THE POWER OF THE PURSE AND THE CONSTITUTION'S MISSING TEXT

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Congress's power of the purse has become a new focal point in high-profile separation of powers disputes. In *Community Financial Services Ass'n v. Consumer Financial Protection Bureau*, the U.S. Court of Appeals for the Fifth Circuit sent shockwaves through the system when it declared that Congress unconstitutionally delegated its power of the purse to the Bureau.[2] While the Fifth Circuit's originalist analysis led it to conclude that the Bureau's standing and self-directed funding mechanism violated the Appropriations Clause, it reached this conclusion based on minimal briefing and a deceptively narrow historical record.[3] Once the Supreme Court had the benefit of a more comprehensive historical analysis,[4] it reversed the Fifth Circuit in a 7-2 decision.[5]

Justice Thomas's majority opinion found the Bureau's funding consistent with original understandings of the Appropriation Clause's text and history.[6] At the same time, he left the door open to "other constitutional checks on Congress's authority to create

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[2] 51 F.4th 616, 623 (5th Cir. 2022) (Congress's decision "to cede its power of the purse to the Bureau . . . violates the Constitution's structural separation of powers."), *rev'd*, 144 S. Ct. 1474 (2024).

[3] Christine Kexel Chabot, *The Founders' Purse*, 110 VA. L. REV. 1027, 1054 (2024).

[4] *Id.*

[5] *Community Financial Services*, 144 S. Ct. at 1490.

[6] *Id.* at 1489–90.

and fund an administrative agency . . ."[7] Justice Jackson penned a provocative concurrence.[8] She argued that the case should have been decided on a much narrower ground: that the text of the Constitution provided no basis for the constitutional challenge raised by the Fifth Circuit. This Essay addresses how broader questions about the spending power and future separation of powers challenges might fare under a textualist analysis of the Constitution.

According to Justice Jackson, the majority was correct to reject the Fifth Circuit's constitutional arguments based on "the plain meaning of the text of the Appropriations Clause." The Appropriations Clause requires only that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[9] It does not contain further requirements that Congress limit the duration or specify precise amounts of spending in appropriation laws.[10] In Justice Jackson's view, "nothing more [was] needed to decide this case."[11] As she noted, a judicial decision to find "unstated limits in the Constitution's text" would further undermine separation of powers by exceeding the proper judicial role under Article III and "undercut[ing] the considered judgments of a coordinate [political] branch."[12]

Justice Jackson's concerns about the constitution's missing text ring true for not only for spending challenges but also for a broad range of significant constitutional disputes.[13] While these broader disputes exceed the scope of this essay, Justice Jackson's textualist critique raises important concerns for future separation of powers

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[7] *Id.* at 1489.

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

[9] U.S. CONST. art. I, § 9, cl. 7.

[10] *Community Financial Services,* 144 S. Ct. at 1492 (Jackson, J., concurring).

[11] *Id.*

[12] *Id.* at 1493.

[13] In *Trump v. United States,* Justice Sotomayor's dissent criticized the majority for recognizing "official-acts immunity" even though it has "'no firm grounding in constitutional text, history, or precedent'" under the standard articulated in *Dobbs.* 144 S. Ct. 2312, 2357 (2024) (Sotomayor, J., dissenting) (quoting Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2272 (2022)).

challenges to funding laws. As this Essay will explain, however, it is difficult to conceptualize a general understanding of the spending power and its limits by considering only the plain meaning of the Constitution's text. The discussion below grounds the spending power and its limits in implicit understandings that go beyond the Constitution's express text. It then explains how these implicit limits on the delegation of spending power have operated in the recent litigation over funding for the Consumer Financial Protection Bureau and the Federal Communication Commission ("FCC")'s universal service program. I conclude that Justice Jackson's concerns about judicial overreach and deference to the political branches remain equally important under a broader interpretive framework which encompasses implicit meaning.

