MONOMANIACAL TEXTUALISM UNDERMINED CONGRESS'S POWER OF THE PURSE

E. DONALD ELLIOTT[1]

ABSTRACT

No structural principle of our government is more fundamental than that the Congress, and especially the House of Representatives, the part of our national government closest to the people, controls the "power of the purse" to raise and spend money. However, in Consumer Financial Protection Bureau v. Community Financial Services Association of America, *the Supreme Court upheld a funding mechanism whose only purpose was to make it more difficult for a future house of Congress with a different political composition to use appropriations riders to rein in initiatives by the CFPB with which it disagrees. The author contends this erroneous result was a consequence of a jurisprudence of "monomaniacal textualism," which considers only the wording and history of constitutional provisions but not their purposes or the background principles or spirit of our "unwritten constitution." The article argues that courts should consider the "spirit" as well as the text of the Constitution, a principle that is particularly salient in considering institutions such as the*

[1] Adjunct Professor, Yale Law School; Distinguished Adjunct Professor, Antonin Scalia Law School, George Mason University. Partner, Earth & Water Law, Washington, D.C.

An earlier version of the argument in this article was presented to the New Civil Liberties Alliance's Ginsburg-Scalia Fellows on July 10, 2024. I thank them and Professors Sai Prakash of the University of Virginia Law School and Adam J. White of Antonin Scalia Law School, George Mason University for their especially helpful comments. I also thank the students in my seminar on "The Reconsideration of the Administrative state" at the Yale Law School for helpful comments on an earlier draft. Of course, I alone am responsible for the errors that remain.

administrative state that did not exist at the time the Constitution was adopted. Finally, it argues that courts had been using common law methods to interpret colonial charters for a century and a half prior to the ratification of the Constitution, and that by vesting them with "the Judicial power" the drafters and ratifiers of the Constitution conferred on the courts the power to continue to use common law methods to elaborate the great silences in the Constitution.

INTRODUCTION

No structural principle of our government is more fundamental than that the Congress, and especially the House of Representatives, the part of our national government closest to the people, controls the "power of the purse" to raise and spend money. True, the Senate must concur in appropriations, but even the President and the administrative state are subservient to decisions by both houses about spending the public's money raised by taxation and borrowing, and thus either house acting alone may block spending by executive departments and agencies of which that house disapproves.[2]

After the demise of the non-delegation doctrine,[3] and the loss of the legislative veto,[4] Congress's power of the purse is one of the few "checks and balances"[5] remaining for controlling the massive powers of the administrative state.[6] Congress often uses appropriations

---

2. The statements in the text are not intended to address the constitutional issues surrounding "impoundment," the alleged power asserted by many presidents to decline to spend funds appropriated by Congress. That is a complex issue which is outside the scope of this short article.

3. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

4. INS v. Chadha, 462 U.S. 919 (1983). For a critique, see E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution and the Legislative Veto*, 1983 SUP. CT. REV. 125.

5. *Checks and balances summary*, ENCYC. BRITANNICA (Mar. 24, 2003), *https://www.britannica.com/summary/checks-and-balances* [https://perma.cc/7CLE-WLUB]. ("Principle of government under which separate branches are empowered to prevent actions by other branches and are induced to share power.")

6. For examples of how Congress uses the appropriations process as an "informal legislative veto" over initiatives with which either house disagrees, *see* Louis Fisher,

riders to express disapproval of administrative initiatives.[7] Riders can be in the form of binding statutory provisions prohibiting the use of appropriated funds to develop or enforce a particular rule or policy. In addition, however, in my experience, even mere report language by a single house will generally be honored by agencies that fear budget cuts in future years if they disobey. As a former General Counsel of one of the most powerful and controversial parts of the administrative state, the Environmental Protection Agency (EPA), as well as a practicing environmental lawyer for over fifty years, my experience is that appropriations riders are the single most effective tool Congress has left for influencing how the administrative state exercises the broad powers delegated to it.

