

WHAT IS THE POWER OF THE PURSE IN CONSTITUTIONAL GOVERNMENT?

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It is heartening to see more attention paid to what is termed the “power of the purse” and the remarkable role it has played in both the evolution of constitutional government and the place it occupies in the U.S. Constitution. Article I vests the power of the purse in the U.S. Congress, making it a bastion of fiscal powers, the only one of its kind on earth, the beneficiary of a legacy that goes back through the British Parliament’s quest for supremacy to the senate of ancient Rome.¹ How public money is spent is a conundrum of constitutional history as well as of civic republican theory and practice. Of late, appropriations, which their most familiar form are the twelve, lately omnibus, annual spending laws, have emerged as a source of controversy, the subject of Supreme Court rulings and attendant law review articles.² The power the purse, however, is not confined to the appropriations power, which is subject to the command of the Appropriations Clause.³ Rather, it encompasses public spending, taxation, and debt resting on multiple sections of Article I. The Constitution gives Congress the power to tax, borrow, and

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1. See, e.g., Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1086 (2021).

2. “Under the Appropriations Clause, an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes.” *CFPB v. Cmty. Fin. Serv. Ass’n of Am. (CFSA)*, 144 S. Ct. 1474, 1480 (2024). See also Metzger, *supra* note 1; Matthew Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1 (2020).

3. U.S. CONST. art. I, § 9, cl. 7.

spend, “appropriate” public funds in order to provide for the “Common Defense and general Welfare of the United States⁴ to “raise and support Armies,”⁵ and to “provide and maintain a Navy.”⁶ Congress may “lay and collect Taxes, Duties, Imposts and Excises;” “borrow Money on the credit of the United States,” and pay those debts.⁷ The Appropriations Clause provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁸ The legislature does not merely control the nation’s finances; it must pursue a cumbersome bicameral lawmaking process to permit money to leave the Treasury. While the executive has peerless powers of initiative, Congress can structure the apparatus of government and shape its actions through how it chooses to expend or withhold funds.⁹ This command is accompanied by the requirement that a “regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”¹⁰ Together, the two provi-

4. U.S. CONST. art. I, § 8, cl. 1 (Taxing and Spending Clause). “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1348 (1988) (“The concept of ‘necessary and proper’ legislation to carry out ‘all . . . Powers vested by this Constitution in the Government of the United States,’ includes the power to spend funds on authorized federal activities.” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419–21 (1819)). The “spending power” or the legislative power to spend for the general welfare and common defense differs from the appropriations requirement, which applies to any expenditure of federal funds. See *id.* at 1350 n.29.

5. U.S. CONST. art. I, § 8, cl. 12.

6. U.S. CONST. Art. I, § 8, cl. 13. No army appropriation may exceed two years. U.S. CONST. art. I, § 8, cl. 12. See also Metzger, *supra* note 1, at 1087.

7. U.S. CONST. Art. I, § 8, cl. 2. Note, the General Welfare Clause gives Congress the power to pay the debt. U.S. CONST. art. I, § 8, cl. 1. Further, all revenue raising (tax) legislation must originate in the House. U.S. CONST. art. I, § 7.

8. U.S. CONST. art. I, § 9, cl. 7.

9. See JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 45 (2017); Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV 357, 386 (2018).

10. U.S. CONST. art I, § 9, cl. 7.

sions provide that the very Congress who holds the power is answerable to the public, issuing a guarantee of fiscal popular sovereignty.

Further, these three powers coalesce in the federal budget, the concurrent resolution that is at once the anchor of the esoteric realm of budget law and cynosure of the power of the purse of the U.S. Congress. The Congressional Budget and Impoundment Act linked the powers of revenue, debt, and appropriations, or spending, together in the concurrent resolution, and the Act's significance in our constitutional history as an implementing statute has yet to be fully appreciated.¹¹ This essay will make few brief observations on the intellectual history of the power of purse and will then turn to an aspect of U.S. budget law that is ripe for contention in future years.