I. THE CONSTITUTION'S MISSING TEXT

Justice Jackson's concurrence urged judges not to go beyond "the plain meaning of the text of the Appropriations Clause." The concept of "plain meaning" is itself somewhat imprecise[14] and has been more commonly invoked in matters of statutory interpretation.[15] Justice Jackson nevertheless expressed a standard textualist concern,[16] and one that made good sense in response to

[14] Victoria Nourse, *Two Kinds of Plain Meaning,* 76 BROOK. L. REV. 997, 1005 (2011) (discussing "two kinds of plain meaning" comprised of "expert meaning" and "public, or prototypical, meaning").

[15] Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning,* 1990 SUP. CT. REV. 231, 252 ("Plain meaning, quite simply, is a blunt, frequently crude, and certainly narrowing device, cutting off access to many features of . . . communicative or interpretive context that would otherwise be available to the interpreter"); Lawrence Solum, *Pragmatics and Textualism,* 33 J.L. & POL'Y (forthcoming 2025) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881344 [https://perma.cc/7XHH-4VXG] (urging a broader "plain meaning" framework for statutory interpretation).

[16] Frederick Schauer, *Unoriginal Textualism,* 90 GEO. WASH. L. REV. 825, 829 (2022) ("existing debates about constitutional interpretation have neglected to take sufficiently seriously the constitutional counterpart of the plain meaning position in statutory interpretation").

the Fifth Circuit's misuse of history.[17] She admonished judges to avoid using history or other sources of meaning to read in spending limits beyond those expressed in the text of the Appropriations Clause.[18] As Professor Schauer has explained "[p]lain meaning can include not only what is plainly in a [law], but also what is plainly not."[19]

Despite the apparent benefits of applying Justice Jackson's textualist approach to the *Community Financial Services* case, it is more difficult to extend this approach to Congress's underlying power of the purse. Most jurists ground the power of the purse in the General Welfare Clause.[20] This clause contains general language empowering Congress to "provide for the general welfare,"[21] but it does not grant Congress a "spending power" in these exact terms.[22] This imprecision has led other scholars to question whether the General Welfare Clause provides the correct textual hook.[23] It is nevertheless widely recognized that the

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[17] Chabot, *supra* note 3, at 1054 (the "Fifth Circuit's analysis of only select parts of the historical record" lead "to an inaccurate understanding of history").

[18] For authorities prioritizing text over historical context in constitutional interpretation, *see* Schauer, supra note 16, at 859 (calling for an approach that "interpret[s] the Constitution according to its public meaning at the time of interpretation"); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 25 (1982) (recounting how Joseph Story urged reliance on "the fair meaning of the words of the text" rather than a historical method in which the interpreters looked "back to the time [] when the constitution was adopted") (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 407, at 390 n.1 (1st ed., Boston, Hilliard, Gray & Co. 1833)); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History,* 91 GEO. L.J. 1113, 1125 (2003) ("the secret drafting history of the Constitution should never trump the 'plain meaning' of its text").

[19] Schauer, *supra* note 15, at 241.

[20] Ryan C. Williams *Unconstitutional Conditions and the Constitutional Text,* 172 U. PA. L. REV. 747, 807 (2024) ("Congress's spending power is conventionally grounded in the first provision of Article One, Section Eight").

[21] U.S. CONST. art. I, § 8.

[22] Williams, *supra* note 20, at 811 (critics note that the "language of the General Welfare Clause focuses principally on Congress's power over taxation and does not confer a power over spending in express terms").