I. WHY THE SUPREME COURT ERRS SO OFTEN IN SEPARATION OF POWERS CASES

The Supreme Court has a mixed record in enforcing Congress's power of the purse. In 1975, in *Train v. City of New York*,[8] the court upheld the application of the Congressional Budget and Impoundment Control Act of 1974,[9] which restricted the President's authority to "impound" or decline to expend appropriated funds. However, in 1986 in *Bowsher v. Synar*,[10] the Court frustrated Congress's

---

The Legislative Veto Invalidated, It Survives, 56 LAW & CONTEMP. PROBS. 273, 288–291 (1993).

7. *See, e.g.*, CURTIS W. COPELAND, CONG. RSCH. SERV., RL34534, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS (2008), *https://www.everycrsreport.com/files/20080805_RL34354_5e68cc6bc4a813c248faeef1506e2f04f3b61000.pdf* [https://perma.cc/FH4E-A4K3].

8. 420 U.S. 35 (1975).

9. Pub. L.93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 601 – 688).

10. 478 U.S. 714 (1986). It should be noted, however, that *Train* was a statutory construction case and did not resolve the constitutional issues. *See* Train v. City of New York, 420 U.S. 35, 35 (1975)("This case poses certain questions concerning the proper construction of the Federal Water Pollution Control Act Amendments of 1972[.]") For a good summary of the constitutional issues left unresolved, see Devin Watkins, *The Constitutionality of Presidential Impoundment: How the courts could decide the brewing fight over spending restraint*, COMPETITIVE ENTER. INST. (Feb. 25, 2025), *https://cei.org/publication/the-constitutionality-of-presidential-impoundment/* [https://perma.cc/A7HS-ND2Y].

attempt to get deficit spending under control through the Graham-Rudman-Hollings Act that gave the Comptroller General authority to enforce legislated spending limits.[11] At that time, the national debt was "only" about $6.7 trillion;[12] today the official national debt is over six times greater, $37.2 trillion and rising,[13] and that does not include numerous off-budget obligations.

More recently, in *Biden v. Nebraska*,[14] the Court held that President Biden does not have authority to "forgive" $400 billion of student debt without clear authority from Congress. But in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*,[15] the Court upheld a statutory provision that freed the Consumer Financial Protection Bureau (CFPB) from periodic appropriations by Congress by upholding against constitutional challenge a provision that gave the CFPB authority to draw up to 15% of the earnings of the Federal Reserve System, subject only to an inflation-adjusted cap.[16]

The thesis of this article is that the Supreme Court's spotty and inconsistent record in enforcing Congress's power over the purse is due to the governing majority of the current Supreme Court carrying textualism too far. I call basing decisions solely on the text and early history of application of Constitutional provisions but refusing to consider the structure and relations of constitutional provisions or the policy purposes underlying the explicit text *monomaniacal textualism* (aka *myopic* textualism).[17] The problems that

---

11. For criticism of that decision, *see* E. Donald Elliott, *Regulating the Deficit After* Bowsher v. Synar, 4 YALE J. ON REGUL. 317 (1987).

12. *U.S. National Debt Over the Last 100 Years*, DEP'T OF THE TREASURY, FISCAL DATA, *https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/*.

13. *Id.*

14. 143 S. Ct. 2355 (2023).

15. 144 S. Ct. 1474 (2024).

16. 12 U.S.C. §§ 5497(a)(1), (2).

17. A commenter has suggested as a friendly amendment that "*myopic* textualism" might be a better term. I agree that the current methodology causes the Supreme Court to overlook important relevant factors, but unlike myopia, which is typically involuntary, the refusal to consider the purposes underlying the text is a self-imposed wound. On the other hand, the commenter makes a strong point that "You're not going to convince textualists to stop being textualists. But you might convince textualists to be *better*

monomaniacal/myopic textualists judges create are not unique to issues involving Congress's power over the purse; they are inherent in many other separation of powers issues, as I described in an article a generation ago explaining "why our separation of power jurisprudence is so abysmal":