To appreciate the role fiscal powers have played in constitutional government we must think ourselves into a twilight. The purpose is twofold, to better understand the sources of influence on the Framers and why they collectively chose to place these fiscal powers in the legislative branch. It may also serve to illustrate a retrospective conjunction and the search for solutions across time and space—various popular governments, commonly known as civic republics, have sought to determine how and where to place these powers in order to balance the expediency and expertise fiscal policy requires with some degree of popular control.¹²

11. Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 601-55 (2000)).

12. There are multiple, competing definitions of "republicanism." For purposes of this essay, it is a tradition of government that in theory originates with Aristotle's *Politics* and in historical experience means a form of government or type of regime where citizens enjoy liberty and equality under the law, participate in government and decide questions of war and peace, taxation, and the administration of justice. See ARISTOTLE, *POLITICS* (Benjamin Jowett, 1908) (c. 350 B.C.). There is some degree of overlap with the theory of mixed government, in which the ideal constitution combines the one, the few, and the many. There is also the argument that to be republican across time also necessarily involved some use of the language of civic virtue. See THE FEDERALIST NO. 10, at 71 (James Madison) (Clinton Rossiter ed., 2003); see also THE FEDERALIST NO. 14, at 94 (James Madison) (Clinton Rossiter ed., 2003); 1 QUENTIN SKINNER, *FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE 3-189* (1978); MAURIZIO VIROLI, *FROM POLITICS TO REASON OF STATE: THE ACQUISITION AND TRANSFORMATION OF THE*

Recall that the U.S. Constitution is a written document, a text drafted at a certain place and time, Philadelphia in the summer of 1787—then ratified by each of the States on specific dates.¹³ We take it for granted today that constitution means a written text that sets forth the fundamental law of a nation-state, another historical innovation. For centuries preceding, however, the term constitution held a different meaning. It meant the health of the body politic the realm or commonwealth and the orders, institutions, and precedents that formed it.¹⁴ The British Constitution, unwritten but extant to this day, exemplifies this older tradition. Irreducible to a solitary Founding document, constitutions, more often than not, exemplified the theory of “mixed government.” In this ancient tradition, each order of society, the one, the few, and the many, was embodied in its own institution. As celebrated by Polybius, the Roman constitution with its consuls, praetors, and quaestors, senate, and popular assemblies, was the ideal mixed regime.¹⁵ Institutional jealousy was the animating principle of this ideal. Each institution watched the others and scrupulously guarded its own authority. And bear in mind, powers were not organized on the basis of function. It was more a jambalaya than a pristine plate. James Wilson’s remarks over the course of the Convention, when he suggested that war and diplomacy were not evidently executive, bear witness to this effort to bring order to the stew.¹⁶ The Roman senate was a de-

LANGUAGE OF POLITICS 1250-1600, at 2–177 (1992); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975). BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

13. New Hampshire was the ninth state to ratify the constitution on June 21, 1788. By its own terms, the Constitution was adopted as the fundamental law of the land when nine of thirteen States ratified it. U.S. CONST. art. VII.

14. See Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* at 35, 35–37 (Terence Ball & J.G.A. Pocock eds., 1988).

15. POLYBIUS, *THE HISTORIES* Book VI, at 379–85 (Brian McGing ed., Robin Waterfield trans., Oxford Univ. Press 2010) (c. 140 B.C.).

16. James Wilson, *Federal Convention (June 20, 1787)*, in 1 *THE FOUNDERS’ CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 1987).

liberative body that exercised both legislative and executive powers.¹⁷ The Congress established by the Articles of Confederation was a deliberative executive assembly with multiple functions and powers.¹⁸

Over the course of the seventeenth and eighteen centuries, emerging during the English Civil War and in the centuries long contest for parliamentary supremacy, the idea each power had certain distinct functional characteristics and should be distinguished on that basis rather than who wields it, took hold.¹⁹ In its mature form, whether one views that as incarnated in Montesquieu Book XI or the U.S. Constitution, the doctrine classifies the powers of government as legislative, executive, and judicial, and entails that these powers be placed in distinct institutions and in different people.²⁰ Whether a social group has a share in power or not is cast aside. The concept of separation of powers, analytic and abstract seems the perfect companion to the austere essentials of social contract theory. However, venerable and interwoven with lived experience, mixed government had life in it yet. After the Bill of Rights of 1689 confirmed the supremacy of Parliament, English thinkers devised the theory of the balanced constitution, a version of mixed government which acknowledged social orders, mixed government, separation of powers, and limited monarchy. The presence of the three estates of the realm—King, Lords, and Commons, in

17. For example, in ancient Rome, power of foreign policy was divided among the senate, consuls, and popular assemblies. In Rome, the assemblies voted on the senate's recommendation to wage war. (Henrik Mouritsen, *Plebs and Politics in the Late Roman Republic* (2001) 13,37. See also Andrew Lintott, *The Constitution of the Roman Republic* (1999) 40.

