would matter,[254] Randolph supported the "compromise" introduced by this clause.[255] In further debates, delegates and interested parties went back and forth on whether the Senate should have more power over money bills[256] or whether limitations on the Senate's role were necessary to leave the "pursestrings . . . in the hands of the Representatives of the people."[257] Ultimately, the Constitution included an origination restriction limited to revenue laws.[258]

A further line of debate focused on separation of powers problems that would ensue if a single branch of government gained unfettered power over military expenditures. As noted by Professor Max Edling, such spending was of the utmost concern because it "dominated the budgets of early modern states," and in England, "civil expenditures remained stable and minor compared to military expenditure throughout the eighteenth

[250] Id. at 305 (Alexander Hamilton's Notes, June 18, 1787) (noting "vast expence—double setts of officers [sic]").

[251] Id. at 523 (Robert Yates's Notes, July 3, 1787) (proposing "in the second branch of the legislature, each state shall have an equal vote").

[252] Id.

[253] Id.

[254] Id. at 527 (James Madison's Notes, July 5, 1787) (Madison "could not regard the exclusive privilege of originating money bills as any concession on the side of the small States"; it would have "no effect.").

[255] Bilder, supra note 243, at 126 (noting Madison and Randolph's differing views).

[256] 2 Farrand's Records, supra note 27, at 190–91 (James McHenry's Notes, Aug. 6, 1787) (recounting a private meeting in which Mr. McHenry requested that "the senate" be given "an equal authority over money bills with the house of representatives").

[257] Id. at 274 (James Madison's Notes, Aug. 13, 1787) (recounting arguments raised by George Mason).

[258] U.S. Const. art. 1, § 7, cl. 1.

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century."[259] Professor Chafetz identifies a narrower concern based on English history: the possibility that the King could use unchecked military expenditures to create standing armies and thereby "oppress the people and rule with an iron fist."[260]

The problem was not necessarily an overly powerful executive but any arrangement that combined the powers of sword and purse in a single branch. Records of the Convention show that Virginia's George Mason repeatedly objected to the possibility that the Constitution would combine "purse and sword" in the legislature and allow a single branch "to raise revenues and make [and] direct a war."[261] Mason raised separation of powers concerns when asserting the "reason why the Impost was opposed": he claimed it was because the Confederation Congress "was a single [branch] with Ex[ecu]tive, Jud[icial] & Legislative authority" and "ought not to be trusted."[262] He further objected to that body's "secret Journals."[263]

Concerns over military spending continued to surface in late August, as the delegates focused on efforts to enumerate key powers and obligations of government ranging from war power to payment of debt.[264] Madison's notes from August 18, 1787 show that George "Mason introduced the subject of regulating the militia."[265] Mason hoped this power would be "given to the Genl. Government" in order to avoid expenditures for a "standing army in time of peace."[266] Mason expressed further concerns over spending in response to Rutledge's motion to refer

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[259] Max Edling, A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State 168–69 (2003).

[260] Chafetz, supra note 30, at 57.

[261] 1 Farrand's Records, supra note 244, at 144 (Rufus King's Notes, June 6, 1787); id. at 139–40 (James Madison's Notes, June 6, 1787) (statement of George Mason) ("The purse [and] the sword ought never to get into the same hands . . . "—"[l]egislative or [e]xecutive."); id. at 346 (Robert Yates's Notes, June 20, 1787) (Mason questioned whether the "people" would "entrust their dearest rights and liberties to the determination of one body of men, and those not chosen by them, and who are invested both with the sword and purse?"); id. at 351 (Alexander Hamilton's Notes, June 20, 1787) (statement of George Mason) ("Objection to granting power to Congress arose from their constitution . . . [s]word and purse in one body.").

[262] Id. at 349 (Rufus King's Notes, June 20, 1787).

[263] Id.

[264] Rakove, supra note 11, at 82–83 (noting the shift to a "more pragmatic course" and discussions of "clusters of discrete issues" rather than "one overriding question"); Bilder, supra note 243, at 143 (noting that the "[d]ebts and militia committee" met and debated in late August).

[265] 2 Farrand's Records, supra note 27, at 326 (James Madison's Notes, Aug. 18, 1787).

[266] Id.

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a "clause 'that funds appropriated to public creditors should not be diverted to other purposes.'"[267] In response, Mason noted that he "was much attached to the principle" of committing to repay creditors, "but was afraid such a fetter might be dangerous in time of war."[268] Mason followed his concern about wartime spending with a broader objection to "the danger of perpetual revenue."[269] He proposed a clause stating that "no taxes should be laid for a longer term than [] years."[270] He lauded "the caution observed in Great Britain on this point as the paladium of the public liberty."[271] To the extent "that Public Credit may require perpetual provisions," Mason noted, "that case might be excepted" from a general rule against perpetual revenue.[272] Mason thus urged a general clause denying Congress perpetual power to collect revenue.

Subsequent proposals and votes determined whether Mason's broader proposal for general limits on the duration of revenue collection would become part of the new Constitution. Initially, on August 18, the delegates agreed unanimously (or "nem[.] con.") to Mason's proposal that the "Committee prepare a clause for restraining perpetual revenue."[273] On August 22, the Committee proposed adding language to this effect "at the end of the 1st clause of the 1st section of the 7 article."[274] The proposed language tracked Mason's concerns and "provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans shall continue in force for more than [] years."[275] By the following day, however, the proposed revenue power in Article 7, Section 1 had changed and eliminated the general restraint on perpetual revenue: "It was moved and seconded to amend the 1st section of the 7. article to read 'The Legislature shall fulfil the engagements and discharge the debts of the United-States, and shall have the power to lay and collect taxes, duties, imposts, and excises.'"[276] This new language granted a general power to raise revenue and eliminated the

[267] Id.
[268] Id.
[269] Id.
[270] Id. at 327; see also Figley & Tidmarsh, supra note 27, at 1254 n.381 (noting Mason's proposal).
[271] 2 Farrand's Records, supra note 27, at 327 (James Madison's Notes, Aug. 18, 1787).
[272] Id.
[273] Id.
[274] Id. at 366 (Journal, Aug. 22, 1787).
[275] Id. at 366–67.
[276] Id. at 382 (Journal, Aug. 23, 1787); id. at 392 (James Madison's Notes, Aug. 23, 1787) (same).

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earlier restraint on perpetual revenue. Thus (albeit without providing an explanation[277]) the records of the Convention show that the delegates ultimately declined the general temporal limits on revenue powers proposed by Mason.

Mason's general objection to perpetual revenue powers seemed to have more purchase with respect to specific limitations on military spending. Records show that the August 18 discussion in which Mason objected to perpetual revenue later returned to the topic of standing armies. In particular, Elbridge Gerry objected that there was no "check" against "standing armies in time of peace."[278] He proposed (alongside Luther Martin) that "in time of peace the army shall not consist of more than [a] thousand men."[279] In further response, Hugh Williamson "reminded him of Mr. Mason's motion for limiting the appropriation of revenue as the best guard in this case."[280]

The idea of checking revenue power to separate the powers of sword and purse and to limit the assembly of a standing army resurfaced in amendments that the Committee proposed on September 5. But the Committee addressed the temporal limitation with respect to appropriations and spending rather than revenue, perhaps because a limitation on spending would apply more broadly and check military efforts financed through borrowing in addition to revenue.[281] The delegates considered the Committee's proposal to "add to the clause '[t]o raise and support armies' the words '[b]ut no appropriation of money to that use shall be for a longer term than two years.' "[282]

Madison's notes recount that Gerry objected to "appropriations to an army[] for two years instead of one."[283] In response Mr. Sherman noted that "the appropriations were permitted only, not required to be for two years. As the Legislature is to be biennially elected, it would be inconvenient to require appropriations to be for one year, as there might

[277] Figley & Tidmarsh, supra note 27, at 1254 n.381 (explaining that the "notes of the debates do not explain why this language never made its way into the Constitution").

[278] 2 Farrand's Records, supra note 27, at 329 (James Madison's Notes, Aug. 18, 1787).

[279] Id. at 330.

[280] Id.

[281] See Edling, supra note 259, at 167–74 (explaining the relationship between military borrowing, tax revenue, and military power).

[282] 2 Farrand's Records, supra note 27, at 505 (Journal, Sept. 5, 1787); id. at 508 (James Madison's Notes, Sept. 5, 1787).

[283] Id. at 509 (James Madison's Notes, Sept. 5, 1787).

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be no Session within the time necessary to renew them."[284] The delegates ultimately approved the revision and two-year limit on military spending without objection.[285] At the same time, the Committee proposed general appropriation provisions with no limit on the duration of spending: "No money shall be drawn from the Treasury but in consequence of appropriations made by law."[286] The delegates agreed to postpone consideration of this clause to address accompanying language about the origination of money bills,[287] and they ultimately approved the general language of the Appropriations Clause, with no temporal limit on spending, on September 8, 1787.[288]

George Mason's final proposal for limiting revenue powers came in the form of reporting requirements. As reported by Madison, Mason moved for a clause, seconded by Gerry, to require "that an Account of the public expenditures should be annually published."[289] After Gouverneur Morris and Rufus King objected that annual reporting would be "impracticable" or "impossible," Madison "proposed to strike out 'annually' from the motion & insert 'from time to time.'"[290] Madison argued that this "would enjoin the duty of frequent publications and leave enough to the discretion of the Legislature," whereas "the difficulty" posed by more frequent reporting requirements might "beget a habit of doing nothing," as had happened with "half-yearly" publication requirements in the Confederation Congress.[291] The delegates ultimately agreed to reporting "from time to time."[292] These were the final points the delegates debated before settling on the final language of the Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[293]

[284] Id. See generally id. at 594–96 (Committee of Style) (incorporating this language and a more general appropriations clause).