[23] Gary Lawson, *A Truism with Attitude: The Tenth Amendment In Constitutional Context,* 83 NOTRE DAME L. REV. 469, 499 (2008) ("Textually" Art. I, section 8, cl. 1 "grants not one whit of power to spend money"); *id.* at 500 (locating appropriations

Constitution somewhere (or perhaps somehow) vests the power of the purse in Congress.[24] In Justice Thomas's majority opinion in *Community Financial Services*, he agreed that "the Appropriations Clause presupposes Congress' powers over the purse."[25]

Justice Thomas's reference to a "presuppose[ed]" power [26] suggests that the spending power is part of the Constitution's implicit meaning. Presupposed meaning is part of public meaning originalism's text and history framework, [27] and Professor Lawrence Solum has recently argued that this type of "pragmatic enrichment" or "communication of implicit content" should fall within a textualist framework that he describes as encompassing statutory law's "plain meaning." [28] Professor Solum's plain meaning framework for statutes appears to be more inclusive than the one Justice Jackson describes for the Constitution, as Solum's framework goes beyond the "literal or acontextual meaning of a legal text" derived from "bare semantic content" and includes meaning established through pragmatics or context.[29]

The pragmatic enrichment recognized by Professor Solum includes "presuppositions" [30] derived from readers' understandings of "common knowledge of shared context,"[31] and

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power in the Sweeping Clause); David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 251 (1994) (locating the spending power in the Property Clause); Williams, *supra* note 20, at 810–12 (summarizing Lawson's and Engdahl's different views); Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 995 (2024) (arguing that power "to provide for the general welfare" refers to legislation rather than spending).

[24] Lawson, *supra* at note 23, at 499 ("No sane person has ever doubted that the Constitution somewhere confers on Congress the power to spend").

[25] CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1488 (2024).

[26] *Id.*

[27] Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1985 (2021) ("constitutional text may have a variety of presuppositions"). For a broader critique of originalist assumptions based on the Constitution's "writtenness," *see* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM 65 (2024).

[28] Solum, *supra* note 15, at 3.

[29] *Id.* at 4.

[30] *Id.* at 46.

[31] *Id.* at 42.

this framework recognizes that the words on the page may convey implicit content beyond their semantic meaning.[32] For example, a law providing that "children under twelve may enter free" presupposes that persons who are older than twelve must pay to enter, even though the text says nothing about payment for older persons. [33] In practice, then, pragmatics allow interpreters to supplement the text with contextual evidence. In contrast to Justice Jackson's argument for a narrow textualist framework, Professor Solum endorses consideration of pragmatics and context because this evidence is necessary "to recover the full and actual meanings conveyed by statutory text."[34]

The spending power illustrates the value of an interpretive framework allowing consideration of contextual evidence. The idea that Congress possesses the power of the purse reflects an implicit understanding that is and has always been widely recognized, [35] even though scholars disagree about the precise textual source of this power. In the absence of a clear textual source, it makes more sense to treat spending as an implicit power presupposed by the Appropriations Clause and revenue raising powers in other parts of the Constitution.[36] In other words, the Constitution reflects an implicit assumption that the government will use taxes, borrowing, and land sales to raise money *that it will later spend* on purposes identified in appropriation laws. This

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[32] *Id.* at 46.

[33] *Id.* at 46 (quoting Mitchell N. Berman, *The Tragedy of Justice Scalia,* 115 MICH. L. REV. 783, 797–98 (2017)).

[34] Solum, *supra* note 15, at 5.

[35] Vesting the spending power in Congress is consistent with understandings that prevailed at the Founding and beyond. *See* CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1481 (2024) (approving Congressional funding law "[b]ased on the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification and our Nation's subsequent history") (Thomas, J.); *id.* at 1490 (Kagan, J, concurring) (for "over 200 years now, Congress has exercised broad discretion in crafting appropriations").

[36] U.S. CONST. art. I, § 8, cl. 1 (taxes); *id.* at cl. 2 (borrowing); U.S. CONST. art. IV, § 3, cl. 2 (land sales). While Justice Thomas suggested that the Appropriations Clause was "not itself the source of" spending power, *Community Financial Services,* 144 S. Ct. at 1488, the limitations imposed by the Appropriations Clause are premised on an implicit spending power.

approach avoids the potential absurdity that arises when one tries to ground spending power in the General Welfare Clause and confront related questions about whether Congress's spending power is limited to the tax revenue authorized in that clause.[37]

