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Money for Nothing, That's Not the Way You Do It: The Consumer Financial Protection Bureau and the Dire State of Congressional Appropriations

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KEY TAKEAWAYS

The Consumer Financial Protection Bureau's funding scheme poses a challenge to the divided form of government set forth in the U.S. Constitution.

In *CFPB v. Community Financial Services*, the Supreme Court of the United States will determine whether that challenge makes the funding scheme unconstitutional.

The Court should hold the arrangement unconstitutional because, if allowed to endure, it would accelerate the drift toward federal administrative control.

The logic of the funding scheme behind the Consumer Financial Protection Bureau (CFPB) poses a challenge to the limited and divided form of government set forth in the U.S. Constitution. In a case slated for argument this fall, *CFPB v. Community Financial Services*, the Supreme Court of the United States will determine whether that challenge makes the funding scheme unconstitutional or whether it is a permissible innovation within the constitutional framework. The Court should hold the arrangement unconstitutional because the CFPB's independent funding exemplifies a principle without limits, the triumph of modern expedience over republican prudence, that if allowed to endure would accelerate our nation's drift toward federal administrative control.

The Framers vested Congress alone with the power to spend money and reinforced the exclusivity of that body's "power of the purse" with the command set

down in the Appropriations Clause that "no money shall be drawn from the treasury, but in consequence of appropriations made by law."[1]

Nevertheless, the CFPB has enjoyed from its inception the right to determine its own annual funding needs and to draw that funding directly from the coffers of the Federal Reserve. This contrasts with the vast swath of federal regulatory bodies and enforcement agencies, like the Securities and Exchange Commission and the Department of Justice, that are obliged to go to Congress annually to seek funding for their operations. The 111th Congress created this state of affairs in 2010 when it passed the Dodd–Frank Wall Street Reform and Consumer Protection Act. Proponents of that law insisted that to avoid future crises, the bureau must be "totally independent" of the political branches and thus be funded only through monies that under the law are "not Government funds...or appropriated monies."[2]

Yet when the constitutionality of this funding arrangement was challenged, the bureau and its supporters took a markedly different stance, arguing that the funds were in fact "appropriated" in the constitutional sense even if Dodd–Frank and a litany of the bureau's past public statements indicated otherwise.[3] According to their revised assessment, Congress satisfied the Appropriations Clause once and for all when it enacted Dodd–Frank and established the bureau's perpetual funding entitlement. Thus, every time the bureau debits funds from the Federal Reserve, it does so "in consequence of appropriations made by law." The Constitution, they maintain, requires nothing more than what the 111th Congress already did, and annual appropriations, while typical, are not constitutionally required.

The lower courts split in their assessment of that argument. The Second Circuit Court of Appeals accepted it at face value, concluding that Dodd–Frank was a lawful appropriation because it specified the purposes for and a limit on the bureau's funding (12 percent of the Fed's annual operating expenses).[4] In the Second Circuit's estimation, requiring that appropriations be time-limited would be a purely judge-made rule supported neither by the text of the Constitution nor by the history of appropriations. That case is not before the Court this term, but the underlying argument is.

The Fifth Circuit Court of Appeals took a more jaundiced view. Drawing on the Founders' well-documented concerns about the need to keep the power of the purse firmly in the hands of the people's elected representatives, the Fifth Circuit reasoned that the Constitution forbade Congress from delegating its duty to appropriate funds to the executive branch.[5] By vesting the CFPB with a permanent entitlement to funding, however, the 111th Congress had done just that and had cut the ties that bound the bureau and future Congresses. The Fifth Circuit declined to say how often appropriations must occur to

comply with the Constitution. Instead, it concluded that "[w]herever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it."[6] That case is now before the Supreme Court and will be decided this term.

The Court has been receptive to legal challenges vindicating the horizontal separation of powers among the three federal branches. Moreover, the Court has been cognizant of the specific ways in which the CFPB operates on the outer margins of our constitutional order. In 2020, in an opinion written by Chief Justice John Roberts, the Court held that the bureau's director enjoyed unconstitutional insulation from removal by the President.[7] In that opinion, the Court commented that the bureau's "financial freedom makes it even more likely that the agency will 'slip from the Executive's control, and thus from that of the people.'"[8] In dissent, Justice Elena Kagan disagreed, noting that the bureau's "budgetary independence comes mostly at the expense of Congress's control over the agency, not the President's."[9] Justice Kagan was right, but the question of Congress's control was not before the Court then. It is now.

Nevertheless, it is uncertain whether the Court will follow the Fifth Circuit rather than the Second when it confronts the question of the CFPB's funding directly. The reasons for this are practical, historical, and legal.

On the practical front, the Court is keenly aware that a small but important set of entities are funded outside the annual appropriations process, the Federal Reserve chief among them. The Fifth Circuit tried to ameliorate this concern by noting that no agency enjoys quite the level of financial independence that the CFPB does.[10] Yet the question is not whether distinctions can be made (they can), but whether the distinctions can be made legally relevant such that the Court could hold the CFPB's funding unconstitutional without calling into doubt the constitutionality of the Fed.

The practical problem bleeds over into a historical one. Courts often define the contours of vague constitutional terms by looking to historical practices, particularly those prevailing in and around the Constitution's ratification. An agency organized like the CFPB would have been utterly alien to the minds of the Framers.[11] But historically, congressional practice concerning appropriations has been something of a hodgepodge, and the Federal Reserve is but one example of the heterodox methods Congress has employed. As one scholar explains, "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."[12] Thus, discerning a principled set of boundaries from

congressional precedent, with all its drifting inconsistency, poses a problem for members of the Court who are inclined to use history as the litmus test for constitutionality.

That concern opens the deeper interpretive question of how and when to venture beyond the constitutional text and rely on structural principles or even background principles of law as the grounds for deciding constitutional questions. As the dueling opinions from the Second and Fifth Circuits demonstrate, the laconic text of the Appropriations Clause is by itself likely insufficient to deem the CFPB's funding mechanism unconstitutional. That does not make the Fifth Circuit's opinion wrong, but it requires resort to the (sometimes controversial) insight that text alone may "give[] incomplete or misleading answers to important questions about the law" and thus "needs to be supplemented with attention to our entire legal framework because our legal system relies not just on written texts but also on an unwritten law."[13]

The Consumer Financial Protection Bureau

Created in the aftermath of the 2008 financial crisis, the CFPB was born from the concern that mainstay financial products like mortgages had been freighted with such quantities of legal and economic jargon that their underlying risks were incomprehensible to the average person. There was additional concern that, as it had before the crisis, investor appetite for financial instruments like mortgage-backed securities and collateralized debt obligations would provide incentives to lenders to inflate the number of mortgages and consumer product loans by lending to unqualified buyers whose low credit ratings made full repayment unlikely.[14]

Elizabeth Warren, then a professor at Harvard Law School, advocated for the creation of a federal "financial product safety commission" to ensure that the financial services industry did not sacrifice "consumer safety" to profit motives.[15] Using the Consumer Product Safety Commission as an analogy, she envisioned Congress creating a new multimember body that, "[f]ree of legislative micromanaging," would review financial products, establish disclosure guidelines, and ban or modify the sorts of terms and conditions that enabled exploitative practices.[16]

In the abstract, Warren's proposal had a commonsense appeal to Americans who were beginning to reckon with the business and regulatory failures behind the financial crisis. Yet the form Warren's idea took in legislation ensured that the bureau would become a persistent source of legal controversy. When Representative Barney Frank (D–MA) introduced legislation

in the House reifying Warren's idea, the bill gave the proposed agency a permanent funding source outside the annual process of congressional appropriations.[17] The version later introduced by Senator Christopher Dodd (D–CT) retained the bureau's budgetary independence and reduced the multimember body to a single director.[18]