[285] Id. at 505 (Journal, Sept. 5, 1787) ("agreed" to this amendment); id. at 508–09 (James Madison's Notes, Sept. 5, 1787) (It was "agreed to nem[.] con[.]").

[286] Id. at 505 (Journal, Sept. 5, 1787).

[287] Id. at 509–10 (James Madison's Notes, Sept. 5, 1787).

[288] Id. at 545 (Journal, Sept. 8, 1787) ("passed in the affirmative"); id. at 552 (James Madison's Notes, Sept. 8, 1787) (It was "agreed to nem[.] con[.]").

[289] Id. at 618 (James Madison's Notes, Sept. 14, 1787).

[290] Id. at 618–19.

[291] Id. at 619.

[292] Id.

[293] Id. at 657.

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The progression of debates and amendments shows that the delegates tailored their approach to address particular concerns over spending on an army.[294] When the delegates agreed to a temporal limitation on money bills, they shifted their focus from revenue to spending in support of an army. The power to spend was broader than power to raise revenue, insofar as the government could support spending by borrowing money that exceeded current streams of revenue. The potential breadth of spending power was particularly worrisome in the military context. As Edling has explained, in the "eighteenth century, governments financed extraordinary expenses, primarily war, by borrowing money."[295] The ability to borrow "increased" governments' "spending power far beyond what their revenue would have allowed."[296] The Constitution's two-year limit on appropriations to support an army checked this type of far-reaching spending power. At the same time, this limitation applied only to the army and not outward-facing military spending on the navy,[297] and the general Appropriations Clause contained no temporal limit whatsoever.[298]

Understandings that emerged during ratification further confirm the Framers' decision to omit a general limit on the duration of appropriations. George Mason's written objections to the Constitution did not renew his earlier opposition to perpetual revenue laws or complain about the lack of a general temporal limit on spending in the Appropriations Clause.[299] Nor did this issue figure prominently in the ratification debates, where Antifederalists' primary concerns focused on the mode and amount of revenue that would be raised.[300] As recounted by

[294] Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 Geo. L.J. 1113, 1204 (2003) (noting that the Convention's records of "evolution of a clause" provide "the interpreter with additional shades of meaning as to the objective intent and purpose of a clause"); Barnett & Solum, supra note 144, at 439 (explaining that original public meaning includes "records of the framing or drafting of the relevant provisions").

[295] Edling, supra note 259, at 174.

[296] Id.

[297] U.S. Const. art. I, § 8, cl. 12.

[298] Id. § 9, cl. 7.

[299] George Mason, Objections to the Constitution of Government Formed by the Convention, *in* 8 The Documentary History of the Ratification of the Constitution 43, 43 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 2009) (limiting complaint to the Senate's power to amend money bills and originate appropriations).

[300] Edling, supra note 259, at 188, 204 (recounting Patrick Henry's complaint that oppressive taxation arose "from the mode" of raising revenue); cf. Klarman, supra note 27, at

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Chafetz, Federalists emphasized how Congress's power over the purse and appropriations would leave money matters in the hands of the people and ward off fears of "presidential military might" and tyranny.[301] Similarly, in Federalist No. 58, James Madison described Congress's "power over the purse" as a key check on "the overgrown prerogatives of the other branches of the government."[302] A separate series of arguments focused on objections to a two- rather than a one-year limit on appropriations in support of an army.[303]

Debates over an early revenue bill in the First Congress underscored the Framers' decision to reject a temporal limit for general appropriation laws. When the House was considering a bill to raise revenue by laying duties on imports (without a concurrent appropriation of these funds), Rep. James Madison moved for "a clause . . . limiting the time of its continuance."[304] His motion prompted others to voice pragmatic concerns about how to offer "public creditors a sufficient security" and ensure that the revenue law would continue until "the wants are supplied."[305] In a response supporting Madison's original motion, Rep. White cautioned that the House "ought not . . . part with" its constitutional power to "originate money bills."[306] "Besides," he continued, "the Constitution says further, that no appropriation shall be for a longer term than two years, which . . . consequen[tly] limits the duration of the revenue law to that period."[307] White's misreading of the Appropriations Clause was not flagged until Madison joined the debate.[308]

324–35 (noting objections to direct taxes and "a very expensive and burdensome government").

[301] Chafetz, supra note 30, at 57; see also Amici Brief, supra note 23, at 21 (concluding that "[d]iscussions about separating the 'purse' from the 'sword' focused overwhelmingly on th[e] specific military concern [of tyranny]").

[302] The Federalist No. 58, at 327 (James Madison) (Clinton Rossiter ed., 1999).

[303] Rappaport, supra note 7, at 342 n.278 (gathering sources on debate of this issue).

[304] 1 Annals of Cong. 344 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison). The first two volumes of the Annals of Congress were published in two separate editions with different pagination. Marion Tinling, Thomas Lloyd's Reports of the First Federal Congress, 18 Wm. & Mary Q. 519, 520 n.2 (1961). References in this Article refer to the edition with the running head "History of Congress."

[305] 1 Annals of Cong. 344 (Joseph Gales ed., 1834) (statement of Mr. Fitzsimons).

[306] Id. at 345 (statement of Rep. Alexander White).

[307] Id.; 10 Documentary History of the First Federal Congress of the United States of America, 1789–1791, at 680 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter 10 DHFFC] (same statement in the Congressional Register).

[308] 1 Annals of Cong. 345–47 (Joseph Gales ed., 1834) (noting further debate as to whether the limitation was necessary or would undermine public credit).

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Madison opened by noting his surprise at the opposition to his motion: he had assumed the "propriety" of his position "was so obvious and striking, that it would meet no opposition."[309] The initial reason advanced by Madison for this motion is that it would be "dangerous" to "pass a bill, not limited in duration, which was to draw revenue from the pockets of the people."[310] Madison reiterated concerns about the House giving up its power to originate money bills, and with classic Madisonian spin he even ventured to "imagine[]" that a revenue law "unlimited in its duration" "*might* be considered" by the House's "constituents as incompatible with the spirit of the Constitution."[311]

At the same time, and despite its potential to augment arguments in favor of a temporal limit on the current revenue bill, Madison rejected White's further argument that the Appropriations Clause included a two-year limit on general spending laws. Madison first "observed, that an honorable gentleman had thought that no appropriation of the public money could be made for a longer term than two years."[312] "This was true," Madison continued, "as it related to the support of armies; but the question here did not appear to be respecting an appropriation."[313] For Madison, therefore, the text of the Constitution imposed temporal limits on spending *only* with respect to the army. As the text of the Appropriations Clause plainly omitted the same temporal limit, Madison distinguished it from his current argument and attempted to conjure temporal limits on revenue from the "spirit" of the Constitution.

After Madison spoke, the debate continued with what Rep. Gerry described as "a great variety of opinions . . . on this question."[314] No one pressed arguments for a temporal limit on appropriations, and the opinions addressed a mix of pragmatic and constitutional concerns while preserving a distinct role for appropriation laws. Rep. Ames, who favored broad revenue power, argued that appropriations would provide a future check on disbursement of revenue collected in the immediate bill at

[309] Id. at 346 (statement of Rep. James Madison).
[310] Id.
[311] Id. at 346–47 (emphasis added); 10 DHFFC, supra note 307, at 681 (same statement in the Congressional Register); Bilder, supra note 243, at 172 (noting argument).
[312] 1 Annals of Cong. 347 (Joseph Gales ed., 1834) (statement of Rep. James Madison).
[313] Id.; 10 DHFFC, supra note 307, at 682 (same statement in the Congressional Register).
[314] 1 Annals of Cong. 350 (Joseph Gales ed., 1834) (statement of Rep. Elbridge Gerry).

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hand.[315] On the other hand, Rep. Elbridge Gerry worried that perpetual accumulation of funds with "no [appropriation to a] particular use" might extend "after the national debt was paid" and "tempt[] . . . the Executive" to possess these funds "by force."[316] Rep. White backed off of his earlier claim that appropriation laws must be limited to two years and focused on revenue. He questioned whether the tax burden imposed by a perpetual revenue law would "be a wise and prudent measure," given the "interests of the people."[317] He also maintained that an unlimited revenue bill would cause the House to lose its constitutional "right of originating money bills."[318] Rep. Boudinot countered that the U.S. needed an unlimited revenue law to support its credit and permanent branches of government.[319] He questioned whether the proposed limitation would "rivet" the "infirmities of the former Confederation . . . upon the present Constitution."[320] In light of these and other views, Madison ultimately offered a compromise position. He said that "one or two years would be a period insufficient to answer the purposes in contemplation" and proposed that the revenue act should not expire until "a more distant day."[321] Congress ultimately passed a revenue bill that would apply through June of 1796.[322]

All in all, this history shows that the text of the Appropriations Clause means what it says and does not impose limits on the duration of appropriation laws. Arguments for a different view reflect losing arguments that the Framers never included in the Constitution's text. As noted in the following Sections, early appropriation laws confirmed this

[315] Id. at 353 (statement of Rep. Fisher Ames) (noting Ames's understanding that the revenue that would "flow into the public treasury" could not be "drawn out but by appropriations by law").