An implicit spending power would also avoid further requirements that might apply if spending laws were authorized as a means "for carrying into Execution" federal powers under the Necessary and Proper Clause. Arguments to ground the spending power in the Necessary and Proper Clause are textually plausible[38] and not entirely without historical support.[39] At the same time, the idea that spending must reflect a "necessary" exercise of one of Congress's enumerated powers[40] has been rejected by the Supreme Court[41] and may create some tension with the general requirements provided by the Appropriations Clause. Rather than proceeding clause by clause, the Appropriations Clause establishes a general rule for all spending laws other than those funding the army: Congress "need only identify a source of public funds and authorize the expenditure of those funds for designated purposes" in general appropriation laws.[42]

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[37] Engdahl, *supra* note 23, at 222 (the General Welfare Clause "fails to provide any authority at all to spend money acquired otherwise than by taxation"); *cf.* Lawson, *supra* note 23, at 499 n.136 ("Of course Congress has the power to spend money raised through property sales or borrowing").

[38] Lawson, *supra* note 23, at 500.

[39] Williams, *supra n*ote 20, at 811–12 (this "understanding effectively mirrors James Madison's view that Congress may only spend money in support of its other enumerated powers"). Madison opposed Hamilton's more expansive view that "Congress's power over spending was . . .'plenary [] and indefinite.'" *Id.* at 807 (quoting Alexander Hamilton, Final Version of the Report on the Subject of Manufactures (Dec. 5, 1791), *in* 10 THE PAPERS OF ALEXANDER HAMILTON 303 (Harold C. Syrett ed., 1966)).

[40] Lawson, *supra* note 23, at 500 (arguing that spending laws must be designed to "'carry[] into Execution' enumerated federal powers" and also be "'necessary and proper'" for that purpose").

[41] Williams, *supra* note 20, at 807 (citing United States v. Butler, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.")).

[42] CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1481 (2024); *see generally* U.S. CONST. art. I, § 9, cl. 7., *id.* at art. I, § 8, cl. 12. It is also doubtful that heightened

II. EXPRESS AND IMPLICIT LIMITS ON THE DELEGATION OF SPENDING POWER

Implicit meaning is also central to separation of powers challenges to spending laws. There is no express "separation of powers clause" in the U.S. Constitution.[43] Recent disputes over spending have focused on delegation of spending power and to what extent the Constitution limits Congress's ability to grant the executive branch broad discretion over spending.

A typical nondelegation argument would pair the grant of an express legislative power (say, commerce) with an implicit structural limit on Congress's delegation of this power to the executive branch. Article I, section 1 vests legislative powers in Congress, and thus this vesting clause implies that Congress cannot pass a law reallocating its legislative power(s) to the executive branch.[44] As explained by then-Professor John Manning, this type of separation of powers limitation reflects an "abstract norm" that

showings of necessity would matter for CFPB funding used for a federal program under the Commerce Clause. *Compare* Lawson, *supra* note 23, at 500 (the "necessity" requirement goes to "germaneness" and may block a "spending condition" if it "is truly nongermane to the federal program" supporting an enumerated power) *with* Ilan Wurman, *The Necessary and Proper Clause and the Law of Administration*, 92 GEO. WASH. L. REV. (forthcoming) (manuscript at 37–38) (suggesting that the Necessary and Proper Clause would also prevent Congress from granting the CFPB funding if it amounted to a "great and important power"); *cf.* Chad Squitieri, *"Appropriate" Appropriations Challenges after* Community Financial Services, 2024 CATO SUP. CT. REV. 73, 92 (arguing that the CFPB's funding would not be "necessary and proper" without a "historical example of Congress using" its Commerce Power "to deviate from the annual appropriations process"). For a critique of the argument that an indefinite spending law must have a precise historical analogue, *see* Chabot, *supra* note 3, at 1065–67 (criticizing Justice Alito's demand for an exact historical replica).

[43] Trump v. United States, 144 S.Ct. 2312, 2344 (2024).