From the outset, these features made the CFPB an outlier. Independent financial regulators like the Federal Reserve are governed by multimember bodies, and agencies that perform similar market regulatory functions like the Federal Trade Commission and the Commodity Futures Trading Commission are multimember bodies and are required to seek funding through Congress's annual appropriations process. Collectively, these features led the Supreme Court to comment that an "agency with a structure like that of the CFPB is almost wholly unprecedented."[19]

The CFPB's advocates made no secret of why they favored these anomalous features: In their minds, the bureau could remain pure in its motives and zealous in its enforcement only if it remained isolated from congressional politics.[20] To ensure that independence, the architects of Dodd–Frank went to great lengths to establish perpetual funding for the bureau outside of Congress's influence. Specifically, Dodd–Frank dictated that:

- "Each year (or quarter of such year)...the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary [not exceeding 12 percent of the Fed's operating expenses[;]"[21]

- "[T]he funds derived from the Federal Reserve System...shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate[;]"[22]

- "All amounts transferred to the Bureau under subsection (a) shall be deposited into the Bureau Fund.... The interest on, and the proceeds from the sale or redemption of, any obligations held in the Bureau Fund shall be credited to the Bureau Fund;"[23] and

- "Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies."[24]

The legislators' desire to create an entity that would be self-sustaining and unsupervised is evident. A specific feature worthy of further comment

is the separate Bureau Fund, in which the CFPB is permitted to retain all of the funds it receives and invest some portion of them rather than remitting them to the Treasury as almost every other agency must.

In other words, as some amici have noted in their briefs to the Supreme Court, the Bureau Fund is a "nest egg." Technically, if the bureau determines that its funding needs for any given year will exceed the 12 percent threshold, then the bureau must ask Congress for more funding.[25] More than a decade of CFPB operating budgets indicates that this scenario is more theoretical than real as the bureau has never exhausted its annual entitlement.[26] The Bureau Fund, however, allows the CFPB to exceed the annual spending cap by drawing on the revenue from its investments rather than presenting themselves before an elected body. The Fund is, at the very least, a further hedge against the remote possibility that Congress could ever have a role in reviewing the CFPB's funding or curtailing its activities. It also means that even if some future Congress passed legislation returning the CFPB to the normal appropriations process, the endowment in the Bureau Fund could allow continued independence until or unless Congress restored that money to the Treasury.

The significance behind Dodd–Frank's funding provisions is easier to understand in context: During the 111th Congress, Democrats outnumbered Republicans in both the Senate (59 to 41) and the House (257 to 178).[27] Thus, it is fair to say that the "CFPB and its financing structure was the product of a Congress and administration under the control of a single party, determined to insulate the newly created agency against interference by a president or a future Congress under the control of the other party."[28]

Today, the bureau's defenders strenuously maintain that total financial independence is indispensable to the bureau's efficacy even as other agencies continue to carry out their missions without this insulation.[29] In other words, the CFPB's advocates are committed to the paradox that the only way the bureau can protect the people is if it remains protected *from* the people. In this way, unaccountability becomes the operational philosophy for an arm of an ostensibly republican government.

That arm, it should be noted, is a uniquely powerful one. The bureau sits atop not only a large stockpile of cash, but also a sprawling mass of authority that consists of Dodd–Frank's mandate to prohibit "any unfair, deceptive, or abusive act or practice" and the mandate to enforce 18 additional federal statutes relating to consumer protection.[30] Within this legal constellation, the CFPB "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens."[31] While

the federal administrative archipelago consists of many powerful actors, the bureau may represent the most complete concentration of powers in any single government entity.[32]

The Appropriations Clause

The second major character in this drama is the Appropriations Clause, the constitutional provision that challengers maintain the CFPB's perpetual funding violates.

The Text. The Appropriations Clause states that "no money shall be drawn from the treasury, but in consequence of appropriations made by law."[33] On its face, the text is fairly simple; it is an injunction against the accessing of public funds by other branches without express permission from the people's elected representatives. But the clause is not merely a limitation on the non-legislative branches; it contains a command to Congress itself: If Congress wants certain matters carried out, then it is Congress's responsibility to see that they are funded.[34] The clause's function is not to confer any new distinct power on Congress; Article I, Section 8, Clause 1 of the Constitution already vests Congress with the antecedent power to spend public funds. Thus, the Appropriations Clause performs a function other than empowering Congress; it entrenches the exclusivity of Congress's spending power and conditions its exercise specifically on the enactment of "appropriations made by law."

This phrase is the kernel of the controversy between the CFPB and its critics. Under the clause's plain terms, the prerequisite to withdrawing money is not merely a law in the generic sense, but *an appropriation by law*. The difference may sound semantic, but it affords solid footing to the contention that "[n]ot every creation of spending authority qualifies, ipso facto, as an 'Appropriation[] made by Law' under the Constitution."[35] That raises the question: What sort of congressional enactment qualifies as a lawful appropriation? Unfortunately, the clause's text does not answer that question. "The appropriations clause...is neither self-defining nor self-executing."[36] Thus, it is necessary to search through other sources to determine the constitutional parameters of an appropriation.

Historical Background. The clause's history helps to refine the picture. The Appropriations Clause is no ancillary provision lodged carelessly between mightier powers; rather, it is a feature "at the foundation of our constitutional order."[37] "The separation between the Executive and the ability to appropriate funds was frequently cited during the founding era as the premier check on the President's power."[38]

Drawing on the bloody, sometimes regicidal, conflicts of Great Britain, the Framers appreciated the need to vest the "power of the purse" exclusively in the legislature.[39] Federalists like James Madison saw legislative control of funding as the germinal power from which "infant and humble representation of the people" grew into a force able to "reduc[e]...all the overgrown prerogatives of the other branches of the government."[40] Because the "legislative department *alone* has access to the pockets of the people...a dependence is thus created in" the other departments of government.[41] The Federalists, it seems, understood the need not only to lodge the funding power in the legislature, but also to make that power exclusive to that body lest the other departments forget their fiscal dependence.

Concerns over the potency of the funding power led the Framers to a further refinement: Bills raising the requisite funds were to originate only in the House of Representatives—the only branch then elected directly by the people and subject most frequently to electoral accountability.[42] The Origination Clause, while separate from the Appropriations Clause, serves to highlight the centrality of government funding as a concern at the Constitutional Convention and illustrates the convention's consistent response: Keep the funding power as close to the people as possible.

The Anti-Federalists—contemporaries who opposed the centralizing designs of the Constitution's authors—were at least equally concerned about possible misuse of the funding power. They were presciently fearful of the aggrandizing tendency of federal power in general and executive power in particular.[43] In the power of the purse, they saw the means by which the federal government could slip the restraints of enumerated powers and realize the ambition to be an all-encompassing authority. Throughout the ratification debates, the Anti-Federalists maintained that if the power of the purse was to reside anywhere in the new federal government, it must be solely within the legislature.[44] In the face of their critiques, the Constitution's "separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president."[45]

The Federalists and Anti-Federalists differed greatly in their views of how republican principles ought to be embodied in government, but they agreed that the funding power must be exclusive to the legislature and must be entrusted to that branch of the legislature representing what their English predecessors called the commons: the House of Representatives.[46]

Historical Application. Congress's modes of appropriation in the era following ratification varied in the particulars, but no analogue emerges from that variety to validate the means Congress used when funding the CFPB.