[316] Id. at 355 (statement of Rep. Elbridge Gerry).

[317] Id. at 358–59 (statement of Rep. Alexander White).

[318] Id. at 359.

[319] Id. at 363–64 (Rep. Boudinot argued that without perpetual laws "there [would] be an end to the Government" and there could be no "permanent" "judicial department.").

[320] Id. at 363; 10 DHFFC, supra note 307, at 699 (same statement reported in The Daily Advertiser); id. at 711 (same statement in the Congressional Register); 1 Annals of Cong. 347 (Joseph Gales ed., 1834) (statement of Rep. Elias Boudinot) (noting a pragmatic concern that a bill of limited "duration" would "prevent the growth of public credit").

[321] 1 Annals of Cong. 364 (Joseph Gales ed., 1834) (statement of Rep. James Madison).

[322] Id. at 366; Act of July 4, 1789, ch. 2, § 6, 1 Stat. 24, 27. This temporal limit likely reflected pragmatic considerations rather than a fixed constitutional requirement, as the initial revenue laws passed in the U.S. ultimately contained a mix of "permanent" and "temporary" revenues. Hamilton, supra note 22.

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understanding by granting indefinite and independently directed funding outside of annual appropriation laws.

B. Early Congresses Granted the Sinking Fund Commission Indefinite, Self-Directed, and Independently Sourced Funding

Spending laws passed by early Congresses are inconsistent with arguments that the Constitution requires Congress to impose specific limits on the duration, amount, and source of funds allocated in spending statutes. The initial legislation allocating money for repayment of debt bypassed all of these limits. In 1790, Congress awarded the Sinking Fund Commission power to self-direct a generous initial fund that supported purchases for years into the future and in today's terms exceeds $400 billion.[323] Within two years, debt instruments purchased with these initial funds generated sufficient surplus interest for Congress to establish a permanent, interest-based fund for the executive branch to apply to repayment of debt. Like the Bureau and Federal Reserve, funds drawn from interest on government-controlled debt instruments funded the executive through captive funds generated outside of annual appropriations.

Initial U.S. laws authorizing repayment of debt reflected the Confederation Congress's earlier struggles to repay a large debt carried over from the Revolutionary War. The Constitution's new revenue and spending powers were designed to overcome this weakness. Of course, the new constitutional powers did not solve an underlying lack of funds and challenges posed by taxpayer opposition to a large new tax burden. Concerns about repaying debt and maintaining U.S. credit still loomed large in the early days of the Republic, and the First Congress turned to Secretary of the Treasury, Alexander Hamilton, for advice.

While many of Hamilton's recommendations focused on refinancing existing debt and maintaining the ability to "borrow upon *good terms*," the First Congress also followed Hamilton's recommendations for exercise of broad new spending powers.[324] In addition to legislation authorizing a yearly stream of payments in the amount of $600,000,[325]

[323] See infra notes 329 and 340 and accompanying text.

[324] Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001 [https://perma.cc/5NCE-4KTD].

[325] Id. at 19 (recommending that Congress "reserve[e] out of the residue of . . . duties an annual sum of six hundred thousand dollars, for the current service of the United States"); Act

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Congress adopted key parts of Hamilton's proposal to manage debt through the Sinking Fund Commission. The Commission was comprised of the Secretary of the Treasury (Alexander Hamilton), Secretary of State (Thomas Jefferson), President of the Senate / Vice President (John Adams), the Attorney General (Edmund Randolph), and the Chief Justice (John Jay).[326] The Commission was not as independent as Hamilton originally proposed, as Congress subjected its decisions to heightened presidential control in important ways that went above and beyond Hamilton's recommendations.[327] At the same time, the First Congress granted key parts of the debt repayment budget proposed by Hamilton—it awarded the Commission $2,957,770 in spending power,[328] a figure which in today's terms would amount to an initial budget of $419.3 billion.[329] The Commission did not spend all of these amounts in its first

of Aug. 4, 1790, ch. 34, § 1, 1 Stat. 138, 138–39 (appropriating a "yearly sum" of $600,000 from "monies . . . which shall hereafter arise from the duties on goods, wares and merchandise" toward "the support of the government of the United States").

[326] Sinking Fund Act of 1790, ch. 47, § 2, 1 Stat. 186, 186.

[327] Chabot, Is the Federal Reserve Constitutional?, supra note 28, at 40–41 (noting how Congress modified Hamilton's proposal by staffing the Commission with a majority of removable officers, subjecting the Commission's purchase decisions to presidential approval, and granting the president unilateral borrowing power). While the Commission's structure allowed it to *decline* purchases independently of the president, the president had power to approve or block any expenditures favored by the Commission before they could take effect. Christine Kexel Chabot, The President's Approval Power, 92 Fordham L. Rev. 373, 390 fig.6 (2023).

[328] Hamilton proposed that the Commission be awarded "a sum not exceeding one million" dollars for purchases or repayment of existing debt, and that the Commission and President be awarded borrowing power "not exceeding twelve million[]" dollars to refinance foreign debt and engage in further purchases of existing debt. Hamilton, supra note 324.

The First Congress ultimately granted the Commission up to just under $1 million in funding. Alexander Hamilton, Report on the State of the Treasury at the Commencement of Each Quarter During the Years 1791 and 1792 (Feb. 19, 1793), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-14-02-0032-0001 [https://perma.cc/GEC2-HWTV] [hereinafter Hamilton, State of the Treasury Report] (noting $957,770 in surplus funding for the Commission). The President received a total of $14 million in additional borrowing power, with power to borrow up to $12 million for funds related to repayment or refinancing of the foreign debt, and up to $2 million for funds related to purchases of existing domestic debt. See Act of Aug. 4, 1790, ch. 34, §§ 1–2, 1 Stat. 138, 139 ($12 million in borrowing power); Sinking Fund Act of 1790, ch. 47, § 4, 1 Stat. 186, 187. Overall, these laws granted the President $2 million more in borrowing power than was initially requested by Hamilton.

[329] This figure is based on a calculation that $2,957,770 represented 1.5325% of the nominal U.S. GDP in 1790, which then stood at $193 million. Louis Johnston & Samuel H. Williamson, What Was the U.S. GDP Then?, MeasuringWorth, http://www.measuringworth.org/usgdp/ [https://perma.cc/G5W8-C9VX] (drawing GDP from 2024 version of the

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year and continued to draw on its initial appropriation for purchases in subsequent years.[330] Eventually, the debt purchased by the Commission generated sufficient surplus interest that Congress established a dedicated, interest-based fund for the Commission to apply to repayment of debt.

The 1790 Sinking Fund Act authorized the Commission to make discretionary open market purchases of debt in the form of U.S. securities. Congress further directed the Commission to execute this power with the President's approval and by making purchases "in such [a] manner . . . as shall appear to them [to be] best calculated to fulfill the intent of this act."[331] As noted in the preamble to the Act, Congress intended the Commission's purchases to both "effect a reduction [in] the public debt" and "benefi[t] . . . creditors of the United States, by raising the price of their stock."[332]

At the time, U.S. securities—or debt instruments which were then known as "stock"—were trading below par,[333] and the Commission had discretion to buy up large amounts of undervalued securities in order to stabilize the market and push the securities' traded price up toward par.[334] Securities that traded at or above par would bolster the United States' credit and make sales of future securities more attractive to investors.[335] To meet these goals, the Commission and President Washington self-directed their spending and adjusted the timing and amount of open market purchases to reflect fluctuating market conditions. For example, the Commission and President responded to a sharp market downturn and financial panic in early 1792 with a series of large-scale purchases "designed to inject liquidity into a market from which investors were rapidly withdrawing funds."[336]

MeasuringWorth website) (last visited on Apr. 10, 2024). In current terms, $419.3 billion is 1.5325% of the $27.36 trillion nominal U.S. GDP from 2023. Bureau of Econ. Analysis, U.S. Dep't. of Com., Gross Domestic Product, Fourth Quarter and Year 2023 (Second Estimate) (Feb. 28, 2024), https://www.bea.gov/news/2024/gross-domestic-product-fourth-quarter-and-year-2023-second-estimate [https://perma.cc/C5XS-ZZYW] (drawing a nominal 2023 GDP of $27.36 trillion from the Bureau of Economic Analysis website).

[330] See infra text accompanying note 342.

[331] Sinking Fund Act of 1790, ch. 47, § 2, 1 Stat. 186, 186.

[332] Id.

[333] Hamilton, supra note 324 (noting that "public debt . . . continues below its true value").

[334] Chabot, Lost History, supra note 28, at 129–30.

[335] Id.

[336] Chabot, Is the Federal Reserve Unconstitutional?, supra note 28, at 44.