[44] Gundy v. United States, 588 U.S. 128, 135 (2019) ("Accompanying [Article I, § 1's] assignment of power to Congress is a bar on its further delegation."); Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1080 (2021) ("[T]he nondelegation doctrine holds that Article I, Section 1 of the Constitution vests in Congress" legislative powers "that Congress may not delegate . . . to the executive branch . . . .").

is "derived from the structure of the Constitution as a whole" rather than any "particular clause."[45]

The "raw text" of Article I's Vesting Clause is further "indeterminate," [46] and often fails to mark a clear boundary between a delegation of legislative power and a delegation of power to execute the law.[47] The current test separating permissible from impermissible delegations is whether the law contains an "intelligible principle" to constrain executive discretion.[48] While the intelligible principle requirement has not provided much of a limit on statutory delegation,[49] it still seems to prevent completely standardless delegations (do whatever you want)[50] or delegations of the entirety of a legislative power or powers.[51] The intelligible principle test therefore reinforces implicit, outer limits on Congress's power to delegate power to the executive branch.

Arguments about excessive delegations of spending power invert the standard nondelegation framework. If spending is a legislative power "herein granted" under Article I, section 1, it is not an express power but one presupposed or implied by general language in Article I. On the other hand, the Appropriations Clause

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[45] John F. Manning, *Separation of Powers as Ordinary Interpretation,* 124 HARV. L. REV. 1939, 1961 (2011).

[46] *Id.* at 2021.

[47] *Id.* at 2019–20 (noting that "multiple branches can often bring about very nearly the same result," and explaining how a prohibition on price fixing could be effectuated through either legislation or rules promulgated by an executive branch agency).

[48] *See* FCC v. Consumers' Rsch., 145 S.Ct. 2482, 2497 (2025).

[49] For this reason some Justices have questioned whether "the intelligible principle doctrine serves to prevent all cessions of legislative power." *Whitman,* 531 U.S. at 487 (Thomas, J., concurring); Christine Chabot, *The Lost History of Delegation at the Founding,* 56 GA. L. REV. 81, 106 (2021) (citing Gundy v. United States, 588 U.S. 128, 160–62 (2019) (Gorsuch, J., dissenting)) (the Court's "lax application of the intelligible principle requirement" has "failed to constrain impermissible delegations of legislative powers").

[50] Cass Sunstein, *Is OSHA Unconstitutional?,* 94 VA. L. REV. 1407, 1407 (2008) (delegation that allowed an executive agency to "[d]o what you believe is best" would likely violate the nondelegation doctrine).

[51] Chabot, *supra* note 49, at 94–96 (2021) (a statute delegating "the entirety of the sovereign power or powers that section 8 vested in Congress" would improperly "alter Article I's original allocation of powers").

in Article I, section 9 imposes express limits on Congress's delegation of spending power. Congress and the President must authorize public spending by enacting a law (a process limit),[52] and as a matter of substance the law must qualify as an "appropriation."[53]

In *Community Financial Services*, the majority and the dissent split over the historical meaning of "appropriation" and the limits this term imposed. Justice Thomas's majority opinion relied on Founding-era dictionaries and concluded that, in "ordinary usage," an appropriation law need only authorize "the expenditure of particular funds for specified ends."[54] In his dissent, Justice Alito criticized the majority for relying on a "few old dictionaries" and urged a more expansive interpretation of appropriation as a "term of art" informed by "centuries of practice."[55] The majority noted that Justice Alito never specified a "competing understanding" of "[a]ppropriations,"[56] however, and the open-ended nature of his historical inquiry seemed to fuel Justice Jackson's concerns about judges supplementing the plain meaning of the Constitution's text.

The Justices' narrow focus on the term "appropriation" and the Appropriations Clause also seemed to detract from significant textual clues elsewhere in the Constitution.[57] One of Justice Alito's key assertions was that the Appropriations Clause required

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[52] Richard A. Primus, *The Limits of Enumeration,* 124 YALE L.J. 576, 579 (2014) (discussing "process limits").