Before their separation from Great Britain, inhabitants of the colonies kept a tight rein on the salaries of local officials and judges by "limit[ing] appropriations for these purposes to one year's duration."[47] "A few appropriations practices have existed since the Founding—such as annual appropriations, appropriations being separate from legislation, and origination of appropriations measures in the House."[48] The early Congresses enacted appropriations separately from substantive legislation because appropriations were time-limited while legislation was intended to be permanent until repealed or until the date specified in its own terms.[49]

The practices that prevailed following the Constitution's ratification affirm that only certain kinds of enactments are appropriations. They also affirm that Congress took seriously the need to maintain regular direct control of the executive branch's funding by imposing a temporal norm of annual appropriations, which ensured that every Congress had its say.[50]

Nevertheless, Congress at times would slacken its tether on the executive branch. "From 1789–1791, the First Congress made lump-sum appropriations for the entire Government—sums not exceeding specified amounts for broad purposes."[51] It was Alexander Hamilton, then Secretary of the Treasury, who engineered this relatively freewheeling approach that empowered the executive branch with discretion in the spending arena,[52] but Hamilton limited himself to *annual* appropriations, which conferred discretion on the executive branch only for limited intervals.[53] Moreover, his lump-sum approach was sufficiently scandalous to produce congressional backlash.[54]

Hamilton's successor, Albert Gallatin, fought both as a Congressman and as Secretary of the Treasury to restore greater specificity, and thus oversight, to the appropriations process.[55] Gallatin was determined that the practices prevailing during the period of Federalist governance should not become precedent lest Congress be reduced to "a mere machine, the convenience used by Government for the purpose of raising up supplies; the medium through which the Executive reaches with ease the purse of the people."[56]

Gallatin succeeded partially in restoring the executive's dependence on Congress, the notable exception being in military affairs—an area soaked with executive prerogative like no other—where Congress continued to allow the executive branch some discretion to shift appropriated funds among a variety of priorities.[57] Even there, however, executive accountability and fiscal dependence were not lost because Congress could rely on a temporal backstop to executive discretion: Concerning the "support [of] Armies," the Constitution provided that "no Appropriation of Money to that Use shall be for a longer Term than two Years."[58] Thus, for all their innovation and presumption, the Hamiltonian practices offer no direct precursor to the CFPB's perpetual funding.

In its petition for certiorari, the CFPB identifies the two Founding-era examples most analogous to the perpetual self-funding authority the bureau enjoys: "a national Post Office, to be funded through its collection of postage rates," and "a national mint, to be funded in part through its collection of fees."[59] In the Post Office Act of 1792,[60] the Second Congress provided that the Post Office would draw its operating expenses from a revolving fund, which is "a species of collection authority."[61] Because the Post Office performs an essentially commercial activity, its own activities generate income that finance its continued operations.[62] Similarly, in the Coinage Act of 1792, Congress provided for the creation of a National Mint funded through the "deduction of one half per cent" the value of bullion bought for coinage.[63] Like the Post Office, the Founding-era mint acted as a service provider, taking value from those bringing bullion in exchange for coining the metal.

Do these creations of the 2nd Congress prefigure the choices the 111th Congress made when constructing the CFPB and thus indicate that those choices were consistent with the Constitution's original meaning? That is doubtful. Funding for the Post Office and National Mint were exceptions to the annual-appropriations norm of the period. The very existence of exceptions at the Founding makes the conclusive foreclosure of others difficult, but it does not follow that every innovation, however tenuously similar to these exceptions, is constitutional. Accepting that view would mean there are no real limits to the ways in which Congress can satisfy the Appropriations Clause, which is simply not a plausible, or even permissible, answer when "[t]he powers delegated by the [] constitution to the federal government, are few and defined."[64] As jurist Spencer Roane once observed, "That man must be a deplorable idiot who does not see that there is no earthly difference between an unlimited grant of power and a grant limited in its terms, but accompanied with unlimited means of carrying it into execution."[65]

Thus, sensible interpreters are obliged to look carefully at the contours of the exceptions the Framers themselves tolerated to understand what limits constrain the innovating proclivities of future Congresses. This approach accords with the Supreme Court's view that "the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it."[66]

Neither example cited by the CFPB goes nearly as far as the 111th Congress went in Dodd–Frank. The arrangements funding the Post Office and the National Mint are only superficially similar to the CFPB's. In both cases, the funding mechanism contains its own limitation because revenues generated from fees bear a direct relation to the demand for the services provided. Fees are generally the result of a voluntary transaction.[67] Moreover, agencies

with the power to impose fees are not at liberty to pursue revenue for the sake of promoting their own fiscal independence; rather, the fee amount charged is determined by the "benefit" or "value to the recipient."[68] The CFPB, by contrast, is vested with power to command funds from the Federal Reserve's $7.5 billion pool of resources based on whatever the director (or the President) thinks desirable, constrained only by a 12 percent ceiling, which in practice has proven to be a limitation more theoretical than real.[69]

The nature of the entities to which early Congresses granted fee funding is also a relevant consideration. The 2nd Congress conferred this more limited, transaction-based form of perpetual funding on two entities that performed unique functions. Both the National Mint and the Post Office perform defined, concrete public services. The CFPB, by contrast, makes broad policy judgements regarding what is and is not an "unfair" consumer practice. It exercises a portfolio of legislative authority through the promulgation of binding rules and executive authority through the prosecution of enforcement actions against private actors. Even conferring this level of policymaking authority on an arm of the executive branch would have been alien to the Framers and ratifiers of the Constitution.[70] By extension, the notion that the Framers would have tolerated that powerful appendage's perpetual immunity from congressional funding review sounds fanciful.

Fee funding is the only species of perpetual, non-appropriated funding the Bureau can locate in and around the Founding. Permanent funding of the sort closer to the CFPB's does not make an appearance until the expansion of the administrative state in the Progressive era of the early 20th century.[71] Although fee funding is perpetual, it is otherwise dissimilar in operation to the CFPB's funding, and the 2nd Congress granted it only to unique entities with limited, non-legislative authority. In short, fee funding looks more like "a limited historically grounded exception to the rule of funding through periodic appropriations" than it does an invitation for Congress to loan its appropriations authority permanently to an executive branch agency.[72]

The Second Circuit, of course, disagreed. It made a gesture in the direction of the historical record before concluding that the CFPB's funding was constitutional. But the opinion's engagement with this facet of the inquiry is shallow. Rather than reviewing the historical record in its particularity, the Second Circuit contented itself with reducing the whole of Founding-era practice to a few remarks by Alexander Hamilton, who once wrote (in a context undescribed) that the Appropriations Clause merely ensures "that the *purpose*, the *limit*, and the *fund* of every expenditure should be ascertained by a previous law."[73] Because Dodd–Frank specified broad purposes, a fund, and a nominal limit to the funding demand, the Second Circuit determined that the law satisfied the Appropriations Clause.[74]

That was the sum total of the Second Circuit's historical analysis. If the Second Circuit was aware of the particular historical practices prevailing in the post-ratification Congresses, it chose not to mention them.

Disregarding recent Supreme Court admonishments, the Second Circuit defined the historical record at a high level of generality rather than closely delineating its contours.[75] The court ignored the fact that Hamilton's statement does not address the durational question at issue here. Assuming Hamilton's statement is exhaustive of his views on the clause's function, the court made no effort at all to establish that Hamilton's views prevailed either among the Framers or among the ratifying population as opposed to being the idiosyncratic view of a man who was uncommonly sanguine about the expansion of federal power. Furthermore, the Second Circuit made no effort to reconcile its truncated recounting of history with the Framers' concerns for the separation of powers or with the lack of historical precedent for a funding power like the CFPB's. The opinion's perfunctory historical discussion gives the distinct impression of a court going through the motions of an exercise it is bound by precedent to conduct but for which it has no real regard.

The heterogenous approaches of the early Congresses support the view that Founding-era practice was "an ongoing process of shaping governmental structures in the absence of clear and convincing customs."[76] From this one might infer, as the bureau and the Second Circuit do, that the Constitution is agnostic about the form appropriations take so long as Congress does something to initiate the process of cash transfer. In effect, then, Congress could proceed however it deems fit so long as it enacts a law.