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The millions of dollars that Congress first allocated to the Commission afforded ample latitude for the Commission to spend large amounts for several years without a further appropriation from Congress. The initial Sinking Fund Act of 1790 funded the Commission's purchases through a large appropriation of "surplus" of duties on "goods, wares and merchandise imported" and "tonnage of ships"[337] that provided just under $1 million in funding.[338] The 1790 Act also authorized the President to borrow up to an additional $2 million to support the Commission's purchases.[339] As noted above, the law authorized an upper limit of approximately $3 million in spending—a figure which in today's terms would provide the equivalent of over $400 billion in spending power.[340] Section 4 of the Act also permanently appropriated sums "out of the interest arising on the debt to be purchased" and directed that they be applied to repayment of the principal and interest on funds borrowed by the President.[341] The 1790 Act contained no end date, and the Commission continued to make discretionary purchases with the funds authorized in 1790 for years into the future.[342]

In January of 1792, Secretary Hamilton recommended that Congress fortify the Commission's budget by establishing what he viewed as a permanent "sinking fund" based on "the amount of the interest on so much of the debt as has been or shall be" purchased.[343] In particular, Hamilton proposed that interest on "sums payable to the United States in their own securities" should be "set apart and appropriated in the most

[337] Sinking Fund Act of 1790, ch. 47, § 1, 1 Stat. 186, 186.

[338] Hamilton, State of the Treasury Report, supra note 328, at 348 (noting $957,770 in surplus funding for the Commission).

[339] § 4, 1 Stat. at 187.

[340] See Johnston & Williamson, supra note 329.

[341] § 4, 1 Stat. at 187. In 1795, Congress substituted a new appropriation for the interest initially pledged in this section.

[342] See, e.g., John Adams, Commissioners of the Sinking Fund, Report of the Commissioners of the Sinking Fund Commission (Dec. 16, 1793), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-15-02-0388 [https://perma.cc/L5M2-HJ29] (describing separate purchases made under the 1790 and the 1792 Acts). One amicus brief claimed that the 1790 Act gave the "committee a fixed amount to expend each year." Brief of Washington Legal Foundation as Amicus Curiae Supporting Respondents at 20, CFPB v. Cmty. Fin. Servs. Ass'n, 144 S. Ct. 1474 (2024) (No. 22-448). This argument ignores the plain language of the statute.

[343] Alexander Hamilton, Dep't of the Treasury, Report on the Public Debt and Loans (Jan. 23, 1792), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-10-02-0124-0001 [https://perma.cc/53CL-6KRR].

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firm and inviolable manner, as a fund for sinking the public debt."[344] Hamilton further recommended that "said fund be placed under the direction" of the Sinking Fund Commission, "to be by them applied towards the purchase of the said debt."[345]

In May of 1792, Congress adopted Hamilton's recommendation and dedicated interest on certain U.S. securities to a fund managed by the Commission. The 1792 Act authorized the Commissioners to use additional funds to self-direct purchases of "debt of the United States" "with the approbation of the President."[346] To finance these purchases, the Act "establish[ed] a fund for the gradual reduction of the public debt"[347] and provided that this fund would be drawn from "interest on so much of the debt of the United States, as has been or shall be purchased or redeemed . . . by the United States."[348] The money pledged in this section reflected surplus generated by interest-based earnings on debt in the form of U.S. securities purchased by the Sinking Fund Commission. The Act "appropriated and pledged" these interest-based earnings "firmly and inviolably for and to the purchase and redemption of the said debt, to be applied under the direction" of the Sinking Fund Commission "with the approbation of the President."[349] Secretary Hamilton emphasized the permanence of this funding in a subsequent report to Congress.[350] Like the 1790 Act, the 1792 Act's open market purchase provisions lacked a determinate end date.

The Commission's initial funding was so permanent that it led to criticism that the Commission would perpetuate rather than repay the debt. In the Commission's initial years of operation, its actions focused

[344] Id.
[345] Id.
[346] Act of May 8, 1792, ch. 38, § 6, 1 Stat. 281, 282.
[347] Id. § 7, 1 Stat. at 283.
[348] Id. The Act further appropriated interest "paid into treasury thereof in satisfaction of any debt or demand" as well as the "surplus" of sums "appropriated for the payment of the interest upon the said debt." Id.
[349] Id. This section further directed the Commission to apply these funds in the following order: purchases of "several species of stock constituting the debt of the United States" up to a certain level; redemption of this debt; and finally, purchase "of any other stock consisting of the debt of the United States," with this final category of purchases to be made "within thirty days" after the day "a quarterly payment of interest on the debt of the United States shall become due." Id. The Act set parameters for purchase prices (not exceeding par and "at the lowest price" on the market) while allowing the Commission substantial discretion as to the timing and overall amounts of purchases. Id. §§ 6, 8.
[350] Hamilton, supra note 22 (stating that the 1792 Act "establishes a permanent sinking fund").

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on discretionary purchases of existing securities rather than final redemption or cancellation of those debt instruments. Hamilton's critics complained about the "slowness of debt redemption."[351] In a September 9, 1792 letter to George Washington, Thomas Jefferson complained of the permanence of Hamilton's policies: "I would wish the debt paid tomorrow; [Hamilton] wishes it never to be paid, but always to be a thing wherewith to corrupt and manage the legislature."[352] At the same time, existing funds appropriated to the Commission were insufficient to pay off the entire debt.[353] Funding sufficient to redeem the entire debt would require further appropriations.

Hamilton's 1795 Report on a Plan for the Further Support of Public Credit proposed to increase the Commission's funding to enable redemption of the debt, while retaining a general policy of committing dedicated funds for the Commission to devote to this end.[354] In 1795, following the recommendations in Secretary Hamilton's Report, Congress preserved the dedicated sinking fund managed by the Commission and redoubled efforts to redeem existing debt. The new law confirmed the 1792 Act's commitment to interest-based funding and added several standing appropriations, including payments "yearly and every year" of "so much of the proceeds" on existing "duties" as "will be sufficient" to reimburse no more than "eight per centum" of principle and interest due on certain debt instruments.[355] Section 9 of the Act underscored the permanence of funds appropriated to the Commission: it provided that "monies which shall accrue to the said sinking fund" under the 1795 and 1792 Acts "shall be under the direction and management of the commissioners of the sinking fund."[356]

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[351] Richard Sylla & Jack W. Wilson, Sinking Funds as Credible Commitments: Two Centuries of US National-Debt Experience, 11 Japan & World Econ. 199, 210 (1999).

[352] Letter from Thomas Jefferson, U.S. Sec'y of State, to George Washington, U.S. President (Sept. 9, 1792), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Jefferson/01-24-02-0330 [https://perma.cc/C999-5LPR].

[353] Sylla & Wilson, supra note 351, at 210.

[354] Hamilton, supra note 22.

[355] Act of Mar. 3, 1795, ch. 45, § 8, 1 Stat. 433, 434–35; Donald F. Swanson & Andrew P. Trout, Alexander Hamilton's Hidden Sinking Fund, 49 Wm. & Mary Q. 108, 112 (1992) (noting that this allowance implemented an "amortization principle" that "would retire debt at a rate equal to a sum growing at compound interest"). In addition, the law appropriated to the Commission proceeds from dividends on stock of the Bank of the United States, "net proceeds of the sales of lands" in western U.S. territory, "all monies, which shall be received into the treasury, on account of debts due to the United States," and certain "surpluses of the revenue of the United States." § 8, 1 Stat. at 434–35.

[356] § 9, 1 Stat. at 435.

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Unlike the open-ended spending awards in the 1790 and 1792 statutes, the 1795 legislation suggested a future end date. It noted that these monies would "continue" to be "appropriated to the said fund" "until the whole of the present debt of the United States" and "future loans" "shall be reimbursed and redeemed."[357] The Act further "declared" these funds "vested" in the "commissioners, in trust" and "pledged" the "faith of the United States" that "the monies or funds aforesaid, shall inviolably remain, and be appropriated and vested" until this debt was paid off.[358] Section 11 of the Act shifted the Commission's mandate from open market purchases to redemption of existing debt and outlined priorities for the Commission's application of funds "yearly and every year."[359]

At the same time, other provisions of the 1795 Act rendered its end date illusory. Although Section 9 provided that the Commission's funding would expire upon ultimate repayment of all debt, the Act also made clear that this debt included "future loans."[360] In Section 10, the Act authorized the Commissioners and the President to take out such future loans.[361] Thus, the Commissioners and the President had power to perpetuate their funding by taking out and then repaying new loans. The Act further underscored the longevity of the sinking fund in Section 16. This section created a general "surplus fund" to return to the Treasury sums which "remained unexpended" "for more than two years" after an appropriation.[362] Section 16 expressly excepted sums "for the purposes of the sinking fund" from the general return-of-surplus requirement, and thus reflected an understanding that the Commission would retain the surplus granted to the sinking fund for an extended time period.[363]

Future Congresses further augmented the Commission's sinking fund in 1796[364] and even under the new Jefferson Administration in 1802.[365] In 1817, Congress decided to simplify the sinking fund with new legislation that repealed its earlier appropriations. The 1817 Act replaced

[357] Id.
[358] Id.
[359] Id. § 11, 1 Stat. at 436.
[360] Id. § 9, 1 Stat. at 435.
[361] Id. § 10, 1 Stat. at 435–36.
[362] Id. § 16, 1 Stat. at 437.
[363] Id.
[364] Act of Apr. 28, 1796, ch. 16, §§ 4–5, 1 Stat. 458, 459 (appropriating additional funds and providing funding for the Secretary of the Commission).
[365] Act of Apr. 29, 1802, ch. 32, § 2, 2 Stat. 167, 168 (requiring payments of $7,300,000 "annually, and each year" "to the commissioners of the sinking fund" and "as the situation of the treasury will permit").