18. Gordon Wood, *The Creation of the American Republic* (1998) 359. Art. 9, U.S. Congress, U.S.C. Articles of Confederation – 1777 (1964).

19. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 39, 47, 51 (1967). (“By the year of the execution of Charles I, then, the doctrine of the separation of powers, in one form or another, had emerged in England, but as yet was still closely related to the theory of mixed government.”) See also W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* (1965).

20. Of course, complete separation does not exist in practice, and further, may not be advisable. See *THE FEDERALIST NO. 51*, at 317–22 (James Madison) (Clinton Rossiter ed., 2003).

Parliament—was the essence of the balanced constitution. Critically, the three estates shared legislative power. Separation of powers, refracted through Locke and Montesquieu, mixed government, the balanced constitution, all figured in the conceptual constitutional universe of the Framers.²¹ And what of fiscal powers in this twilight? The Roman senate stands as the paradigmatic example. As recalled by Polybius, the Greek historian of Rome familiar to the Framers and Madison in particular: “The Senate’s most important role is that it controls the treasury, in the sense that it is responsible for all state revenues and almost all expenditure.”²²

Founding era America was drenched in the language of rights, the argot of liberal political theory. But if the Framers were assiduous students of Locke, so were they students of Montesquieu, Hume, Harrington, Sidney, and Machiavelli. Thanks to the work of J.G.A. Pocock and Gordon Wood, who resurrected the civic republican influence on American political thought of the Founding era, we recognize the language of civic virtue and corruption.²³ There are multiple definitions of republicanism that vary at the boundaries but all contain at their core certain characteristics. Republics were not hereditary monarchies, but were polities where citizens participated to some degree or other in self-government, by participating in civic life, serving on commissions and boards, agreeing to taxes and spending, embodying what Aristotle termed rule and being ruled, rare but treasured in history, ever in danger of lapsing into a facile servility. Madison himself was an inveterate scholar of the practices and institutions of ancient and modern republics, and *Federalist* 18, 19, 20, and 21, among others, are littered with references to the practices, institutional designs, and constitutions of ancient and modern republics.²⁴

21. *See id.* at 33.

22. POLYBIUS, *supra* note 16, at 381. “To a considerable extent, then, each of the three components of the Roman constitution can harm or help the other two.” *Id.* at 384.

23. J.G.A. Pocock, *The Machiavellian Moment* *supra* note 12; Gordon Wood, *The Creation of the American Republic, (1776-1787)*.

24. Alexander Hamilton, James Madison & John Jay, *THE FEDERALIST WITH LETTERS OF “BRUTUS”* 79–97 (Terence Ball ed., 2003).

City-republics were beacons of experience and this experience may be instructive, both because it was part of the collective experience of eighteenth century republicans were familiar and because these practices, illustrate, albeit in an attenuated, fashion, where the power of the purse was placed in various non-monarchical constitutions in history.²⁵ Thanks to work of twentieth century historians of political thought and its most prominent sons, Niccolo Machiavelli and Luigi Guicciardini, Medieval and Renaissance Florence stands as the preeminent exemplar of republican government, a vessel preserving and transmitting it into modern age.²⁶ Florence's republican constitution underwent various permutations until its demise in 1530, but the lineaments remained largely the same, including the allocation of fiscal powers.