Again, however, that inference contradicts the well-founded view that not all laws are appropriations laws. More fundamentally, it is a mistake to assume that the appropriations power, or any constitutionally derived power, is unconstrained apart from the largely illusory political check from voters. Given the Framers' appreciation for the gravity of the funding power, it is implausible that they conceived of either the Post Office or the National Mint as precursors to ever-bolder experiments in weakening congressional control of the public purse. The lack of firm historical precedent might be dispositive for the constitutionality of the bureau's funding.

Separation of Powers as a Constitutional Baseline

If a majority of the current Supreme Court is disposed against the CFPB's funding arrangement, no one expects that the Court would stop its critique with the lack of historical precedent. If history is the answer, one needs a

justification for why this is so, a principle that enables us to interpret the facts in the historical record and explains the lack of precedent for the CFPB. That principle is the separation of powers, which holds that governmental authority consists of three distinct types of power—legislative, executive, and judicial—with each power wielded exclusively by the corresponding branch of the federal government. Thus, the legislators legislate, the executive executes, and the judges judge.

The Constitution contains no "'separation of powers clause' or a 'federalism clause.' These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies."[77] The design set forth in the Constitution's first three articles serves as a barrier against "a gradual concentration of the several powers in the same department."[78] Both Federalists and Anti-Federalists agreed on the necessity of maintaining that separation. Madison insisted that "[w]ere the federal constitution...really chargeable with th[e] accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."[79] In similar terms, the Anti-Federalist Centinel declared that the "mixture of the legislative and executive moreover highly tends to corruption. The chief improvement in government, in modern times, has been the compleat [sic] separation of the great distinctions of power; placing the legislative in different hands from those which hold the executive; and again, severing the judicial part from the ordinary administrative."[80] What the Framers have divided let no man unite.

Although some like Centinel desired complete separation among the branches, the Founders determined that this was neither possible nor desirable in all cases.[81] Thus, at certain junctures, they permitted a degree of commingling: In Article I, Section 7, for instance, they provided for the presidential veto, which mixes executive and legislative authority. Yet, as the late Justice Antonin Scalia explained, "In designing that structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document."[82] Therefore, it is improper "to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this [or any] Court."[83]

"Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[84] If one cannot know the precise answer the Framers would have given, then resort must be had

to the commitments and values that their generation defended insofar as they bear on the question at issue. When looking to constitutional text, one must ask:

- Is it more faithful to the Framers' designs to interpret ambiguity as enabling or limiting the modes and methods by which a power can be exercised?

- Does the existence of exceptions in the record of historical practice invite further legislative variations, or should those exceptions be construed narrowly?

When facing a seemingly indeterminate constitutional provision, which the Appropriations Clause arguably is, the separation-of-powers principle helps to answer the threshold interpretive question: What is the baseline?[85]

When a novel congressional enactment has the tendency to transfer power vested in one branch to a different branch, the separation of powers sets the baseline presumption firmly against that type of innovation. The question is not whether the Constitution has specifically anticipated and expressly forbade the novel legal arrangement, but whether the Constitution allows it because the arrangement is consonant with, or is at least inoffensive to, the charter's provisions, structure, and principles. This default posture of restraint underlies the Supreme Court's view that "the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it."[86] And that view is implicated most where, as here, a law results in "the creation of a new Branch altogether" that is vested with the complete complement of governmental powers including the ability to command its own funding.[87] The separation of powers also helps to explain why the alternative, more permissive view of the constitutional baseline is implausible. Justice Kagan summarized that view thus: "The Framers understood that new times would often require new measures, and exigencies often demand innovation.... In deciding what this moment demanded, Congress had no obligation to make a carbon copy of a design from a bygone era."[88] This is living constitutionalism adapted to the convenience of the administrative state. The judicious compromises and intricate balances struck by the Framers are not regarded as enduring guides to our national challenges; instead, they are artificial obligations, anachronisms time-bound to a "bygone era" in which "exigencies" and "innovation" were unknown or unanticipated.

Appeals to innovation flatter our sense of cleverness and addiction to technological metaphors for governance, while allusions to emergencies appeal to our natural fear and desire for self-preservation. Surely, the argument goes, the Constitution must allow for modern genius to shape government institutions and ward off imminent disaster.

That assertion mixes practical considerations with emotional appeal, but it is not a legal argument, nor does it supply any limits to the innovation it will abet. It is, rather, an "urge to meet new technological and societal problems with novel governmental structures" and "one that must be tempered by constitutional restraints that are not known—and were not chosen—for their efficiency or flexibility."[89] Of course, "there are many desirable dispositions that do not accord with the constitutional structure we live under."[90] Yet in pursuing those heterodox arrangements, "the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous."[91]

The Courts' Interpretive Role. Proponents of constitutional innovation tend to pair the appeal described above with an argument that sails under the separation-of-powers flag. That argument, borrowed by the CFPB in its petition, is that Congress alone has authority to determine the meaning of the Appropriations Clause.[92] Consequently, the Constitution reserves no interpretive role for the courts on this issue. Were the judiciary to define the contours of a provision like the Appropriations Clause, the courts themselves would violate the separation of powers by arrogating to themselves a sphere of discretionary power that the Framers left to Congress. Implicit in this is an argument that the Appropriation Clause's meaning is not fixed but changeable according to the views of any given Congress.

This sounds in a certain way ridiculous. Is it not "emphatically the province and duty of the judiciary to say what the law is"?[93] Yet, under headings like the "political questions" doctrine, we accept that not all controversies are susceptible of judicial resolution. So why should we conclude that the courts ought to play a role in resolving the interpretive questions presented by the Appropriations Clause? They should do so because courts are competent to engage in the inquiry and because their failure to do so abets the collusion between the other two federal branches in the creation of a new form of government.[94]

Alexander Hamilton, an ardent Federalist, conceded that "a limited constitution…can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void."[95] Note that Hamilton speaks not merely of courts applying the document's express prohibitions, but of reifying the "manifest tenor of the constitution" in its

decisions. The separation of powers is manifestly part of that tenor. "The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch."[96] Moreover, "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; [they] must call foul when the constitutional lines are crossed."[97]

Some have expressed prudential concerns about the prospect of courts inserting themselves into the mechanics of a uniquely legislative task like appropriations,[98] but more recent scholarship highlights why prudence favors judicial intervention to ensure that Congress does not gradually concede its appropriations power to the executive. The judicial quietism on appropriations that Professor Gillian Metzger calls the "marginalization" or "minimizing of appropriations in public law doctrine departs from the importance of appropriations in the Constitution, undercuts key constitutional values, and creates a de facto presidential spending authority fundamentally at odds with the separation of powers."[99] Faced with that prospect, judicial correction, not judicial restraint, is the better part of valor.

Still others contend that the judiciary may enter the fray only when Congress has *completely* abdicated its power. Those making this argument wish to make judicial review a purely theoretical restraint on the other branches. Are courts to enforce the separation of powers only in the most extreme cases—for example, in the event a power assigned to one branch has been totally alienated or seized by a coordinate branch? When the violation of the separation of powers is at its peak, the prospects for redress have reached their nadir. If the consolidation of the disparate powers in a single branch or body is tyranny as the Founders believed, then that tyranny will exercise itself to the fullest defending all the potent prerogatives it has amassed. The Constitution does not condition the judiciary's core function of interpreting law on the utter dereliction of another branch.

Moreover, those who insist on judicial restraint up to the verge of disaster proceed from the misapprehension that a whole spectrum of untested mixtures of government power are constitutionally tolerable and thus do not warrant judicial scrutiny. That is not so. As stated above, the Constitution itself prescribes a stable equilibrium among the powers including the degree of intermixing that is permissible in the absence of a ratification-era analogue or a constitutional amendment. It is not merely a starting point from which future experiments in commingling may depart.