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complex financing provisions, including interest-based funds, with a simple structure that "vested" in the Commissioners "yearly" $10 million appropriations.[366] The 1817 legislation further eliminated permanent funding based on payments of interest from additional debt purchased by the Commission. It provided that "all certificates of public debt" that become property of the United States "shall be cancelled or destroyed."[367] But while the Act limited the Commissioners' budgetary authority, it also granted them standing rights to a stream of yearly funding in the amount of $10 million.

Early sinking fund legislation adopted Secretary Hamilton's proposals and bypassed all three proffered limits on the specificity, duration, and source of funds in spending laws. In particular, the Commission self-directed the timing and amount of funds it expended on open market purchases. Generous initial funding in the 1790 Sinking Fund Act afforded the Commission leeway to continue drawing these funds for open market purchases for several years.[368] By 1792, Congress awarded the Commission a dedicated sinking fund drawn from an independent source: interest-based earnings on debt held by the United States.[369] The 1795 Act preserved and augmented this funding and underscored the permanence of the sinking fund entrusted to the Commission.[370] Even the more simplified Act passed in 1817 relied on a generous standing award of yearly funding rather than annual appropriations that would last only one year.[371]

Critics of the Bureau's funding structure have complained about the "novelty" of its standing, self-directed funding drawn from interest-based earnings of the Federal Reserve. These critics have missed the materially identical funding structure that early Congresses used for the Sinking Fund Commission.[372] The Commission received broad power to self-

[366] Act of Mar. 3, 1817, ch. 87, §§ 1–2, 3 Stat. 379, 379.
[367] Id. § 6, 3 Stat. at 380.
[368] Sinking Fund Act of 1790, ch. 47, 1 Stat. 186.
[369] Act of May 8, 1792, ch. 38, § 7, 1 Stat. 281, 283.
[370] Act of Mar. 3, 1795, ch. 45, §§ 8–9, 1 Stat. 433, 434–35.
[371] Act of Mar. 3, 1817, ch. 87, §§ 1–2, 3 Stat. 379, 379.
[372] As noted by the government, the fact that the Bureau self-directs funding for law enforcement is irrelevant to analysis under the Appropriations Clause. Brief for Petitioners, supra note 23, at 35 ("[N]othing in the constitutional text or history supports distinctions" in this analysis "based on the . . . nature of an agency's portfolio."). Early references to the combined powers of the sword and purse referred to concerns about standing appropriations for an army rather than general law enforcement. Id. at 29 ("[T]he Founders used the 'sword' not as a metaphor for the Executive Branch generally, but instead as a specific reference to the

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direct spending from funding that was even more generous than funding awarded to the Bureau. The Bureau's funds draw "from the combined earnings of the Federal Reserve System,"[373] a body which finances its operations "primarily from the interest earned on the securities it owns" and which were "acquired in the course of the Federal Reserve's open market operations."[374] The Commission's permanent funds were likewise drawn from interest on U.S. securities that were acquired through open market purchases of the Commission. In both cases, Congress used standing awards that eschewed temporal limitations and relied on interest-based earnings that were drawn outside of annual appropriations. Key aspects of the Bureau's funding structure are by no means novel. They date back to the earliest days of our Republic.

C. Early Congresses Used Standing and Independently Sourced and Directed Funding to Compensate a Majority of Early Federal Officers

At the Constitutional Convention, a key concern with the proposed new government was the additional expense of a second layer of federal officers.[375] Early laws mitigated this expense by providing fee-based funding that operated outside of annual appropriations. As Professor Leonard White noted in his leading work on the Federalist Era, annual appropriation laws provided fixed yearly salaries for only a minority of federal officials: "By far the larger number of federal officials were compensated by fees for services rendered."[376] White went on to explain that "[n]early the whole of the field service was paid" by fees collected outside of salaries funded through annual appropriations,[377] and these officers included "collectors, naval officers, and surveyors; the supervisors and inspectors of revenue; the attorneys and marshals; the deputy postmasters; and the consuls."[378] Such compensation structures were a fixture of early enforcement mechanisms in the United States.

army."); see also Christine Kexel Chabot, Interring the Unitary Executive, 98 Notre Dame L. Rev. 129, 157 (2022) (noting concern that the President could use the removal power to gain control of both the "army" and the "money" and then build a "throne upon the ruins of [the] visionary republic").

[373] 12 U.S.C. § 5497(a)(1).

[374] The Fed Explained, supra note 33, at 4.

[375] See supra note 250 and accompanying text.

[376] White, supra note 24, at 298.

[377] Id.

[378] Id.

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Fee-based field officers were omitted from the first three "civil lists" that Congress incorporated by reference in its initial appropriation laws,[379] and certain field officers were awarded only partial and after-the-fact "deficiency" funding in spending estimates for 1792.[380] As further evidence that field officers' fee-based compensation operated outside of appropriation laws, lists of these officers and their fees were included in reports of governmental emoluments that Secretary Hamilton provided to Congress for 1792.[381] The list of emoluments made clear that field officers were compensated by separate statutory fee structures that operated outside the salaries provided for other officers in annual appropriation laws.

[379] For 1789: Alexander Hamilton, Dep't of Treasury, Schedule I: Estimate of the Expenditure for the Civil List of the United States for the Year 1789 (Sept. 19, 1789), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-05-02-0162-0002 [https://perma.cc/YX94-ZSQY] (excluding marshals and U.S. Attorneys from expenditures "[f]or the Judicial Department" and excluding customs officers for expenditures "[f]or the Department of the Treasury"); see also Alexander Hamilton, Dep't of Treasury, Report on the Estimate of the Expenditure for the Civil List and the War Department to the End of the Present Year (Sept. 19, 1789), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-05-02-0162-0001 [https://perma.cc/A7PC-LLLZ] (same).

For 1790: Enclosure: Schedule I (Jan. 9, 1790), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0010 [https://perma.cc/7YR2-FTPL] (excluding marshals and U.S. Attorneys from expenditures for judicial officers and excluding customs officers for expenditures for the "Treasury Department"); see also Report on Supplementary Appropriations for the Civil List for 1790 (Mar. 1, 1790), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-06-02-0173 [https://perma.cc/NU6X-WW3J] (same).

For 1791: Estimates for 1791, *in* 9 American State Papers: Finance, 83–84 (1832) (excluding marshals and U.S. Attorneys from expenditures listed for judges and attorney generals, and excluding customs officers for expenditures for the "Treasury Department"); Alexander Hamilton, Dep't of Treasury, Report on Appropriations of Money for Certain Purposes (Jan. 6, 1791), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-07-02-0289 [https://perma.cc/9JTN-T9KZ] (same).

[380] For 1792: Alexander Hamilton, Dep't of Treasury, Report on the Estimate of Expenditures for 1792 (Nov. 4, 1791), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-09-02-0326 [https://perma.cc/VG9J-JMPN] (failing to mention funding for U.S. Attorneys or customs officers and providing limited "deficiency" spending for marshal of District of Vermont, marshals' enumeration expenses, and amounts owed to courts, jurors, and witnesses).

[381] List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending October 1, 1792 (2-2), 1 American State Papers: Miscellaneous 57, 59–67 (1834) (noting fee-based emoluments for District Attorneys, marshals, and customs/revenue officers including collectors, naval officers, surveyors, revenue cutters, inspectors, and supervisors, with occasional salary payments for customs and revenue officers).

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Fee-based payments compensated key law enforcement officials ranging from customs officers to U.S. District Attorneys and marshals. Congress even used fee-based compensation to fund the first Patent Board. As discussed below, early statutes providing fee-based compensation allowed executive officers the same type of discretion (indefinite authority over independently directed funding from an outside source) that critics of the Bureau's funding structure complain about today. The amount of fees allowed by some statutes turned on private decisions to use fee-generating services such as customs or patent services over which the United States held a regulatory monopoly. In other cases, the amount of fees allowed turned on executive officers' prosecutorial discretion and the number of cases they chose to prosecute. In all of these cases the total amount of fee-based funding was ultimately set by private or executive decisions and independent of appropriations passed by Congress.

1. The First Congress Funded an Initial "Behemoth" of Customs Officers Through Standing Fees That Were Independently Sourced and Directed

Revenue collection was one of the First Congress's most pressing concerns. Thus, it is no surprise that three of its initial five laws imposed duties and established an extensive network of customs officers to collect these duties. The July 31, 1789 Collection Act compensated customs officers through a mix of user fees and bounties that were standing, self-directed, and independently sourced.[382]

With respect to user fees, the Collection Act provided that "fees" ranging from $0.20 to $2.50 "shall be" "paid to the collectors, naval officers and surveyors" for entry, clearance, and permitting services at ports of entry.[383] These fees were to be "received by the collector," a head customs officer who then had to "settle accounts monthly" and pay the naval officer monthly and surveyor weekly[384] before remitting the balance of duties to the Treasury.[385] While the total amount of fees had no cap and would fluctuate according to the total number of imports, the statute imposed a limit on rates of fees that officers could charge for each

[382] Amici Brief, supra note 23, at 23.