Traditionally, the nine member Signoria were the chief executive board.²⁷ It was advised by two venerable boards, the Board of the Twelve Good Men and the Board of Sixteen Gonfaloniere. Various other boards, such as the Ten of War, the Eight, and the Monte formed an entrenched bureaucracy. For our purposes the most salient feature of the republic's structure is the fact that the formulation and execution of policy were collective endeavors. Then there were the councils, the Council of the Commune and the Council of the People could be traced back to the city's earliest days.²⁸ The famous law of December 22, 1494, reorganized the city, abolished the

25. In the winter and spring of 1786, Madison delved into the history of ancient and modern republics courtesy of the books he received from Jefferson in Paris. JOHN RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 42 (1996). These would bear fruit in THE FEDERALIST NOS. 15-17, at 100-17 (Alexander Hamilton) (Clinton Rossiter ed., 2003); THE FEDERALIST NOS. 18-20, at 118-33 (James Madison) (Clinton Rossiter ed., 2003); THE FEDERALIST NO. 63, at 380-87 (James Madison) (Clinton Rossiter ed., 2003), among others.

26. See generally POCOCK, *supra* note 13, HANS BARON, THE CRISIS OF THE EARLY ITALIAN RENAISSANCE: CIVIC HUMANISM AND REPUBLICAN LIBERTY IN AN AGE OF CLASSICISM AND TYRANNY (1966); FELIX GILBERT, MACHIAVELLI AND GUICCIARDINI, POLITICS AND HISTORY IN SIXTEENTH CENTURY FLORENCE (1965).

27. Composed of 9 members, eight priors of liberty and a Gonfaloniere of Justice. Gonfaloniere was presiding officer of the republic. FELIX GILBERT, MACHIAVELLI AND GUICCIARDINI, POLITICS AND HISTORY IN SIXTEENTH CENTURY FLORENCE 13 (1965).

28. See *id.* at 8-15 (1965). During their decades of subversion, the Medici established the council of the Seventy and the Council of the Hundred, complicating an already

new councils established by the Medici, and combined the traditional old councils into what became known as the Great Council.²⁹

The Signoria prepared, deliberated upon and agreed to all legislative proposals before it submitted them to the Boards of the Twelve, the Sixteen and then to the Great Council for approval.³⁰ In the early days, the city's two councils could not propose legislation, that was for the Signoria, but the councils had to consent.³¹ Neither was the Great Council, a deliberative body. Instituted in 1494, its function was to vote and to choose the men who were to sit on the various boards.³² The Signoria made all final decisions on all questions of policy. However, there were no individual executive functions.³³ Members of boards, including the Signoria, rotated rapidly, as it was believed that rotation protected the republic against tyranny, and board members often were chosen by lot rather than election.³⁴ The Board of the Ten of War had authority over war and diplomacy.³⁵ The Board of the Eight handled the administration of justice.³⁶ Originally authorized to oversee the rising public debt during the Visconti Wars, the Monte managed public finances.³⁷

Over the course of the fifteenth century, the staggering costs of mercenaries and carrying the public debt weighed the Republic's finances.³⁸ The government had three options, direct taxes on the countryside and subject cities, indirect taxes on consumption, and

elaborate governing structure to further fragment power and then "to impose their will upon the people." Fubini explains in more detail the Medici's constitutional innovations which marginalized the old councils. See Ricardo Fubini, *From Social to Political Representation in Renaissance Florence*, in *CITY STATES IN CLASSICAL ANTIQUITY AND MEDIEVAL ITALY* 223–40 (Anthony Molho, Kurt Raaflaub & Julia Emlen eds., 1991).

29. GILBERT, *supra* note 31, at 19 (finding that of the roughly 100,000 inhabitants of Florence, 3,000 had the right to membership in the Great Council).

30. *Id.* at 13.

31. *See id.*

32. *Id.* at 12–13.

33. *See id.*

34. *See id.* at 12–15.

35. *Id.* at 13–14.

36. *Id.* at 14.

37. *Id.*

38. *See* ANTHONY MOLHO, *FLORENTINE PUBLIC FINANCES IN THE EARLY RENAISSANCE, 1400–1433*, at 11 (1971).