[53] U.S. CONST. art. I, § 9, cl. 7; CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1488 (2024) (the Appropriations Clause is "phrased as a limitation" and appears in a section of other limitations).

[54] *Community Financial Services,* 144 S. Ct. at 1481–82; *see generally* Christine Kexel Chabot, *Saving the Consumer Financial Protection Bureau (and the Constitution) from the Courts,* YALE J. ON REGUL.: NOTICE & COMMENT (May 20, 2024), https://www.yalejreg.com/nc/saving-the-consumer-financial-prot

ection-bureau-and-the-constitution-from-the-courts/ [https://perma.cc/MT3G-BMXV].

[55] *Community Financial Services,* 144 S. Ct. at 1496 (Alito, J., dissenting).

[56] *Id.* at 1488 (majority opinion).

[57] For a critique of interpretive problems caused by narrow focus on one or two words, *see* Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude,* 106 CORNELL L. REV. 1397, 1438 (2021) (an analysis limited to "a couple of words is rarely a useful unit of linguistic analysis").

Congress to limit the duration of spending awards.[58] But as the Army Appropriations Clause's two-year limit on army spending makes clear,[59] when the Framers wanted to impose a temporal limit on spending power, they did so expressly. The lack of a similar temporal limitation in the Appropriations Clause strongly suggests that there was no time limit for general appropriations. One might think of this as a further textual argument under the canon of *expressio unius est exclusio alterius*.[60] It may also be an implicit omission based on what the Appropriations Clause did not say (and the Army Spending clause did).[61] This argument from omission and implicit meaning bolsters the majority's reasoning, and yet it received surprisingly little air time in opinions that focused on the Appropriations Clause's text.[62]

III. FURTHER NONDELEGATION CHALLENGES?

The spending power's distinct structure raises a further question: are the Appropriations Clause's express limits on the source and purpose of funding the only limits there are, or might the Constitution's structure imply further, non-temporal limits on Congress's ability to delegate spending power? Some scholars have suggested that appropriation laws are exempt from general nondelegation concerns.[63] In theory, however, it still seems possible that a law granting the executive too much discretion over the total amount spent could effectively hand off the power of the purse to the executive branch. Part of Justice Alito's objection to the

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[58] *Community Financial Services,* 144 S. Ct. at 1493–94 (objecting that the majority's interpretation "imposes no temporal limit" on spending) (Alito, J., dissenting).

[59] U.S. CONST. art. I, § 8, cl. 12.

[60] Solum, *supra* note 15, at 57 n.189 (noting this canon).

[61] *Id.* ("*expressio unius* . . .is based on a pragmatic enrichment").

[62] Justice Thomas emphasized this point only in rebuttal, *Community Financial Services,* 144 S. Ct. at 1487, and Justices Jackson and Alito did not address it. *See* Chabot, *supra n*ote 54.

[63] *See, e.g.*, Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 320 (2001) ("the nondelegation doctrine does not apply to appropriation laws"); Chabot, *supra* note 3, at 1047–48 (noting distinction).

majority's approach in *Community Financial Services* was just that. He complained that the majority would allow a law that "empowers the Executive to draw as much money as it wants."[64]

The power to spend an unlimited amount was not squarely presented in *Community Financial Services*, as the Consumer Financial Protection Bureau's funding law allowed the agency only the discretion to spend up to a capped amount.[65] The Court's decision arguably leaves open the question of whether another law without a spending cap would amount to an impermissible delegation of Congress's power of the purse.[66] One answer might be that an unlimited spending allowance would violate the Appropriations Clause in ways not addressed by *Community Financial Services*,[67] although this argument would be difficult to square with significant laws providing uncapped funding in the Founding Era.[68] A further answer might be that limitations on the purpose of spending, in either an appropriation law or a separate authorization law, would also imply limits on the total amount of spending.[69] A final line of analysis might depend on how much discretion Congress awarded. Does the executive truly have power to spend whatever it wants, or is the ultimate amount of spending

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[64] 144 S. Ct. at 1494 (Alito, J., dissenting).