[383] Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44–45; Amici Brief, supra note 23, at 23.

[384] § 29, 1 Stat. at 44–45; id. § 5, 1 Stat. at 36–37 (collectors' duties included obligation "to receive all monies paid for duties").

[385] Id. § 9, 1 Stat. at 38.

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regulatory action. Congress authorized private informers to sue and recover $100 to $200 in forfeitures (plus costs) from any customs officer who failed to post or charge "a fair table of the rates of fees" in his office.[386]

The Act also granted collectors significant discretion to prosecute and collect self-directed bounties. It empowered collectors to self-determine funding by initiating lawsuits designed to recover penalties from persons who attempted to evade the customs laws.[387] Penalties ranged from $400 per offense for unlading goods without a permit,[388] to $500 per offense for neglecting to report and document entry into port,[389] to forfeiture of vessels and forfeiture of unauthorized or concealed goods.[390] In successful suits, the Act awarded customs officers bounties reflecting half of the penalties, fines, and forfeitures recovered.[391]

The Act granted customs officers further discretion to marshal resources for the enforcement of customs laws. Collectors could employ "proper" numbers of fee-based workers to serve as "weighers, gaugers, measurers and inspectors."[392] With the approval of the soon-to-be-created Secretary of the Treasury, collectors could "provide at the public expense . . . store-houses for the safe keeping of goods" as well as "such scales, weights and measures as shall be deemed necessary."[393] Collectors could also appoint deputies to "execute and perform" the duties of their offices in cases of the collector's "absence [or] sickness."[394]

This extensive budgetary discretion has led prominent constitutional historians to conclude that customs officers amounted to a "regulatory behemoth" supported by a "permanent, self-funding revenue stream."[395] In 1790, subsequent legislation created an Amended Collection Act and repeated key fee-based funding provisions from the initial Collection

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[386] Id. § 29, 1 Stat. at 45.
[387] Id. § 36, 1 Stat. at 47.
[388] Id. § 12, 1 Stat. at 39.
[389] Id. § 11, 1 Stat. at 38–39.
[390] Id. § 12, 1 Stat. at 39 (subjecting "goods" and "vessel[s]" to "forfeiture and seizure" in cases of unpermitted unlading); id. § 25, 1 Stat. at 43. (persons "convict[ed]" of "conceal[ing]" goods, "shall . . . forfeit and pay a sum double the value of the goods so concealed").
[391] Act of July 31, 1789, ch. 5, § 38, 1 Stat. 29, 48.
[392] Id. § 5, 1 Stat. at 36–37.
[393] Id.
[394] Id. § 6, 1 Stat. at 37.
[395] Amici Brief, supra note 23, at 23.

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Act.[396] Later that year, Congress passed further independent funding provisions in the Spirits Act.

The Spirits Act afforded the President considerable discretion in determining the number of and compensation for revenue officers intended to collect new domestic taxes under the Spirits Act.[397] The Act divided the United States into fourteen districts and authorized the President to appoint "a supervisor to each district," along with "as many inspectors" for subunits of each district as the President "shall judge necessary."[398] In addition, the President could appoint, with the advice and consent of the Senate, "so many officers of the customs to be inspectors . . . as he shall deem advisable to employ in the execution of [the] act."[399] Supervisors also had power to "appoint proper officers to have the charge and survey of the distilleries" within a given district.[400]

The Spirits Act granted the President considerable discretion over revenue officers' compensation. He could award supervisors and inspectors "reasonable and proper" allowances "to be paid out of the product of the said duties," so long as the total amount of payment did not exceed $45,000.[401] These discretionary payments afforded the President flexibility in compensating officers tasked with the dangerous and unpleasant chore of collecting a tax "so hated that it ultimately led to the Whiskey Rebellion."[402] Two years later, Congress granted the Postmaster General similar discretion to pay deputy postmasters whatever

[396] Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154 (power to employ customs workers and spend public funds on store-houses and equipment); id. § 7, 1 Stat. at 155 (power to appoint deputy collector); id. § 53, 1 Stat. at 171–72 (fees to pay customs officers); id. § 54, 1 Stat. at 172–73 (supplemental appropriations to provide adequate compensation at certain ports); id. § 55, 1 Stat. at 173 ($100–200 penalties for failing to post/charge proper fees); id. § 65, 1 Stat. at 175 (empowering collectors to employ, with approval of the Secretary of the Treasury, "small open row and sail boats" necessary for inspectors to board ships); id. § 67, 1 Stat. at 176 (authorizing collector to initiate suit for recovery of penalties); id. § 69, 1 Stat. at 177 (awarding bounties based on one-half of all penalties to customs officers). The Amended Collection Act continued to impose penalties on persons who attempted to evade customs laws. See, e.g., id. § 16, 1 Stat. at 158–59 (forfeiture of $1000 for neglecting to document and report entry into port); id. § 27, 1 Stat. at 163 (forfeitures for unpermitted unlading of goods); id. § 49, 1 Stat. at 170 (forfeitures for concealment of goods subject to duty).

[397] Amici Brief, supra note 23, at 25.

[398] Spirits Act of 1791, ch. 15, § 4, 1 Stat. 199, 200.

[399] Id.

[400] Id. § 18, 1 Stat. at 203.

[401] Id. § 58, 1 Stat. at 213. The Spirits Act itself was authorized to continue "until the debts and purposes" for which its duties were pledged "shall be fully discharged." Id. § 62, 1 Stat. at 214.

[402] Amici Brief, supra note 23, at 26.

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commissions "he shall think adequate to their respective services," up to a certain cap, from postal revenues.[403]

2. Early Congresses Funded Enforcement Efforts of U.S. Attorneys and Marshals Through Standing, Fee-Based Compensation that Fluctuated According to Executive Enforcement Discretion

a. U.S. Attorneys

Standing fee statutes empowered U.S. Attorneys to rack up bounties by "convict[ing] as many people as possible"[404] rather than tailoring their enforcement levels to reflect congressional objectives calibrated through annual appropriation laws. The First Congress established the permanent offices of Attorney General and U.S. District Attorneys in the Judiciary Act. Unlike the appropriations-based salary awarded to the Attorney General,[405] the U.S. District Attorneys were awarded court-imposed fees that operated outside of annual appropriation laws: the "attorney for the United States in [each] district . . . shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which" civil suits or criminal prosecutions would be held.[406] Professor Nick Parrillo has explained that fees paid at the state level in the late eighteenth century were either "case-based" or based "on the number of convictions won."[407] "[A]s states increasingly adopted conviction fees" after the turn of the century, more "U.S. attorneys practicing in those states began receiving such fees" under federal statutes.[408]

[403] Act of Feb. 20, 1792, ch. 7, § 23, 1 Stat. 232, 238; Amici Brief, supra note 23, at 26–27.

[404] Parrillo, supra note 25, at 277.

[405] Judiciary Act, ch. 20, § 35, 1 Stat. 73, 92–93 (1789) ("[S]uch compensation for his services as shall by law be provided.").

[406] Id.

[407] Parrillo, supra note 25, at 262. While case-based fees were "the most common fee arrangement" as of "the early nineteenth century," id. at 258, New Jersey lawmakers had imposed "conviction fees" starting in 1748, id. at 263. States with case-based fees sometimes paid fees for acquitted persons or "insolvent convicts" out of their treasuries rather than imposing these fees upon defendants. Id. at 259.

[408] Id. at 263.

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The 1792 Process Act replaced initial funding statutes[409] and awarded U.S. Attorneys standing, fee-based compensation.[410] Section 3 outlined "fees and compensations to the several officers" that would apply "from and after" the passage of the Act.[411] It awarded "such fees in each state respectively as are allowed in the supreme courts of the same" "[t]o the attorney of the United States for the district."[412] Section 4 provided for additional renumeration "paid out of the treasury" for "the attorney of the district for travelling to court" and also committed funds from the Treasury for "legal fees" for U.S. Attorneys in "criminal prosecutions."[413] Thus, U.S. Attorneys' compensation would remain a function of their fees based on cases they brought, but ultimate payment of travel expenses and fees for work in criminal cases would come from appropriations of money from the Treasury.

"[A]s states increasingly adopted conviction fees" after the turn of the century, more "U.S. attorneys practicing in those states began receiving such fees" under the Process Act.[414] Conviction-based fees incentivized U.S. Attorneys to self-direct their funding through what many perceived as overly zealous enforcement of the laws. As Parrillo has explained, litigation fees recovered from defendants against whom federal laws were successfully enforced amounted to "bounties" for prosecutorial "acts that the affected persons did not want."[415] As a result, the amount of fees recovered were determined by enforcement decisions of U.S. Attorneys rather than limits set by Congress. "To get paid" in a system based on conviction fees, early prosecutors "had to sift accusations to find the 'convictable' suspects."[416] According to Parrillo, the conviction fee

[409] In addition to the fees provided by the Judiciary Act, in 1791 Congress provided temporary travel funding for District Attorneys. Act of Mar. 3, 1791, ch. 22, § 1, 1 Stat. 216, 216 (awarding "expenses and time in travelling from the place of his abode to any court of the United States" for "the attorney of the United States for the district").