forced loans.³⁹ The Law of May 22, 1427, which placed a tax of .5 percent on each citizen's total wealth, calculated on the basis of detailed declarations of patrimonies—an innovation at that time—was a major enactment in history of the republic.⁴⁰ There was no annual sovereign budget.⁴¹ Rather, public expenses were met on a month-to-month basis. When the treasury was in danger of being depleted, the Signoria would consult and decide on tax bill.⁴² The approval of the Councils was required for the tax bill to be authorized, but special commissions “balie” also imposed forced loans.⁴³ The Ten of War had borrowing authority but borrowed in excess and defaulted in 1425 at the height of the Visconti Wars.⁴⁴ The Signoria and Councils then intervened to compensate creditors, and the Ten could borrow no more.⁴⁵ A new office was authorized to administer military funds: the officials of the bank.⁴⁶ Staffed by prominent bankers, the office accumulated broader fiscal powers, including the powers to collect taxes and reduce expenses.⁴⁷ A series of fiscal crises in the 1430s set the stage for government by extraordinary emergency commissions, the aforementioned “balie” which undermined the traditional authority of the legislature and paved the way for the subversion of the republic by the Medici.⁴⁸

Late in the life of the Republic, when the Great Council failed to approve legislative proposals, often a proposal to raise new taxes, the Signoria would gather influential citizens for a consultation, a

39. GILBERT, *supra* note 31, at 22.

40. MOLHO, *supra* note 42, at 81 (detailing the computations and deductions).

41. *Id.* at 89.

42. The American colonies did much the same. See E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790*, at 8 (1968).

43. MOLHO, *supra* note 42, at 89.

44. *Id.* at 165–66.

45. *Id.* at 166.

46. *Id.*

47. *Id.* at 166–67.

48. See *id.* at 166–81. But as Gilbert reminds us, “[t]he cash needed for extraordinary expenses, particularly war . . . was raised by loans which only the wealthy families could provide, and which (with delays, and irregularly) were repaid to them from tax income.” Felix Gilbert, *Florentine Political Assumptions in the Period of Savonarola and Soderini*, 20 J. WARBURG & COURTAULD INSTS. 187, 191 (1957).

“pratica.”⁴⁹ These focus-group-like consultations of the influential who believed they had a special gift for public finance and foreign affairs are preserved in the archives of Florence.⁵⁰ Summoned to find solutions, the wise men would talk, for Florence, though small in territory and arms, had a weapon of its own—reason. The sagacity of its leading citizens kept it going: Delay when possible. Enjoy the benefit of time. Choose the middle way (neutrality) until the last moment. In the minutes of the practice dedicated to public finance, the same maxim appears over and over, “Money is the sinew of war.”⁵¹ It was reified into a doctrine, which in practice meant paying mercenaries through loans which the richest would advance to the republic to be handsomely repaid. In one of his many unorthodoxies, Machiavelli, a bureaucrat familiar with the consultations, asserted that a citizen army, not money, is the sinew of war.⁵² This was his solution to the Florentine Republic’s fragmented power of the purse.⁵³

Across the Alps, the gregariousness of political life faded, but it did not vanish entirely. In the later Middle Ages, the principle of representation made its way through Europe in the form of representative assemblies, which merged traditions of self-government with the insatiable needs of princes for funds. From the thirteenth through the fifteenth century, these representative institutions (Parliament, the Cortes, the Sejm, foremost among them) organized and met with some regularity, inspired by the tenet of Roman law, “what concerns all must be approved by all.”⁵⁴ Traditionally, the

49. Protocols of these meetings are preserved in the Florentine Archives. Felix Gilbert’s study of them offered unparalleled insight into political decisionmaking in an early modern republican regime. *Id.* at 187–214 (1957).

50. *Id.* at 187.

51. See Jérémie Barthas, *The Political Economy of Machiavelli’s Discourses*, in *MACHIAVELLI’S DISCOURSES ON LIVY: NEW READINGS*, 229, 239 (Diogo Pires Aurélio & Andre Santos Campos eds., 2022).

52. *See id.* at 241.