> My basic thesis is that separation of powers is different. It calls for different styles of judicial reasoning, and perhaps even for a different conception of the nature of the judicial enterprise and the role of the Supreme Court. . . . There is no discrete "Separation of Powers Clause" in the Constitution. Rather, the term "separation of powers" is used to encapsulate the general principles of constitutional structure and design that are immanent throughout the Framers' Constitution. The Framers found it either redundant or impossible to sum up their theory of the federal government in a single phrase. In a sense, the "text" in separation of powers law is everything that the Framers did and said in making the original Constitution plus the history of our government since the founding.[18]

Justices who subscribe to monomaniacal/myopic textualism appear to do so out of a single-minded, but misguided, obsession with maintaining the perceived legitimacy of the Supreme Court by sticking to the original understanding of explicit text plus the early history of how the Constitutional provisions were applied early on, but willfully ignoring the policy purposes underlying the text even when it is beyond debate what those policy goals were.[19] However,

---

textualists, by showing them that the Constitution's text is best understood not word-by-word, but more holistically." (private email quoted by permission of the author).

18. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989); *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY ix (2012) ("The phrases 'separation of powers,' 'checks and balances" and 'the rule of law' are also absent from the written Constitution, but all these things are part of America's working constitutional system—part of America's unwritten Constitution." (emphasis in original).

19. Granted, sometimes Congress's purposes are unclear and in the instances of purposes that are unknowable or unclear, that factor should carry little if any weight. For an example, Justice Alito recently conceded that a device designed to facilitate rapid firing was clearly within Congress's intentions to regulate as a machine gun but nonetheless joined the Court in holding that it is not covered by the statute banning machine

this version of textualism has failed to achieve the goal of maintaining the legitimacy of the Court in the eyes of the public, which is near all-time lows.[20] Rarely, if ever, does one see an article in the popular news media defending the result of a Supreme Court case because it was true to the original public meaning of the text. On the other hand, monomaniacal/myoptic textualism imposes significant costs in terms of competing values. A textualism that only considers the original public meaning of the words used but ignores the context and evident purposes for those words prevents courts from properly resolving separation of powers and the many other questions that never occurred to the Framers of the Constitution. Even when not addressed in the explicit wording of the Constitution, principles such as separation of powers and checks and balances were part of the background understandings that shaped the new constitution they were drafting. Thus, they really *are* part of the text in this expanded understanding of what enlightened textualists can and should take into account in interpreting the words that were used.

This problem is particularly important in separation of powers cases involving the administrative state. Whatever else one may think of the administrative state—good, bad or indifferent—there is no question that the Framers never contemplated a government in which unelected bureaucrats would be delegated authority to make most of the policy decisions in an ever-expanding federal regulatory state. "The administrative state wields vast power and

---

guns because it is not, in the Court's view, within the best meaning of the explicit statutory language. *See* Garland v. Cargill, 144 S. Ct. 1613, 1627 (2023) (Alito, J., concurring) ("I join the opinion of the Court because there is simply no other way to read the statutory language. There can be little doubt that the Congress that enacted 26 U. S. C. § 5845(b) would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock. But the statutory text is clear, and we must follow it.")

20. *See, e.g.*, *Confidence in the Supreme Court remains low*, ASSOCIATED PRESS, NORC (June 27, 2024) *https://apnorc.org/projects/confidence-in-the-supreme-court-remains-low/* [https://perma.cc/WVL7-8B7F] ("Most [people surveyed] believe justices are shaping the law to fit their own ideologies, rather than serving as an independent check for other branches of government.").

touches almost every aspect of daily life," Chief Justice Roberts observed in his *City of Arlington* dissent.[21] "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. The administrative state with its reams of regulations would leave them rubbing their eyes."[22] Consequently, they never addressed what kinds of powers Congress needs to supervise today's administrative state one way or the other. But silence on the specifics should not preclude the Congress that creates these new institutions from applying the Framers' theories of government such as "checks and balances" or legislative control of spending as expressed in the Constitution for the institutions that the Constitution *did* create to those new institutions that the Constitution empowers the Congress to create.