[65] *Id.* at 1487 (majority opinion) ("Congress determined the amount of the Bureau's annual funding by imposing a statutory cap").

[66] The issue is further complicated by the Fifth Circuit's holding that Community Financial Services "did not raise" an "appropriations-based nondelegation argument" alongside the Appropriations Clause challenge "in the district court." Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616, 633 n.6 (5th Cir. 2022).

[67] According to Alexander Hamilton, the "Appropriations Clause required . . .a 'previous law' to 'ascertain[]' the 'purpose, the limit, and the fund' out of which an expenditure would be drawn." Alexander Hamilton, Explanation, *in* 7 THE WORKS OF ALEXANDER HAMILTON 81, 86–87 (Henry Cabot Lodge ed., 1886).

[68] For example, the First Congress authorized uncapped, fee-based funding for customs officers. Chabot, *supra* note 3, at 1090 (citing Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44–45).

[69] While total amount of fee-based funding for customs officers was uncapped, *id.*, in reality an officer could collect only so many fees for the purpose of levying duties on imported goods; *see also* Rappaport, *supra* note 63, at 319 (use of separate "authorization laws . . . to establish and regulate spending programs" would "eliminate the need specify how much money should be spent on the program").

limited by an intelligible principle? As with a substantive delegation, an intelligible principle to limit spending would ensure that Congress delegated something less than the entirety of its spending power. That would seem to be enough to prevent an unconstitutional delegation.

Recent litigation over the FCC's universal service funding mechanism confirms that courts will continue to apply the intelligible principle test when assessing the constitutionality of spending laws. Litigants argued that the Telecommunications Act of 1996 does not contain an intelligible principle and "sufficiently instruct[the] FCC regarding how much it should tax Americans to pay for the universal service program."[70] While the challenges focused on the FCC's discretion to raise revenue for universal service, under the Act limits on raising revenue for universal service also function as limits on amounts that the FCC can spend on this program.[71]

The Act authorizes the FCC to draw funding for universal service directly from telecommunications carriers: "Every telecommunications carrier that provides interstate telecommunications services shall contribute . . . to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[72] Subsection 254(c)(1) of the Act further defines "universal service" as a "level of telecommunications services" established by the Commission, and subsection 254(b) provides that this service must be offered in accordance with seven general "principles." The U.S. Courts of Appeals for the D.C., Sixth, and Eleventh Circuits all held

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[70] Consumers' Rsch. v. FCC, 109 F.4th 743, 760 (5th Cir. 2024) (en banc), *rev'd* 145 S. Ct. 2482 (2025).

[71] Subsection § 254(d) allows the FCC to collect "contributions" to fund universal service and subsection 254(e) allows the FCC to provide "eligible telecommunications carriers" with "support" for these services. While the Act's funding for universal services therefore operates outside limits that might normally be set by an annual appropriation law, annual appropriations are not required under the holding of *Community Financial Services.*

[72] 47 U.S.C. § 254(d). In practice the carriers then pass these contributions along to end users. *Consumers' Research,* 109 F.4th at 800.

that these requirements establish a sufficient intelligible principle for the FCC to follow when raising funds for universal service.[73] In other words, the Act limits the FCC's discretion by precluding it from raising money for purposes beyond the "sufficient mechanisms" that the FCC has deployed to "preserve and advance universal services" authorized by the Act.[74]

The Fifth Circuit was been an outlier in declaring the FCC's funding mechanism unconstitutional. Although a panel of the U.S. Court of Appeals for the Fifth Circuit initially declared this funding mechanism constitutional, the Fifth Circuit granted en banc review and reversed. In his majority opinion, Judge Oldham rejected the "combination of Congress's broad delegation to FCC and FCC's subdelegation" of power to implement universal service funding "to private entities."[75] At the same time, he disagreed that that the "concept of universal service is sufficiently intelligible" to constrain the FCC's collection of funds.[76]