53. Assertion of the superiority of his own solution, and its popular implications cut through the impasse of elite financed mercenaries, citizen army. *See id.*

54. *Quod omnes tangit ab omnibus approbatur*, a procedural maxim of Justinian’s Code that acquired enormous resonance and power as a political principle over the course of the thirteenth and fourteenth centuries, and one which when joined with the principle

prince formulated laws which the representative assembly would confirm or reject. An important distinction, to which we owe Chief Justice Fortescue, is that the King of France could impose taxes at will, hence France was a “dominium regale.” Other regimes were “dominium politicum et regale,” meaning kings could not impose taxes without subjects’ consent.⁵⁵ A political realm was a limited regime. Alas, this was but for a time; from the sixteenth century onwards, the continent witnessed the rise of military establishments and absolutism, neither of which boded well for public participation whether through dialogue or consent, in fiscal matters, or any other public matters.⁵⁶

And of the English Civil War and the great confrontations between Crown and Parliament, the details and the patterns of which left a firm imprint on the conceptual universe of the revolutionary and Founding generation, our present Supreme Court is well-versed.⁵⁷ When the Crown’s ordinary revenues did not suffice to cover expenses, Parliament had to be summoned to consent to “extraordinary revenues” funded through taxation. The 1689 Bill of Rights confirmed this practice for all time, stating that parliamentary authorization was required to use funds or levy tax.⁵⁸ “The

of representation came close to approximating the tradition of government through dialogue. H.G. KOENIGSBERGER, *MONARCHIES, STATES GENERALS, AND PARLIAMENTS 5* (2001).

55. *Id.* at 13, 25.

56. Jean-Philippe Genet, *Which State Rises*, 65 *HIST. RSCH.* 119, 131 (1992). James Madison also commented on liberties and the price of military establishments. *THE FEDERALIST* NO. 41, at 251–59 (James Madison) (Clinton Rossiter ed., 2003) (“Not the less true is it that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments.”).

57. See *CFPB v. Cmty. Fin. Servs. Ass’n of Am.*, 144 S. Ct. 1474, 1482–83 (2024) (citing FREDERIC WILLIAM MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND 183–84*, 430, 434 (1908), 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 281, 306, 333 (1771), and G. M. TREVELYAN, *THE ENGLISH REVOLUTION 1688–1689*, at 180–81 (1939)).

58. See *BILL OF RIGHTS OF 1689*, 1 W. & M., 2d sess., c.2 (1688), reprinted in 6 *STATUTES OF THE REALM* 143 (John Raithby ed., 1819) (stating “levying Money for or to the Use of the Crowne by [pretense] of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegal”).

ensuing power struggle culminated in the Glorious Revolution, in which Parliament stripped away the remnants of the King's hereditary revenues and thereby secured supremacy in fiscal matters."⁵⁹ Parliament continued to limit the duration of revenue grants to the king so that an annual meeting of Parliament was a necessity. At least from 1688 if not earlier, Parliament legislated appropriations clauses, adding language in legislation setting aside certain sums of public funds and specifying their uses as "appropriating"⁶⁰

Persuasive and powerful the examples may be, one should take care not to resort to British Parliamentary practice for every constitutional conundrum, for the Framers did not aim to recreate the British constitution in written form but to do something entirely new. They ransacked the near and distant past for precedents and at times ignored them all. Mansfield reminded readers that the American president is not patterned on the British monarch, but the "main feature of a new experiment in self-government."⁶¹ Recall for a moment that Parliament started as a body that consented to monarch's initiatives and gradually wrested legislative power from it. The U.S. Congress, by contrast, did not laboriously acquire but was endowed with the legislative power from birth. Even today in parliamentary democracies, the "government," meaning the cabinet, initiates legislation which the Parliament passes or rejects.

Whether fiscal powers should be lodged in the legislature or split between the executive and the legislature does not avail itself of an obvious answer. The history of finance is an unreliable guide when contemplating the peregrinations of political and constitutional theory. Should the legislature's role be limited to consent or veto, of which there are many precedents? Must funding decisions be

59. *CFSA*, 144 S. Ct. at 1482 (citing BLACKSTONE, *supra* note 61, at 306, 333, and MAITLAND, *supra* note 61, at 434).

60. See U.S. CONST. art. I, § 9, cl. 7; see also *Historical Background on Appropriations Clause*, LIBR. OF CONG., https://constitution.congress.gov/browse/essay/artI-S9-C7-2/ALDE_00013189/ [<https://perma.cc/27R8-P6YM>].