Finally, permitting Congress alone to define what qualifies as an appropriation without judicial input or restraint undermines the fundamental

precept that Congress is subject to the Constitution, a law of which it is not the author. A critical distinction between the British Parliament the Framers took for their template and the Congress they created is that the Framers refused to endow Congress with the absolute legislative supremacy that permitted legislators in Britain to reshape government as best suited them.[100] "To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states,"[101] but the Constitution would be wholly unable to restrain Congress if that body could reserve to itself the sole prerogative of interpreting the clauses that apply to it.

The CFPB's Funding Is Unconstitutional

The Supreme Court should not interpret a law that violates the separation of powers as a valid means of complying with the Appropriations Clause. Much of what has been said about why the Court should address the question explains also why it should find the CFPB's funding unconstitutional. The bureau's funding arrangement precisely reverses the constitutional baseline: It mixes the powers of separate branches by empowering an executive agency to exercise singly a power that the Constitution reserves to the people's elected representatives collectively.

In Dodd–Frank, Congress carefully parsed form and function such that their enactment would mimic the form of an appropriation, even as the function—the requisitioning of sums from government coffers—would then be performed by an executive branch official in perpetuity. This is not faithful to the constitutional design; it encourages presidential Administrations to collude with legislative majorities of the same party to remove as many priorities as possible from the oversight of future Congresses. That artifice diminishes the possibility that voters, through future legislative elections, could meaningfully affect policy in the area that is spun off under the supervision of the independently funded agency.

Not only did Dodd–Frank enable another branch to exercise a core legislative function: By design, the law made it difficult for Congress to resume its exercise of that power. The CFPB has made it evident that it has no imminent fear of Congress's reassuming its appropriations power. When Representative Ann Wagner (R–MO) asked then-CFPB Director Richard Cordray to explain the bureau's $215 million expenditure on office renovations, he responded memorably: "Why does that matter to you?"[102]

Having given the CFPB the authority to withdraw all necessary funding annually, Congress could remove that authority only by amending

Dodd–Frank or enacting an entirely new law, both of which would require majorities in both houses and presidential approval. This sets the legislature's natural inertia, which the Framers intended to forestall the rash excess of legislative action, as an obstacle to the resumption of Congress's own constitutional prerogatives. As one amicus brief notes, "[s]eventeen failed attempts to alter the CFPB's funding structure in just over ten years seem to prove this point."[103]

Additionally, even were a majority of both houses to agree among themselves to resume time-limited appropriations, the President retains the power to veto any law that Congress might enact. It is possible to overcome his veto with supermajority support in both houses, but this would be "exceedingly difficult," leading scholars like Professor Ilan Wurman to conclude that "delegating legislative power to the executive branch is effectively an alienation because Congress simply does not control that branch."[104]

The difficulty of reverting appropriations authority back to the source is no small matter, and the reversion of power was a consideration of great importance to the Founding generation. The conceit of constitutional republicanism was that the people were the source of authority, which they delegated in certain limited particulars to the institutions of representative government. As Patrick Henry stated during the ratification debates, "The delegation of power to an adequate number of Representatives; *and an unimpeded reversion of it back to the people at short periods,* form the principal traits of a Republican Government."[105] This is the basis for the view that the Constitution does not permit what are in essence "sub-delegations" of power in which Congress takes the authority delegated by "the People" through the Constitution and redelegates it to loci further attenuated from public control.[106]

To prevent an institutional drift that gradually shelved power beyond the citizens' reach, the Framers thought it necessary to keep power near its source and provide the ready means for its reversion. The CFPB's funding arrangement violates both of these criteria.

Critics can fairly retort that many, if not all, of these same features are present in Congress's oft-indulged delegations of policymaking authority to agencies. Although there are signs of interest from the high court in reviving the non-delegation doctrine, it has still been more than 80 years since the Supreme Court last held that a law worked an unconstitutional delegation of legislative power to the executive.[107] It was therefore not surprising that the Second Circuit critiqued the Fifth Circuit in this vein, claiming that a court could not hold the CFPB's funding unconstitutional without "circumvent[ing] the Supreme Court's nondelegation doctrine cases."[108]

But those cases need only be "circumvented" if they are truly obstacles. In fact, the Supreme Court's non-delegation jurisprudence does not address the delegation of the appropriations power. The assumption that past non-delegation case law is dispositive here ignores the ways in which the delegation of appropriations power is distinct from Congress's more prevalent delegations of interpretive policymaking authority.

The primary textual-structural support for the non-delegation doctrine comes from the Constitution's vesting clauses in Articles I–III, which allot distinct species of authority to the separate branches.[109] The restraint on delegation inferable from the Legislative Vesting Clause in Article I would apply just as much to the spending/appropriations authority as it would to Congress's other vested powers. But the Appropriations Clause itself acts as an additional prophylactic against delegation. Recall that the "reinforcement provided by the Appropriations Clause is textually unnecessary. Simply vesting the spending power in Congress would be sufficient to give Congress control over appropriations[.]"[110] Thus, "a primary significance of the appropriations clause in section 9 lies in what it takes away from Congress: the option not to require legislative appropriations prior to expenditure."[111] The Framers set down the additional constraint on the exercise of this—and *only* this—authority to emphasize "the importance... [they] assigned to popular legislative control over government funds."[112]

The appropriations power warranted an additional restraint not imposed on any other congressional power, because by "specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government."[113] Validating Congress's decision to give an executive entity perpetual funding would permit one Congress to assert a parliament-like legislative supremacy to reshape the structure of government, fortifying the executive branch with new powers while inhibiting future Congresses from exercising their vested powers.

When Congress delegates control of funding, it delegates the very backstop that permits it to throttle back other policymaking delegations. When Congress drafts broadly worded statutes conferring a surfeit of discretion on an agency, Congress still retains the ability to control the agency's priorities without passing a new law because Congress can diminish the funding that is the lifeblood of agency operations.[114] By ceding the appropriations power along with policymaking power, Congress takes delegation to its extreme, creating an entity that is self-sufficient and operable without regard to the deliberations or preferences of any subsequent Congress.

Not only does perpetual self-funding create a novel concentration of legislative and executive power in one body, and not only does it negate

the executive's dependence on Congress and give the executive de facto spending authority, but it also enables the executive branch to dictate the "contours of the federal government" in whatever sphere this unaccountable funding is granted. In the case of the CFPB, that sphere of independence covers significant swaths of the U.S. economy including institutions like "banks, lenders, and large non-bank entities," "credit reporting agencies and debt collection companies," and consumer products like credit cards and mortgages.[115] This is not to say that these entities and products are not in need of regulation, but it is not at all evident that their regulation can be or ought to be independent of congressional politics.

It is no answer to say that a law like Dodd–Frank is an appropriation; not all laws that call for expenditures on new projects are appropriations, and "Congress abdicates, rather than exercises, its power of the purse if it creates permanent or other open-ended spending authority that effectively escapes periodic legislative review and limitation."[116] As none of the Supreme Court's non-delegation cases addresses the double restraint that the Constitution imposes on the appropriations power through the Legislative Vesting Clause and the Appropriations Clause, there is reason to doubt that prior case law enabled Congress to delegate the appropriations power to the CFPB.[117]

As troubling (and possibly unconstitutional) as policymaking delegations are, delegation of the funding power raises the constitutional concerns to another plane. Yet while the concerns raised are greater, the practical justification for funding delegations is far weaker than the justification for policymaking delegations.