The Supreme Court granted certiorari and reversed the Fifth Circuit in a decision handed down in June of 2025. In a 6-3 majority opinion by Justice Kagan, the Court applied the "usual intelligible-principle test" [77] and rejected an invitation to apply a "special nondelegation rule" for tax laws that raise revenue.[78] Under the intelligible principle test, Consumers' Research objected that the Act delegated too much discretion to the FCC: it imposed "no quantitative but only qualitative limits on how much money the FCC can raise" and provided "a floor—not a ceiling" when it authorized the FCC to "collect the amount that is 'sufficient' to

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[73] Consumers' Rsch., Cause Based Com., Inc. v. FCC, 88 F.4th 917, 923–24 (11th Cir. 2023) (rejecting nondelegation argument that "there is no limit on how much the FCC can raise" to fund universal service and identifying intelligible principles that limit the agency's funding authority), *cert. denied,* No. 23-743, 144 S. Ct. 2629 (June 10, 2024) (Mem.); Consumers' Rsch v. FCC, 67 F.4th 773, 795 (6th Cir. 2023) (same), *cert. denied,* No. 23-456, 144 S. Ct. 2628 (June 10, 2024) (Mem.); Rural Cellular Ass'n v. FCC, 685 F.3d 1083, 1091 (D.C. Cir. 2012) (same).

[74] 47 U.S.C. § 254(d).

[75] *Consumers' Research,* 109 F.4th at 756.

[76] *Id.* at 760.

[77] FCC v. Consumers' Rsch., 145 S.Ct. 2482, 2501 (2025).

[78] *Id.* at 2497.

support the universal-service programs Congress has told it to implement."[79] The Court rejected this challenge and held that the Act passed the intelligible principle test.

According to the Court, Congress provided adequate guidance when it "expresse[d] the 'general policy' the FCC must pursue in setting contribution amounts, as well as the 'boundaries' it cannot cross."[80] The allowance for "'sufficient'" contributions "sets a floor and a ceiling alike" and prevents the FCC from raising "twice as much as needed . . ." [81] Chief Justice Roberts and Justices Sotomayor, Kavanaugh, Barrett, and Jackson joined the majority opinion finding that the Act's funding mechanism satisfied the intelligible principle test.[82] While Justice Gorsuch's dissent urged a more rigorous nondelegation doctrine, his opinion was joined by only Justices Thomas and Alito,[83] and it failed to outline a clear alternative to the intelligible principle test.[84] As a result, the Court seems unlikely to depart from the current, accommodating version of the intelligible principle test any time soon.

CONCLUSION

Justice Jackson's concurrence in *Community Financial Services* raised serious concerns about judges' use of unstated constitutional limits to override judgments typically left to the political branches and the legislative process. Her concerns provide important reasons to question ongoing separation of powers challenges to statutory funding mechanisms. While courts may not be able to resolve disputes about delegation of spending power by relying exclusively on the Constitution's text, Justice Jackson's concerns

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[79] *Id.* at 2501.

[80] *Id.*

[81] *Id.* at 2502.

[82] *Id.* at 2496.

[83] *Id.* at 2518–19 (Gorsuch, J., dissenting).

[84] *See* Christine Kexel Chabot, *Nondelegation under* Loper Bright, 57 *LOY. U. CHI.* L. J. forthcoming 2025, manuscript at 37–39 *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5377239* [https://perma.cc/78P7-4C2T] (discussing limitations of the analysis in Justice Gorsuch's dissent).

about exceeding the proper judicial role also resonate with a broader interpretive framework and leading judicial precedents on delegation of legislative powers. As Justice Scalia noted over twenty years ago, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[85] Recent challenges to the statutory funding mechanisms for the Consumer Financial Protection Bureau and FCC's universal service program have provided no reason to depart from this deferential judicial role.

[85] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474 – 75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).