61. "The American president is neither a revived Roman dictator nor a moderated British monarch; he is one main feature of a new experiment in self-government which will attempt to found the first successful republic." HARVEY C. MANSFIELD, *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* 247 (1989).

made by law, rather than regulation or some other administrative order? The answer to this last query lies at least in Parliament's decision centuries ago, as only legislation could bind the monarch. The American decision to vest all fiscal powers in the legislature from the outset is unique. The Philadelphia delegates were neither scrupulous students of Montesquieu nor naïve admirers of the British crown and constitution.⁶²

If eighteenth-century Britain witnessed an overweening parliament and the collusion between Crown and Parliament, the colonial experience was more akin to the preceding century, with colonial legislatures disputing royal governors' free and easy indulgence in prerogatives that had sunk into desuetude at home.⁶³ In consequence, the revolutionary State constitutions placed the powers to tax, borrow, and appropriate (or spend from the public treasury) in the legislature.⁶⁴ The Articles of Confederation gave the Continental Congress the power to borrow on behalf of the States assembled and to appropriate the necessary sums from the

62. See JUDITH N. SHKLAR, *Montesquieu and the New Republicanism*, in *POLITICAL THOUGHT AND POLITICAL THINKERS* 244 (Stanley Hoffmann ed., 1998). See also RAKOVE, *supra* note 28, at 21 ("Americans were as eclectic in their use of history as they were in their often selective readings of texts and authorities."). However, Federalist 58 does confirm that the power of the purse described in the Revenue, General Welfare, Borrowing, and Appropriations Clauses, is modeled on Parliament: "They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government." THE FEDERALIST NO 58., at 354 (James Madison) (Clinton Rossiter ed., 2003). The Army and Navy Clauses may also be encompassed by power of the purse. See U.S. CONST. art. I, § 8, cls. 12, 13.

63. RAKOVE, *supra* note 28, at 20 ("the structure of colonial politics gave seventeenth-century agreements a continuing vitality in eighteenth-century America.").

64. See MD. CONST. OF 1776 arts. X–XI (specifying that the House of Delegates would originate all money bills, a term defined to include all bills appropriating money in the treasury or otherwise providing supplies for the support of the government); By contrast, the constitution of Virginia, did not contain appropriations language. See VA. CONST. OF 1776. No state constitution permitted any funds be drawn from the state treasury absent legislation.

common treasury.⁶⁵ To those powers which the Continental Congress already possessed, the Committee of Detail proposed the power to lay and collect taxes.⁶⁶ Mindful of Locke's theory of the legislative power, that it must not raise taxes on the people without consent lest it be a taking of private property, and the history of parliament, which uses consent as the crux on which to expand, tax bills must originate in the House of Representatives.⁶⁷

And we know the story that the new federal government's assumption of revolutionary debt of the States became a "bond of union" as Morris and Hamilton had hoped.⁶⁸ Borrowing authority was not controversial, and so Congress has the power to borrow money on the credit of the United States.⁶⁹ And of Appropriations? There was remarkably little debate so conventional was it to place this power in the legislature. George Mason, ever skeptical of the Senate, waged a rearguard action to forbid it from amending or originating "money bills," but this amendment came and went.⁷⁰ The connection between the appropriations requirement and the companion requirement of regular statement and account of the receipts and expenditures be made public was not lost upon ratifiers at State conventions.

And appropriations law, tranquil for two centuries, now enjoys the spotlight. In the past decade the Supreme Court has had occasion to opine on the boundaries of the appropriations power.

65. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5 ("to ascertain the necessary sums of money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the united states, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted").

66. See John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 770 (1990).

67. JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 140, 142; See also THE FEDERALIST NOS. 41-46, at 251-96 (James Madison) (Clinton Rossiter ed., 2003).

68. FERGUSON, *supra* note 46, at 142-43.

69. FERGUSON, *supra* note 46, at 334-35; Funding Act of 1790, Ch. 34, 1 Stat. 138.

70. Journal, Sept. 8, 1787 (Madison), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 545, 552 (Max Farrand ed., 1911). See LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 174-76 (1995).

Congress may not impair a contractual obligation or retroactively limit an obligation set by a statutory formula through appropriations riders.⁷¹ And in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*, the Court pronounced that an appropriation is a law that authorizes expenditures from a particular source of public money for a specific purpose.⁷² In so doing the court confirmed what the —“four corners of the budget”—CBO, OMB, and the Budget Committees, along with GAO have long understood.