As Justice Kagan has explained, Congress is dependent "on the need to give discretion to executive officials to implement its programs," and agencies simply could not perform functions of real consequence if they had no room in which to determine and revise their approach to implementing congressional policies.[118] The same is not true of granting them the power to self-fund, some version of which only a few agencies enjoy. Evidently, most federal agencies do a reasonably good job of discharging their mandates even though they must ask Congress annually for the necessary sums. Both theory and practice indicate that some policymaking to "fill up the details" is a natural part of the executive's constitutional power,[119] but funding levels implicate a different sort of determination that it is neither necessary nor appropriate for the executive branch to make. This belies any attempt to conflate the CFPB's annual funding demands with its policymaking discretion: When the CFPB draws money from the Fed, it is engaged in an activity separate from and antecedent to its enforcement of Dodd–Frank.[120]

Perhaps the CFPB's best rejoinder is Article I, Section 8, Clause 12, which states that where funding for the Army is concerned, "no Appropriation of Money to that Use shall be for a longer Term than two Years." Although that clause addresses only one specific purpose that Congress funds, it is the Constitution's sole explicit restriction of the duration of an appropriation. The inference the CFPB draws from this is that for all non-military purposes, the Framers intended to allow Congress to appropriate funding for any duration including unlimited duration.[121] As with the Founding-era examples of perpetual funding, the clause's significance for the constitutionality of CFPB funding is not self-explanatory, but there is good reason to think that the CFPB has drawn the wrong inference from the clause's time limit on Army funding.

The CFPB's argument is based on an interpretive canon that "expressing one item of [an] associated group or series excludes another left unmentioned."[122] Thus, the argument goes, the Framers' decision to include a durational limit on military funding implies their decision to exclude any other durational limits on appropriations.[123] But this interpretive canon is not applicable in all instances, and the "force of any negative implication... depends on context."[124] For instance, in the context of statutory interpretation, the Supreme Court has held that the canon does not apply "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."[125]

As for the interpretive context in this case, "we must never forget that it is a constitution we are expounding."[126] In general, it is accepted that the Constitution confers powers and protects rights that are not explicitly written into its text, though there is, naturally, disagreement with respect to the scope of both. It stands equally to reason that many constitutional limitations are implied rather than stated outright. The separation-of-powers principle informs us that this *must* be the case, for inherent in that principle is the recognition of limitations on power that are not expressly or exhaustively committed to writing. They nonetheless remain indelibly part of the document's structure, design, and "manifest tenor."[127] Had the Framers set for themselves the impossible task of forecasting every subterfuge that future legislatures or Presidents might employ to realize extraconstitutional designs, the Constitution would surely have taken on "the prolixity of a legal code, and could scarcely be embraced by the human mind."[128]

The Armies Clause sits at the nexus of two concerns that threatened to undermine public support for the proposed Constitution: federal appropriations power and the standing Army. The former has been discussed already. As for the latter, the recent presence of his majesty's armed forces

imbued citizens of the former colonies with a well-founded fear of standing armies. There was considerable doubt that one ought even to be maintained separate from the existing state-run militias. The possibility of professional soldiers enjoying access to unlimited resources was far too much for the population to bear; therefore, to win support for ratification, it was necessary to make this two-year compromise explicit in the document itself.

But that does nothing to diminish the considerable concerns the Framers entertained with respect to the appropriations power outside the military context, and it still leaves an interpreter separated by a large, unwarrantable leap from the conclusion that the Framers were totally agnostic about whether funding for non-military purposes could be of completely *unlimited* duration. The most one could fairly draw from the durational limit on the Army's funding has been suggested by another panel of the Fifth Circuit: "[I]t suggests only that Congress may appropriate an amount of money for other purposes to be used over a timespan longer than two years."[129] This is too slender a reed to support the bold assertion that Congress can otherwise exercise the transformative power of appropriations however it chooses to exercise it.

Final Review and Further Considerations

The text, history, and tradition bearing on the constitutionality of the CFPB's funding may not offer the kind of certitude one craves when deciding questions of great importance, but a few important things can be stated with reasonable certainty. The separation of powers principle is embedded in the Constitution's text and structure. That principle sets an interpretive presumption against the constitutionality of any mixture of executive and legislative power that is not expressly specified in the Constitution itself. Respect for the Constitution's original, fixed meaning obliges interpreters to assess any further developments and deviations by reference to the historical practice in the post-ratification era. That historical practice provides no comparable analogues to the CFPB's funding arrangement, although it does offer examples of certain federal service providers being permitted to fund themselves independently through fee collection.

When considering whether those precedents permit an expansion of perpetual funding to the non-fee-based arrangement of an entity wielding legislative, executive, and judicial power in tandem, the answer must be "no." The CFPB's ability to determine and draw its own funding without any further congressional action exemplifies that precise evil of the "gradual concentration of the several powers" that the Framers took pains to prevent. "By divesting its core Article I appropriations power in this way, Congress

crossed a forbidden line."[130] Dodd–Frank impermissibly freed the executive from its fiscal dependence on Congress by giving the executive Congress's power of direct, permanent access to public funds. Moreover, it created barriers to Congress's future exercise of the appropriations power, which by its very nature is meant to be exercised regularly and repeatedly.[131]

Though a variety of perpetual funding mechanisms have come into wider use since the 20th century, these relatively modern innovations tell us nothing about the Constitution's original meaning, as neither the Spending Clause nor the Appropriations Clause has been altered since 1787. Having sprung up well after the ratification, the legal underpinnings of these modern institutions may be nothing more than deep-rooted weeds, and "age alone does not make up for brazen invention."[132] However, not all are necessarily doomed if their constitutionality is called into question. Each has a distinct mixture of history and function to be measured against Founding-era practice and the separation of powers. The Federal Reserve, for instance, obtains its funding on the fee-based model, and it performs core market functions that are distinct in nature from what either Congress or the CFPB does.

However unsatisfying the answer, the Fifth Circuit was correct when it said that "[w]herever the line between a constitutionally and unconstitutionally funded agency may be, th[e CFPB's] unprecedented arrangement crosses it."[133] In assessing what Congress intended in Dodd–Frank, the Supreme Court ought to "take Congress at its word that it meant to impose a meaningful restriction on" Congress's ability to exercise its appropriations power by making the CFPB's annual funding "non-appropriated."[134] Notwithstanding the CFPB's litigation-driven reimagining of Dodd–Frank, that law sought to circumvent the Appropriations Clause in a manner so brazen that it obviates much of the need for more nuanced inquiries. Of course, that answer sounds unsatisfying because it resolves only the case at hand without answering the questions or allaying the fears pertaining to other 20th-century creations like the Federal Reserve. It also offers Congress only a modicum of clarity regarding what it may permissibly do in the appropriations arena.

But the constitutionality of the Federal Reserve is not before the Court this term. Nor, for that matter, is the question of whether any specific time limitation is required for a funding arrangement to pass constitutional muster. Could Congress lawfully choose to fund the CFPB or some other administrative creation for one hundred years? This funding would not be perpetual, but neither would it maintain the relationship of restraint and accountability between agency and legislature. The dependence would become so theoretical, so attenuated that both Congress and the agency

would come to "operate (as a matter of policy or of psychology) under the illusion that funding for the activity does not affect other budgetary decisions, and that the present Congress is neither responsible nor accountable for the program."[135] The agency for decades would exercise Congress's power and be fiscally independent, and many future Congresses would have no fiscal control. This too would offend the separation of powers despite the presence of a nominal time limit.

It would be tempting to say that no appropriation can be longer than two years because that would correspond with the term limits for the House of Representatives, where spending must originate, and ensure that every Congress has a say in funding each part of the executive branch. But such a cleanly applicable rule is foreclosed by the limited implication of the Armies Clause discussed above. A strict rule-based approach would also fail to account for the fact that not all funding decisions raise separation-of-powers concerns to the same degree.