True, my former Yale Law School colleague Jerry Mashaw has shown isolated examples of what we would recognize today as delegated rulemaking by administrative decisionmakers that go back to the beginnings of our republic.[23] But sometimes a change in quantity amounts to a change in kind.

The core of the problem is that many separation of powers issues do not involve an explicit constitutional text. The problem of the absence of an explicit text is especially intense for "checks and balances" on expanding federal powers or new institutions that that the Framers never foresaw. Consequently, judges should abstract principles from the 18th century government the Framers did create and apply those separation of powers principles when assessing an evolving modern government structure that the Framers never envisioned. That includes whether Congress's power over the purse allows one Congress to put an agency such as the CFPB beyond the reach of the appropriations process, including riders, for future Congress's without a two-house statutory amendment and

21. City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).

22. *Id.*

23. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006).

presidential sign-off, or a super-majority in both houses to override a presidential veto.

Abstracting lessons from the past and applying that stored wisdom[24] to new situations is not some radical new concept but rather the traditional common law method. As described by former Dean of the Law School, President of the University of Chicago and later Attorney General, Edward H. Levi, in his classic book, *An Introduction to Legal Reasoning*:

> The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process … in which a proposition descriptive of the first case is made into a rule of law and then applied to the next similar situation. … [T]he rules change from case to case and are remade with each case. This change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process. *The determination of similarity or difference is the function of each judge.*[25]

Courts in the colonies used common law methods to construe colonial charters for a century and a half before the adoption of the Constitution in 1789.[26] Therefore, it seems highly likely that when the Framers vested "the Judicial Power" in the Supreme Court and such inferior courts as Congress may establish,[27] they and the public that ratified the Constitution expected them to keep doing what

---

24. *See generally* E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113 (1984).

25. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1949) (emphasis added). *See also* Elliott, *supra* note 23.

26. *See generally* Charles S. Hyndeman & Donald S. Lutz, *Introductory Essay*, *in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 11, 18 (Charles S. Hyndeman & Donald S. Lutz eds., 1998) (describing "the development of American political institutions found later in our constitutions – institutions . . . [including] separation of powers, and checks and balances").

27. U.S. CONST. art III, § I.

they had been doing for over a century. In the language of textualism, the original public meaning of vesting the federal courts with "the Judicial Power" was that courts should continue to use common law methods to address questions not covered by explicit texts.

As the Framers and the ratifiers expected, the courts early in our republic's history did in fact apply traditional common law methods when confronting "the great silences" in the Constitution.[28] How to apply the Constitution to new institutions established under, but not by, the Constitution was the central issue in *McCulloch v. Maryland*[29] in 1819. Chief Justice Marshall famously wrote for the majority in *McCulloch* that new governmental institutions such as those that we now call the administrative state were legitimate, provided that they were consistent not only with the explicit text but also with the "spirit" of the Constitution:

> [T]he sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the Constitution, are Constitutional.[30]

The text of the Constitution does not give Congress the power to charter banks, but the *McCulloch* court ruled that power was implied by the combination of the Necessary and Proper clause and the other powers that were granted. By the "spirit of the Constitution," Marshall meant to incorporate the kind of common law reasoning based on similarities described by Professor Levi above, but in this context, the similarities are not to facts of prior cases but to

---

28. *See, e.g.*, Richard Alpert & David Kenny, *The challenges of constitutional silence: Doctrine, theory, and applications*, 16 INT'L J. CONST. L. 880 (2018).

29. 17 U.S. (4 Wheat.) 316 (1819).

30. *Id.* at 421 (emphasis added).

the structural features and principles underlying the relationships among the institutions that were created by the Constitution. In other words, the "spirit" of the Constitution is what the late great constitutional scholar, Charles Black, called constitutional "structure and relationships" in his wonderful little book in 1969 that has not received the attention it deserves.[31]

Unfortunately, judicial reasoning based on the "spirit," rather than explicit coverage by the text, of the Constitution has gone out of fashion. Fortunately, Professor Sai Prakash of the University of Virginia Law School is in the process of recovering this lost part of our intellectual heritage and has documented literally hundreds of cases in the early years of our Republic in which judges relied on the "spirit" of constitutions and statutes,[32] not merely their explicit textual provisions.[33]