[410] Act of May 8, 1792, ch. 36, § 3, 1 Stat. 275, 276–77.

[411] Id. § 3, 1 Stat. at 276.

[412] Id. § 3, 1 Stat. at 277. Section 7 provides for fines and imprisonment for officers convicted of "wilfully and corruptly demand[ing] and receiv[ing] any greater fees than those allowed by this act." Id. § 7, 1 Stat. at 278.

[413] Id. § 4, 1 Stat. at 277; id. § 5, 1 Stat. at 277 (subjecting convicted defendants to mandatory or discretionary "payment of costs").

[414] Parrillo, supra note 25, at 263. Congress later "enacted a uniform fee schedule," id., and "made conviction fees available to U.S. attorneys nationwide in 1853," id. at 268.

[415] Id. at 24.

[416] Id. at 265.

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system motivated "public prosecutors to target convictable defendants and prosecute them vigorously."[417]

The self-directed fee system had its costs, however, and Congress eventually rejected it because it promoted overly zealous enforcement of the laws. In the 1880s, Parrillo notes, "federal lawmakers . . . began to argue that U.S. attorneys' fees were perverse and counterproductive."[418] The "fees incentivized the officers to convict as many people as possible, but congressmen increasingly felt that not everybody who was guilty and lawfully convictable ought to be punished as a matter of policy."[419] Thus, there was "virtually no dissent" when Congress shifted to salaries to rein in the number of prosecutions and promote forbearance in 1896.[420]

b. U.S. Marshals

Early Congresses also compensated U.S. marshals through fee-based payments. These laws afforded marshals standing, fee-based compensation for law enforcement activity in support of courts, in total amounts that would fluctuate according to the volume of litigation generated by private parties and U.S. Attorneys. Congress also awarded marshals substantial discretion to self-direct funding for the additional work of conducting the census. Thus, the funding and scope of marshals' work was determined outside of annual appropriations set by Congress and through others' enforcement actions or self-directed census funding. These funding mechanisms also paid marshals so little that Congress held no real purse strings and instead resorted to bonds guaranteed by private parties and *qui tam* actions to ensure that marshals lived up to their statutory duties.[421]

The First Congress created the offices of marshal and deputy marshal in the Judiciary Act. The Act provided that "a marshal shall be appointed in and for each district for the term of four years," and that the marshals' duties included "attend[ing] the district and circuit courts [and] execut[ing] throughout the district, all lawful precepts directed to him."[422] Marshals also had "power . . . to appoint as there shall be occasion, one

[417] Id. at 267.
[418] Id. at 276.
[419] Id. at 277.
[420] Id. at 278.
[421] Chabot, Interring the Unitary Executive, supra note 372, at 179–81.
[422] Judiciary Act, ch. 20, § 27, 1 Stat. 73, 87 (1789).

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or more deputies."[423] After initial, temporary legislation allowing marshals to recover a mix of litigant and appropriations funded fees,[424] Congress passed standing compensation provisions for marshals in the 1792 Process Act.[425]

The 1792 Process Act granted marshals standing funding based on fees drawn from a combination of private litigants and the Treasury.[426] Section 3 granted marshals fixed fees for piecework, such as travel and "service of any writ, warrant, attachment or process in chancery."[427] And "for all other services not herein enumerated," marshals would receive "such fees or compensation allowed in the supreme court of the state where the services shall be rendered."[428] Section 4 provided for further payments to marshals and specified that certain travel and "legal fees" for marshals in criminal cases were to be "paid out of the treasury."[429] Because marshals themselves did not control the number of criminal cases (and thus the level of related legal fees), the Act placed marshals in the difficult position of submitting estimates of criminal legal fees to Congress without knowing "what cases the U.S. attorney intended to file or prosecute that term."[430] The Act further recognized that appropriations drawn from the Treasury would cover only part of marshals' and other court officials' compensation. Section 6 described the hybrid nature of marshals'

[423] Id.

[424] Judicial Process Act, ch. 21, § 2, 1 Stat. 93, 93–94 (1789) ("[R]ates of fees" for court officials other than judges "shall be the same" as in state courts.); Act of Mar. 3, 1791, ch. 22, § 1, 1 Stat. 216, 216–17 (appropriating fees "in addition to the fees . . . to which they are otherwise by law intitled" to cover marshals' work such as "five dollars per day" for attending court, and "three dollars" for "summoning a grand jury").

[425] This Act also placed marshals in charge of disbursing funds for court expenditures. It ordered that marshals be paid money that they were then required to disburse for court expenses and compensation to other court officials. Act of May 8, 1792, ch. 36, § 4, 1 Stat. 275, 277 (regulating "Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses").

[426] Id. §§ 4, 5.

[427] Id. § 3.

[428] Id. § 3, 1 Stat. at 276–77. This statute did not specify fees for marshals' deputies, but in practice marshals "skimm[ed] a percentage off the fees earned by their deputies," and "deputies were entitled to no more than three-fourths of the fees they earned." Frederick S. Calhoun, The Lawmen: United States Marshals and Their Deputies, 1789–1989, at 22 (1999). To the extent this fee-sharing arrangement encouraged marshals "to appoint lots of deputies, to maximize [their] own income," Parrillo, supra note 25, at 508 n.184, it also afforded marshals additional discretion to self-direct funding.

[429] § 4, 1 Stat. at 277; id. § 5, 1 Stat. at 277 (subjecting convicted defendants to mandatory or discretionary "payment of costs").

[430] Calhoun, supra note 428, at 54.

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compensation and acknowledged that marshals would receive certain "fees and compensations" (generally for cases in which the United States was not a party) in addition to funds "directed to be paid out of the treasury" for criminal cases.[431]

Marshals' fees often provided inadequate levels of compensation. One historian has reported that fees suffered from "the lack of business" in courts, and the "pittance the marshals and their deputies received as fees made the job of marshal a poor way to earn a living."[432] Congress "ignored" Attorney General Edmund Randolph's 1790 recommendation that "marshals be allowed higher earnings."[433] The fee system instead required each marshal to post a privately guaranteed "$20,000 bond to protect the United States from any attempt by errant marshals to cheat on their fees or abscond with the large amounts of government funds they handled."[434] As a testament to the inadequate nature of marshals' fee-based compensation, "the federal government had frequent opportunities to collect on those bonds" until "the marshals were put on a salary in 1896."[435]

In addition to marshals' work for courts, Congress tasked them with the "burdensome duty" of conducting the census.[436] Congress afforded marshals substantial discretion to self-direct spending to adjust for differences in enumerating the populations of different districts. The initial Enumeration Act set flat compensation rates of up to $500 for marshals according to their districts,[437] but it also allowed them discretion "to appoint as many assistants within their respective districts as to them shall appear necessary."[438] Beyond discretion to decide how many assistants to employ, Congress granted marshals further discretion to supplement the assistants' statutory rates of pay in more sparsely populated areas: the marshals "may make such further allowance to the assistants in such divisions as shall be deemed an adequate compensation,

[431] § 6, 1 Stat. at 278; Calhoun, supra note 428, at 56 ("[F]or cases in which the United States was not a party, the marshals collected their fees and other court expenses directly from the litigants.").

[432] Calhoun, supra note 428, at 22.

[433] Id. at 23.

[434] Id. at 15; id. at 21 (noting that "local businessmen and friends" would "normally" "pledge portions of the total" bond).

[435] Id. at 15. In 1793, Congress approved a $200 advance of incidentals to marshals, and this amount "eventually . . . evolved into a salary" by 1896. Id. at 22.

[436] Id. at 19.

[437] Enumeration Act, ch. 2, § 4, 1 Stat. 101, 102 (1790).

[438] Id. § 1, 1 Stat. at 101.

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provided the same does not exceed one dollar for every fifty persons."[439] While taking the census was an inherently time-bound activity that occurred only once every ten years, Congress delegated marshals substantial discretion over how much to spend on assistants who would help them conduct the census.

Congress also supplemented minimal fees awarded by the Enumeration Act with *qui tam* suits. Rather than attempting to monitor enumerations work through appropriations or rely on presidential oversight, Congress allowed private parties to bring an "action of debt" to recover half of the $800 forfeiture that courts could assess against marshals who shirked their enumeration duties.[440] The law thus imposed monetary penalties on marshals who failed to perform their statutory duties.

The marshals' fee structures operated as part of a shoestring budget and an underfunded Congress's attempt to cobble together a critical mass of field officers for whom it could not afford annual salaries. These laws were a far cry from the congressionally imposed "supervisory role" for appropriations envisioned by advocates of stronger nondelegation requirements.[441] The standing fees that statutes awarded marshals for court-related work were driven by enforcement initiatives of U.S. Attorneys and private parties, and these fees were "collected . . . directly from the litigants" rather than the Treasury for civil matters including "cases in which the United States was not a party."[442] Standing allowances for fee-based payments from private parties are inconsistent with assumptions that all spending was fixed in annual appropriation laws which facilitated supervision by Congress. For enumeration, Congress likewise gave marshals broad discretion to determine the number of and compensation for assistants needed to conduct the census. Congress relied on *qui tam* actions to supervise and seek forfeitures from marshals who shirked their enumeration duties.