This is the takeaway from the Founding-era Post Office and National Mint. Where the departmental function is limited, well-defined, and non-legislative, it may be appropriate and even constitutional for Congress to allow a longer leash on funding matters. The separation-of-powers concerns exist on a continuum such that the broader and more discretionary the mandate that is being funded is, the more exacting the amount and time limitations attached to an appropriation must become.[136] That said, the continuum must have discernible limits or end points, and perpetual fiscal independence for "a sort of junior-varsity Congress" like the CFPB must lie beyond the end point.[137]

The Court's current inclination to assess the Constitution's contours through the lens of text, history, and tradition has considerable merit, especially when compared with the efficiency-driven or legal-realist alternatives. But a rule-like clarity in its holdings is not necessarily one of the advantages of that approach, and it is unlikely that a standard can be formulated to govern appropriations that will yield ready, easily predictable results in all cases. That should not evoke despair among jurists or counsel against engaging the issue at all. For the reasons discussed, failure to engage the issue is not a real option. When Congress abdicates its constitutionally vested authority, the courts should not compound the issue by abdicating their own.

In truth, some uncertainty in this area may provide the right sort of incentives for Congress. If Congress is uncertain of just how far it may go in innovating but is keenly aware that any novel approach will undergo certain, searching judicial review, Congress may have less incentive to pursue ahistorical solutions and may instead craft legislation with the separation

of powers in mind. That is preferrable to the alternative of a Congress that is happy always to operate in constitutional borderlands, steadily relieving itself of both burdens and power as it abets the executive branch's perpetual project to "acquire authority forbidden by law through a process akin to adverse possession."[138]

The very notion of limited government is mocked when any given Congress may create an unlimited number of shadow governments operating outside the Constitution's tripartite division of powers. Whatever the pretext for creating these self-sustaining globules of power may be, by bringing them into existence, Congress unlawfully cedes the ability to define the federal government's contours to the executive, which henceforth appropriates its own funding. "The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow, without intruding on the rights reserved to the sovereign people. Abdication of responsibility is not part of the constitutional design."[139]

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Endnotes

1. U.S. Const. Art. I, § 9, Cl. 7. As respondents explain in their brief, "The 'Treasury' refers both to the funds held by the Executive Department later created by Congress and all other 'public money,' including 'all the taxes raised from the people[] as well as revenues arising from other sources.'" Brief for Respondents at 11 (quoting OPM v. Richmond, 496 U.S. 414, 427 (1990)).
2. 156 Cong. Rec. 5,220 (2010); 12 U.S.C. § 5497(c)(2).
3. See Adam J. White, The CFPB Engages in Legal Deception, Wall St. J. (Dec. 4, 2022), https://www.wsj.com/articles/deceptive-practices-at-the-cfpb-perpetual-appropriations-congress-dodd-frank-fed-independence-fifth-circuit-11670160972?mod=Searchresults_pos2&page=1.
4. In 2022, the 12 percent cap would have been $734 million. The bureau requisitioned $641.5 million for its use last year. Per the respondent's brief, the CFPB has never actually hit the cap during any fiscal year, indicating that the cap is well above the bureau's annual needs. See William Yeatman, Congress Should Not Give Any Government Agency Financial Free Rein, Reason (Mar. 3, 2023) https://reason.com/2023/03/03/congress-should-not-give-any-government-agency-financial-free-rein/.
5. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 635–37 (5th Cir. 2022).
6. Id. at 639.
7. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).
8. Id. at 2204 (quoting Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).
9. Id. at 2240 n.11 (2020) (Kagan, J., dissenting).
10. Cmty. Fin. Servs. Ass'n, 51 F.4th at 641.
11. See City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 313 (2013) ("The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities.") (Roberts, C.J., dissenting).
12. Gillian Metzger, Taking Appropriations Seriously, 121 Colum. L. Rev. 1076, 1158 (2021).
13. William Baude, The 2023 Scalia Lecture: Beyond Textualism?, 46 Harv. J. L. Pub. Pol'y (2023).
14. The Federal Deposit Insurance Corporation, Crisis and Response: An FDIC History, 2008–2013, https://www.fdic.gov/bank/historical/crisis/chap1.pdf; U.S. Department of Justice, Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities (Apr. 11, 2016), https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed; U.S. Department of Justice, Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in Its Sale of Residential Mortgage-Backed Securities (Jan. 17, 2017), https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed.
15. Elizabeth Warren, Unsafe at Any Rate, Democracy a Journal of Ideas (2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/.
16. Id.
17. Todd Zywicki, The Consumer Financial Protection Bureau: Savior or Menace?, 81 Geo. Wash. L. Rev. 857, 860 (2013).
18. Id. at 861.
19. Seila L., 140 S. Ct. at 2201.
20. See Brief for Respondents at 4–5; Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., 33 F.4th 218, 222 (5th Cir. 2022) (Jones, J. concurring) (collecting citations). S. Rep. No. 111-176, at 163 (2010) (congressional supporters claimed that "the assurance of adequate funding, independent of the Congressional appropriations process," was "absolutely essential" for the bureau).
21. 12 U.S.C. § 5497(a)(1)–(2).
22. 12 U.S.C. § 5497(a)(2)(C).
23. 12 U.S.C. § 5497(c)(1).
24. 12 U.S.C. § 5497(c)(2).
25. 12 U.S.C. § 5497(e)(1).
26. See Br. of the New Civil Liberties Alliance et al. in Support of Respondents at 16 n.2 ("The annual 'cap' has at all times been far in excess of the amount actually requisitioned by CFPB.").
27. See 111th Congress (2009–2011), https://history.house.gov/Congressional-Overview/Profiles/111th/.
28. Christopher C. DeMuth, Sr. & Michael S. Greve, Agency Finance in the Age of Executive Government, 24 Geo. Mason L. Rev. 555, 587 (2017).
29. See, e.g., Br. of Current and Former Members of Congress in Support of Petitioners at 20.
30. Seila L., 140 S. Ct. at 2193.
31. Id. at 2202 n.8.

32. Markham S. Chenoweth & Michael P. DeGrandis, Out of the Separation-of-Powers Frying Pan and Into the Nondelegation Fire: How the Court's Decision in Seila Law Makes CFPB's Unlawful Structure Even Worse (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-chenoweth-degrandis/ ("No other government agency has this much power to regulate, investigate, adjudicate, and punish, while simultaneously enjoying the authority to fund itself without consulting the people's representatives.").
33. U.S. Const. Art. I, § 9, Cl. 7.
34. See Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1349 (1988) ("Since legislative appropriations power is rooted in article I, section 8, we may infer that a primary significance of the appropriations clause in section 9 lies in what it takes away from Congress: the option not to require legislative appropriations prior to expenditure.").
35. Id. at 1377.
36. Gerhard Casper, Appropriations of Power, 13 Ark. L. Rev. 1, 2 (1990).
37. Stith supra note 34 at 1344.
38. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 8–9 (D.C. Cir. 2020).
39. The Federalist No. 58 (Madison).
40. Id.
41. The Federalist No. 48 (Madison) (emphasis added).
42. U.S. Const., Art. I, § 7, Cl. 1; Erik M. Jensen, Hands Off My Purse! Why Money Bills Originate in the House (Jan. 27, 2011), https://www.heritage.org/the-constitution/report/hands-my-purse-why-money-bills-originate-the-house. Senators were chosen by the state legislatures until 1913 when the Seventeenth Amendment was ratified.
43. See, e.g., The Complete Anti-Federalist 2.4.85–86 (Luther Martin); 5.16.14 (Patrick Henry).
44. The Complete Anti-Federalist 2.8.140 (Federal Farmer).
45. Josh Chafetz, Congress's Constitution, Legislative Authority and the Separation of Powers 57 (2017).
46. Compare The Federalist No. 58 (Madison) with The Complete Anti-Federalist 2.8.140 (Federal Farmer) ("fix a genuine democratic branch in the government solely to hold the purse…and the people, I conceive, have but little to fear and their liberties will always be secure.") and 2.8.208 (Federal Farmer) ("It has long been thought to be a well founded position that the purse and sword ought not to be placed in the same hands in a free government. Our wise ancestors have carefully separated them—placed the sword in the hands of the king…and the purse in the hands of the commons alone.").
47. Casper supra note 36 at 5.
48. Metzger supra note 12 at 1087.
49. Allen Schick, Cong. Rsch. Serv., Rep. No. 84-106 GOV, Legislation, Appropriations, and Budgets: The Development of Spending Decision-Making in Congress at 8–9 (1984).
50. Clinton v. City of New York, 524 U.S. 417, 466 (1998) (cleaned up).
51. Id. at 466–67 (cleaned up).
52. Casper supra note 36 at 10–13.
53. See Brief of 132 Members of Congress in Support of Respondents at 21–22 n.7.
54. Casper supra note 36 at 11–14.
55. Id. at 16–20.
56. Id. at 4, n.12 (quoting 7 ANNALS OF CONG. 1133 (1798)).
57. Id. at 18.
58. U.S. Const. Art. I, § 8, Cl. 12.
59. Petition for Writ of Certiorari 14.
60. SECOND CONGRESS. Sess. I. Ch. 7. 1792, https://njpostalhistory.org/media/pdf/postact1792.pdf.
61. Stith supra note 34 at 1366.
62. Id. at 1366–67.
63. United States Mint, Coinage Act of April 2, 1792, https://www.usmint.gov/learn/history/historical-documents/coinage-act-of-april-2-1792.
64. The Federalist No. 45 (Madison).
65. Spencer Roane, Rights of the States and of the People, Richmond Enquirer (June 11, 1819).
66. Seila L., 140 S. Ct. at 2201 (cleaned up).

67. Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340 (1974).
68. Id. at 340–43.
69. Adam J. White, The CFPB's Blank Check—or, Delegating Congress's Power of the Purse, Yale J. Reg. (Nov. 27, 2022) https://www.yalejreg.com/nc/the-cfpbs-blank-check-or-delegating-congresss-power-of-the-purse/.
70. Compared with the level of discretion allotted in the handful of Founding-era delegations, the breadth of the CFPB's policy-setting discretion would have astounded the Framers even were it not unified with independent funding. See Ilan Wurman, Nondelegation at the Founding 130 Yale L.J. 1490, 1539–53 (canvassing inter alia the regulations covering military pensions, early patent statutes, and the Direct Tax of 1798).
71. See Metzger supra note 12 at 1089; New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) ("post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.").
72. Brief of 132 Members of Congress in Support of Respondents at 18.
73. Consumer Fin. Prot. Bureau v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174, 183 (2d Cir. 2023) (citing 7 Alexander Hamilton, The Works of Alexander Hamilton 532 (John C. Hamilton ed. 1851)).
74. Id.
75. Cf. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022).
76. Casper supra note 36 at 18.
77. Seila L., 140 S. Ct. at 2205.
78. The Federalist No. 51 (Madison).
79. The Federalist No. 47 (Madison).
80. The Complete Anti-Federalist 2.7.50 (Centinel).
81. Id.
82. Mistretta v. United States, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting) (emphasis original).
83. Id.
84. New York State Rifle & Pistol Ass'n, 142 S. Ct. at 2132.
85. Baude supra note 13.
86. Seila L., 140 S. Ct. at 2201.
87. Mistretta, 488 U.S. at 427 (Scalia, J., dissenting).
88. Seila L., 140 S. Ct. at 2241–42.
89. Id. at 2207.
90. Mistretta, 488 U.S. at 427 (Scalia, J., dissenting).
91. Id.
92. Petition for Certiorari at 12.
93. Marbury v. Madison, 5 U.S. 137, 177 (1803).
94. See Stith supra note 34 at 1393 ("courts would appear to have both the capacity and the power to enforce the appropriation norms"); Metzger supra note 12 at 1155 ("leaving appropriations to the political branches too often amounts to transferring a de facto power over appropriations to the President. Correspondingly, expanding judicial involvement in appropriations may actually serve to enforce the separation of powers insofar as it reasserts congressional appropriations control.").
95. The Federalist No. 78 (Hamilton).
96. Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).
97. Id.
98. Stith supra note 34 at 1393.
99. Metzger supra note 12 at 1132.
100. See Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 74–75 (2015) (Thomas, J., concurring).
101. Id.
102. Financial Services Committee, CFPB Director's Dismissive Response to Congresswoman's Question Another Sign Bureau Is Unaccountable, Lacks Transparency (March 4, 2015), https://www.youtube.com/watch?v=5IxSfJ638cs.
103. Brief of Former Members of Congress in Support of Respondents at 22.

104. Wurman supra note 70 at 1521.
105. The Complete Anti-Federalist at 5.16.18 (Patrick Henry) (emphasis added).
106. Philip Hamburger, Is Administrative Law Unlawful? at 377–80 (2015).
107. See Gundy, 139 S. Ct. at 2129; id at 2131 (Alito, J., concurring) (expressing willingness "to reconsider the approach [to the non-delegation doctrine] we have taken for the past 84 years").
108. L. Offs. of Crystal Moroney, 63 F.4th at 184 n.2.
109. Seila L., 140 S. Ct. at 2205.
110. Metzger supra note 12 at 1139.
111. Stith supra note 34 at 1349.
112. Metzger supra note 12 at 1139.
113. Stith supra note 34 at 1345.
114. See id. at 1383 ("It is especially important that Congress impose amount and time limitations on spending authority in those areas where the Executive has significant authority to define government policy and has significant discretion in deciding the means of policy implementation.").
115. See USA.gov, Consumer Financial Protection Bureau, https://www.usa.gov/agencies/consumer-financial-protection-bureau.
116. Stith supra note 34 at 1345.
117. The same is true of the other cases cited by the Second Circuit for the proposition that "[t]he constitutionality of this delegation of authority has never been seriously questioned." See L. Offs. of Crystal Moroney, 63 F.4th at 182 (collecting cases). Those cases do not evince an awareness of, let alone address, the question of whether or to what extent Congress can permissibly enable an executive entity to exercise its appropriations power. Nor do the cases cited by the Second Circuit consider what laws qualify as appropriations.
118. Gundy, 139 S. Ct. at 2118.
119. Wayman v. Southard, 23 U.S. 1, 43 (1825).
120. White, supra note 69.
121. Petition for Certiorari at 12.
122. N.L.R.B. v. SW Gen., Inc., 580 U.S. 288, 302 (2017).
123. Id.
124. Marx v. Gen. Revenue Corp., 568 U.S. 371, 381 (2013).
125. Id. (cleaned up).
126. M'Culloch v. Maryland, 17 U.S. 316, 407 (1819).
127. The Federalist No. 78 (Hamilton).
128. Id.
129. All Am. Check Cashing, 33 F.4th at 232.
130. Chenoweth & DeGrandis, supra note 32.
131. The need for recurring exercise of this power is apparent both from the power's structural function as a continuing check on the executive and from the Founding-era practice of differentiating between appropriations and legislation because the former were time-limited while the latter were perpetual. See page 7 supra.
132. Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 572–73 (2015) (Scalia, J., dissenting).
133. Cmty. Fin. Servs. Ass'n of Am., 51 F.4th at 639.
134. Seila L., 140 S. Ct. at 2207.
135. Stith supra note 34 at 1381.
136. See id. at 1383.
137. Mistretta, 488 U.S. at 426 (Scalia, J., dissenting).
138. Biden v. Texas, 597 U. S. ____ (dissenting opinion) (slip op., at 15).
139. Clinton, 524 U.S. at 451–42 (Kennedy, J., concurring).