I do not doubt that focusing on text as a limitation on "legislating from the bench" was a necessary reform to rein in the real and perceived abuses of the Warren Court when textualism (then called "originalism") was proposed by Robert Bork in 1971. But as the nineteenth century polymath Samuel Taylor Coleridge wrote: "Every reform, however necessary, will by weak minds be carried to an excess, that itself will need reforming."[34] A distinguished contemporary scholar, Georgetown Law professor Randy Barnett, has argued that textualism, like other forms of "judicial restraint," if

---

31. CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

32. Admittedly, construing constitutions and statutes may involve different issues. However, as I pointed out in an early article, in the United States, we often use "framework statutes" rather than constitutional amendments to establish new institutions and to define relationships among them, a practice that I called "the constitution of the administrative state." Elliott, *supra* note 3, at 169–73 (1983). The concept caught on and has subsequently been used by numerous authors. *See* Mila Sohoni, *The Administrative Constitution in Exile,* 57 WM. & MARY L. REV. 923 (2016).

33. Saikrishna Prakash, Spirit, 2023 Doyle-Winter Lecture at Yale Law School (Oct. 30, 2023), *https://law.yale.edu/yls-today/yale-law-school-videos/2023-doyle-winter-lecture-saikrishna-prakash-93* [https://perma.cc/6BTG-EZ8T]. For an expanded version, *see* Saikrishna Bangalore Prakash, *Spirit*, 173 PA. L. REV. 937 (2025).

34. SAMUEL TAYLOR COLERIDGE, BIOGRAPHIA LITERARIA 13 (Ernest Rhys ed., E.P. Dutton & Co. 1906) (1817).

carried too far can interfere with the Supreme Court's ability to perform its essential functions.[35] I concur. Maintaining the perceived legitimacy of the Supreme Court is an important value, but it is only one consideration among many and must be balanced against others. In separation of powers cases, keeping the other parts of our government such the administrative state in their proper lanes is also an important role for the courts. As in many other areas of law, courts must balance these sometimes competing values.

Applying "the spirit of the Constitution" does not mean that judges can impose whatever strikes them to be good policy. They must be able to point to some principle derived from the Constitution plus they are limited by the range of plausible meanings of words in the text that does exist. But the fact that the constitutional text does not specifically address a point does not demonstrate that the Constitution has no content on the point.[36] To believe that is to ignore implied meanings, a well-established concept in the philosophy of language.[37]

To be sure, textualists sometimes also consider early applications of the language used in the Constitution. However, early applications do not necessarily reveal implied meanings for two reasons: (1) the issue may not have come up, as is generally the case for issues involving the administrative state which did not exist in its present form in the early years of our republic; and (2) the early applications may be wrong, as they sometimes are, particularly for the First Amendment, but also if evolving social norms such as the rights of women and minorities are involved.[38]

---

35. Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL'Y 925 (2013).

36. For multiple examples, *see* AMAR, *supra* note 17.

37. *See* Wayne Davis, *Implicature*, STAN. ENCYC. OF PHIL. (Edward N. Zalta & Uri Nodelman eds., 2024), *https://plato.stanford.edu/entries/implicature/* [https://perma.cc/Y33H-H5TY].

38. *See* Vidal v. Elster, 144 S. Ct. 1507, 1529 (2024) (Barrett, J., concurring in part) ("I disagree with [the majority's] choice to treat tradition as dispositive of the First Amendment issue.")

Justice Barrett is correct, as our early history included abuses of the modern understanding of freedom of speech such as the Alien and Sedition Acts. *See* Stuart Leibiger, *The Alien and Sedition Acts,* BILL OF RIGHT INST., *https://billofrightsinstitute.org/essays/the-*

In the next section, I summarize the majority's reasoning in *CFPB v. CFSA*[39] as an illustration of how monomaniacal textualism can result in the Supreme Court failing to perform its proper function in separation of powers cases. I criticize the decision for overlooking the fact that the sole purpose for funding the CFPB out of the earnings of the Federal Reserve Board was to place the CFPB beyond the power of future Congresses to influence its policies.[40] In the final section, I give a few examples of how I think separation of powers cases, including those involving the power of the purse, should be decided.