The singularity of appropriations, its relative isolation from other public law, is an indication of the autonomy of the various powers that comprise the power of the purse. Public laws on debt, taxation, and appropriations proceeded on separate procedural tracks until the Congressional Budget and Impoundment Act of 1974, when the House and Senate collected the fiscal powers and reasserted control through new procedures and institutions.⁷³ This much is familiar, but it is an act of civic virtue to review the concurrent resolution on the budget. The budget resolution brings together new budget authority (the foundation of appropriations) revenues, and public debt and certain entitlement outlays.⁷⁴ This bird’s eye view of the budget embodies Congress’ authority over the entire fiscal realm. Budget law became its own distinct legal practice, with its own precedents.⁷⁵

71. See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 192 (2012); *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020). Congress can also cap payments by setting a dollar amount or identifying a specific fund from which the government shall pay. In *Maine Community Health Options*, faulty drafting doomed the appropriations riders that attempted to undo risk corridors because they were limited to funds made available by the statute itself and did not include “any other sources of funds.” 140 S. Ct. at 1324.

72. 144 S. Ct. 1474, 1481–82 (2024).

73. See *supra* note 11.

74. See Congressional Budget and Impoundment Act of 1974, Pub. L. No. 93-344, § 301(a), 88 Stat. 297, 306.

75. Through the use of shadow budgets or waiving provisions, one specific Congress can abdicate its institutional prerogatives, but one Congress cannot bind another or change Art. I.

Of the various budget laws that followed in the wake of the CBA, one provision may merit additional attention. The Balanced Budget and Emergency Deficit Control Act (BBEDCA) established the distinction between mandatory and discretionary spending. Direct spending, defined as budget authority outside appropriations acts constitutes the majority of federal spending.⁷⁶ Section 257 of BBEDCA further specifies how the baseline (the projection of budget authority, outlays, and revenues against which all further spending is calculated for purposes of budget enforcement and oversight) is assembled. Section 257(b)(1) commands that laws creating direct spending are assumed to operate as prescribed and that such entitlements will be fully funded.⁷⁷ What is considered an entitlement, as legal entitlements, such as contracts differ from statutory entitlements or budgetary entitlements based on eligibility criteria set by law, is a complicating factor.⁷⁸ The obligations that are classified as entitlements and hence placed in the baseline may become contentious.⁷⁹ Likewise, the budgetary implications of the equal protection clause, and whether it requires statutory entitlements to be expanded beyond the original class of recipients, may come under scrutiny from Congress and the Courts.⁸⁰ Constitutional rights, too, have budgetary implications. Finally, in practice, the fiscal powers of Congress, derived from Art. I of the Constitution, have come to rely on something else, as the former President

76. See 2 U.S.C. § 900(c)(8); Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, § 257(8), 99 Stat. 1037, 1093.

77. See 2 U.S.C. § 907(b)(1); Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 257(b)(1), Stat. 104 Stat. 1388-591.

78. See CONGRESSIONAL BUDGET OFFICE, *THE FEDERAL BUDGET IN FISCAL YEAR 2023* (2024), <https://www.cbo.gov/system/files/2024-03/59728-Mandatory-Spending.pdf> [<https://perma.cc/7Q66-SUPM>].

79. See Letter from CBO to Congressman Mark Meadows (June 8, 2018), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53961-csrletter.pdf> [<https://perma.cc/F74E-DH42>] (addressing “[t]he budgetary treatment of cost-sharing reductions”)

80. See Stith, *supra* note 4, at 1351; *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022) (holding that the Fifth Amendment does not require supplemental SSI benefits for Puerto Rico).

of France, the aristocratic Valéry Giscard d'Estaing, languidly observed, on "the exorbitant privilege" of the U.S. dollar.⁸¹ The aristocrat chose his words carefully; it is a privilege, not a right.

81. Gary Gensler, Chair, SEC, "Exorbitant Privilege: Responsibilities and Challenges": Prepared Remarks before the Council on Foreign Relations (Dec. 4, 2023), https://www.sec.gov/newsroom/speeches-statements/gensler-prepared-remarks-council-foreign-relations-12042023#_ftn1 [<https://perma.cc/PT95-NLYE>].