Notwithstanding that the underlying payments for enumeration and certain fees for travel and criminal enforcement actions came from the Treasury, the overall legal structure still relied on fees paid by private parties and delegated significant decisions on funding of enforcement actions away from Congress. Congress's standing fee laws replaced annual appropriations decisions with compensation that fluctuated

[439] Id. § 4, 1 Stat. at 102.
[440] Id. § 3, 1 Stat. at 102.
[441] CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 225 (5th Cir. 2022).
[442] Calhoun, supra note 428, at 56.

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according to the amount of fee-earning activities that marshals, deputies, and assistants performed. Early fee-based funding regimes placed key enforcement and spending decisions outside of Congress's direct supervision and control.

3. Congress Used Standing and Independently Directed and Sourced Fees to Fund an Entirely New Agency Known as the First Patent Board

The First Congress relied on standing, fee-based funding that was both independently directed and sourced when it created an entirely new agency known as the first Patent Board.[443] Congress's initial patent legislation followed on the heels of the Framers' decision to include the Intellectual Property Clause in the Constitution.[444] This Clause was crafted against the general backdrop of the English system and the Statute of Monopolies, which permitted certain letters patent as an exception to the general prohibition against state-sanctioned monopolies.[445]

England's bare-bones registration system for granting patents left open many questions about the initial system for granting patent rights at the federal level in the United States.[446] Congress declined to continue the state legislatures' practice of granting patents in private bills issued in response to individual petitions.[447] It considered delegating power to grant patents and resolve initial claims to competing patent rights to a variety of actors before assigning these powers to a new Patent Board inspired by the French examination system.[448]

Congress avoided the expense of staffing a new agency when it passed legislation that named the Secretary of State (Thomas Jefferson), Attorney General (Edmund Randolph), and Secretary of War (Henry

[443] Thanks to Professor Nadelle Grossman for raising this question about Congress's ability to fund whole agencies outside of annual appropriations.

[444] U.S. Const. art. I, § 8, cl. 8.

[445] Craig Allen Nard, Legal Forms and the Common Law of Patents, 51 B.U. L. Rev. 54, 63 n.51 (2010) ("[A] plausible inference can be made that the Founders were aware of the Statute of Monopolies.").

[446] Chabot, Lost History, supra note 28, at 138 ("English practice was limited.").

[447] Herbert Hovenkamp, The Emergence of Classical American Patent Law, 58 Ariz. L. Rev. 263, 267–68 (2016) (noting transition away from state legislature's role).

[448] Gregory Reilly, Our 19th Century Patent System, 7 IP Theory 1, 8–9 (2017) (noting Congress's ultimate choice of an examination system); Chabot, Lost History, supra note 28, at 140.

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Knox) as *ex officio* officers of a new Patent Board.[449] The Board had discretion to grant patents for a "term not exceeding fourteen years" if at least two of its members "deem[ed] an invention or discovery sufficiently useful and important."[450] To fund the Board members' additional patent-related work, the Act required the patentee to first "pay" certain "fees to the several officers employed in making out and perfecting [the patent].[451] As recounted by Professor Jerry Mashaw, amounts paid to the Secretary of State ranged from "ten cents" for "filing specifications, per copy-sheet containing one hundred words" and "fifty cents" for "receiving and filing the petition" to "one dollar" to affix the "great seal" with approval of the President to "two dollars" for the already underpaid Attorney General to "make out the patent."[452] The Act's funding not only lacked a temporal limit, but it also required the Board to collect fees directly from patentees and varied the total amount of fees according to the number of patents sought.

Board member Thomas Jefferson was dissatisfied with the fee-based examination system and proposed amendments to the 1790 Act. As recounted by Edward Walterscheid, Jefferson objected to the workload created by the examination system because he and other Board members "had insufficient time to properly carry out" their work on the Patent Board while maintaining their principal offices of Secretary of State, Attorney General, and Secretary of War.[453] Jefferson would later complain that he was oppressed "beyond measure" by the need to resolve weighty matters in little time and "give crude" and "uninformed opinions on rights often valuable."[454] The fee-based payments failed to provide adequate compensation for these officers to manage patent applications alongside duties of their other offices.[455]

[449] Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10 (authorizing "persons" to "petition" the "Secretary of State, the Secretary for the department of war, and the Attorney General" for patents).

[450] Id.

[451] Id. § 7, 1 Stat. at 110.

[452] Id.; Mashaw, supra note 25, at 1302 (recounting statutory fees for these officers).

[453] Edward C. Walterscheid, Priority of Invention: How the United States Came to Have a "First-to-Invent" Patent System, 23 AIPLA Q.J. 263, 301 (1995).

[454] Letter from Thomas Jefferson to Hugh Williamson (Apr. 1, 1792), Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Jefferson/01-23-02-0312 [https://perma.cc/DL6R-5NJ2].

[455] Sinking Fund Commissioners' *ex officio* appointments also omitted funding for certain expenses such as additional travel that was not covered by the Chief Justice's salary. James E.

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In Congress, debates over patent reform reflected concern over the expense of staffing a reconfigured Patent Office and an argument that fee-based compensation might allow Congress to avoid providing for yet another officer's salary.[456] In 1793, Congress ultimately opted for a streamlined registration system. This legislation replaced the Patent Board and its discretionary examination process with registrations processed by the Secretary of State's office.[457] The 1793 legislation retained standing fee-based compensation.[458] It also added a requirement that these fees be processed through the Treasury rather than paid directly by the patentee: it required "every inventor" to "pay into treasury thirty dollars" and ultimately "pass to the account of clerk hire" for the Secretary of State.[459] The Act provided that this money paid "shall be in full for the sundry services, to be performed in the office of the Secretary of State."[460] Congress further retained fee-based funding when it again revised the patent laws in 1836.[461]

CONCLUSION

Originalism has arrived. Its dominance as a constitutional methodology is underscored by recent challenges to the constitutionality of the Bureau's funding structure. At the same time, these challenges raise vital questions about judges' ability to apply originalism. Critics of the Bureau's funding structure mistook a small and discretionary segment of a much greater historical record for clear evidence of original constitutional meaning. These critics missed important counterevidence and equated original meaning with select instantiations of Congress's spending power. Their omissions illustrate significant problems with an

Pfander, Judicial Compensation and the Definition of Judicial Power in the Early Republic, 107 Mich. L. Rev. 1, 42 n.212 (2008).

[456] See e.g., 3 Annals of Cong. 855 (1793) (Rep. Williamson was "decidedly opposed to creating a new Department—expense to the Government would be the inevitable consequence."); id. at 854 (Rep. Page "alluded to fees from the patentees" as a way to add a patent officer "without recurring to a salary.").

[457] Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318, 318–21.

[458] Id. § 11, 1 Stat. at 323.

[459] Id.

[460] Id.; see also Mashaw, supra note 25, at 1302 n.145 (explaining that the Patent Office was moved to the State department).

[461] Act of July 4, 1836, ch. 357, § 9, 5 Stat. 117, 121.

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analysis fixated on anti-novelty and call into question whether jurists can reliably divine novelty from a distant historical record.[462]

The Fifth Circuit omitted significant historical counterevidence when it identified a new Appropriations Clause violation without the benefit of additional briefing on this issue.[463] Once the Supreme Court was able to consider a more complete historical record, it reversed the Fifth Circuit's decision by a 7-2 vote.[464] Only Justices Alito and Gorsuch refused to accept the constraints posed by a more complete historical record and evidence that overwhelmingly supported the Bureau's funding structure.[465] Their attempts to shoehorn historical and empirical evidence into a precise legal analogue seemed geared to exclude history relevant to the quest for original meaning. With respect to separation of powers, an unduly narrow historical lens runs a great risk of confusing discretionary structural choices for binding constitutional requirements.[466] The errors introduced by selective analyses of historical evidence in *Community Financial Services* illustrate the need for courts to approach originalist assertions of novel separation of powers violations with a modicum of modesty and a broader historical lens. Concurrences written by Justices Kagan and Jackson highlight both of these concerns.

As a majority of the Court ultimately recognized, the critics asserted limits on congressional powers that appear nowhere in the text of the Appropriations Clause. Both the history relied on by the majority and the broader historical context introduced by this Article show that these limits are also at odds with the Founding generation's understanding. The purported limits on congressional powers were never adopted by the Framers, shot down by James Madison in early congressional debates, contrary to legislation awarding the Sinking Fund Commission a generous and indefinite fund, and contrary to standing, fee-based funding that supported a majority of officers in the early days of our Republic. Proponents of constitutional limits on Congress's power to delegate spending power have failed to uncover the original meaning of the Appropriations Clause. They have instead made history.

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[462] See Litman, supra note 163, at 1482–83.
[463] See supra text accompanying notes 146–49.
[464] See supra note 4 and accompanying text; CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1480–81 (2024).
[465] See supra text accompanying notes 215–28.
[466] Id.