II. HOW THE SUPREME COURT GOT THE CFPB CASE SO WRONG

The *CFPB v. CFSA* case was not an easy one from a separation of powers perspective.[41] The constitutional provision at issue, the Appropriations Clause,[42] merely states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[43] In addition, Congress itself enacted the provision empowering the CFPB to draw funding from earnings of the Federal Reserve Board, so the question becomes whether that unusual funding mechanism qualifies as an "appropriation made by law." The Court concluded that "the answer is yes based on the Constitution's text, the historical background against which the text was

alien-and-sedition-acts [https://perma.cc/WAC5-3TZF] ("The controversy over the Alien and Sedition Acts shows that even the Founders themselves would violate the First Amendment for political purposes.").

39. CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474 (2024).

40. *See id.* at 1493 (Jackson, J., concurring) (citing Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 44–45, 55–59, 68–70 (2008)) (citing Elizabeth Warren, the primary drafter of the provision at issue in *CFPB v. CFSA*).

41. For an interesting, but ultimately inconclusive, discussion of the topic of the Court's errors in *CFPB v. CFSA* by four distinguished scholars and advocates, *see* New Civil Liberties Alliance, *How could SCOTUS get the CFPB case so wrong?*, YOUTUBE (June 13, 2024), *https://www.youtube.com/watch?v=9TMKdAczSEc* [https://perma.cc/PU2B-KWDQ].

42. U.S. CONST. art. I, § 9, cl. 7.

43. *Id.*

enacted, and congressional practice immediately following ratification," as is accurately summarized in the syllabus.[44]

Two particularly troublesome problems for those challenging the CFPB funding mechanism were (1) that early practice under Constitution included a law allowing the Post Office to fund itself by charging for its services,[45] and (2) that the text of the Constitution specifically provides that appropriations for the Army may not exceed more than two years' duration.[46] Based on these and similar texts and historical precedents, in a triumph for monomaniacal textualism (or perhaps originalism),[47] the Court concluded that

> Based on the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification, we conclude that appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause.[48]

What's wrong with that? Several things: (1) By unnecessarily inserting the word "only" into its holding the Court rules on numerous questions that are not before the Court, a point rightly criticized by Justice Jackson in her concurrence[49] but (2) more fundamentally, the Court fails to consider the purposes behind the Appropriations

---

44. CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1475 (2024).

45. *Id.* at 1486.

46. U.S. CONST. art. I, § 8, cl. 12. The two-year limit is likely significant as it is also the period for which the House of Representatives are elected. This is at least indirect evidence that the Founders indeed no permanent appropriations that bound future Congresses, at least in the case of the armed forces.

47. See Randy Barnett, *Somewhere, Robert Bork Is Smiling*, WALL ST. J., July 10, 2024, https://www.wsj.com/opinion/somewhere-robert-bork-is-smiling-originalism-court-gorsuch-constitution-9571dd51?gaa (describing *CFPB v. CSFA* as "an unqualified triumph for originalism.").

48. *CFPB v. CSFA*, 144 S. Ct. at 1481.

49. *Id.* at 1492 (Jackson, J., concurring)

Clause and to construe general language to fulfill those purposes to the extent that it is ambiguous.[50]

The Court's failure to consider the purposes behind the Framers' decision to give the power over the purse to the legislative branch may in part be due to the way that the case was argued. The climatic moment in the oral argument came when Justice Thomas, who later authored the majority opinion, asked the lawyer for the challengers to complete the following sentence: "Funding of the CFPB . . . violates the Appropriations Clause because?"[51] His answer was "Because Congress has not determined the amount that this agency should be spending."[52] That wasn't too bad, but it implicitly assumed its major premise that Congress *should* be determining what the agency may spend. That was a missed opportunity to explain the policy reasons why Congress should be determining how much agencies are spending and on which programs or initiatives. Moreover, the answer failed to call to the Court's attention a clear statement by the primary author of the provision, Senator Elizabeth Warren (D-Mass.), that its sole purpose was to impede the power of future Congresses in which the Republicans might hold a majority from utilizing the power of the purse to restrict CFPB initiatives:

> If Republicans control Congress, they could starve the CFPB of resources to neuter its ability to go after wrongdoing. … Instead of regulators that watch out for the safety and soundness of our

50. Interpreting texts in accordance with what judges perceive to be their purposes to the extent permissible under the words used has been called "purposive interpretation" by Aharon Barak, former Justice of the Supreme Court of Israel. S*ee* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2007). Barak makes a convincing case that this is the dominant judicial method in other western democracies.

51. Transcript of Oral Argument at 86, CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474 (2024) (No. 22-448), *https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-448_4f15.pdf*.

52. *Id.*

> economy, we'll have regulators who bow to the wishes of the most politically connected financial institutions.[53]

Yes Senator, that's how democracy is supposed to work: the party in control of the House of Representatives or the Senate gets to exercise some control over the administrative state through the power of the purse, even when you disagree with its policy decisions. Otherwise, why bother holding elections for the House of Representatives every two years?

To be sure, if both houses of Congress and the President with veto power were to agree, by all three acting in concert they could change the law but that places an extraordinary burden[54] on a future Congress to override the likely veto of the President.

---

53. Senator Elizabeth Warren, Keynote Address to the Center for American Progress (Sept. 28, 2023), *https://www.warren.senate.gov/newsroom/press-releases/icymi-warren-delivers-keynote-speech-on-consumer-financial-protection-bureau-ahead-of-supreme-court-case* [https://perma.cc/UTA5-YZ2V].

In her concurring opinion, Justice Jackson cites several additional authorities, including the Senate Report, confirming that "Congress designed the funding scheme to protect the Bureau from the risk that powerful regulated entities might capture the annual appropriations process." *CFPB v. CFSA*, at 1492–1493 (Jackson, J., concurring) (citing S. Rep. No. 111-176, at 162–164 (2010), Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics*, 127 HARV. L. REV. 1991, 2056–58 (2014), and Rachel E. Barkow, *Insulating Agencies*, 89 TEX. L. REV. 15, 42–45, 67, 77 (2010)).

54. The principle that no legislature may bind a future one is called "parliamentary sovereignty" in Great Britain from which we inherited the principle, but the issue is more complicated in the U.S. because here the Constitution, not a parliament, is sovereign. For an explication of these concepts, see Christopher Beam, *Pelosi's Paradox*, SLATE (July 14, 2010) *https://slate.com/news-and-politics/2010/07/can-today-s-congress-tell-tomorrow-s-congress-what-to-do-no-maybe-sort-of.html* [https://perma.cc/BQ5K-7RPF] ("Courts have long held that Congress cannot 'bind' future Congresses—that is, it can't force a future session of Congress to carry on its own policies. That practice, formally known as 'legislative entrenchment,' is seen as privileging one group of lawmakers over another, 'binding' future to the priorities set in the present.").

The issue in *CFPB v. CSFA* was even more complicated: may Congress and the President by passing a simple statute rather than a Constitutional amendment divest a future house of Congress from its constitutional role of concurring in appropriations by requiring a statutory amendment that the President does not veto or vote in both houses by super-majorities to override a veto. For the reasons indicated in the text, I think that the answer should have been "no." The entrenchment issue was discussed with both sides in oral argument but is not mentioned in the majority opinion. *See* Oral Argument, *supra* note 50, at 42 – 44, 66–67. Justice Kavanaugh and even went so far as

Unfortunately, as far as I have been able to determine, Senator Warren's statement was not brought to the attention of the Court. However, one of the adverse consequences of a prevailing jurisprudence[55] that focuses solely on text, contemporary dictionaries and early understandings and applications is that both courts and litigants will overlook such clear statements of purpose by drafters as irrelevant.

Focusing solely on the meaning of individual constitutional texts but not on the relationships and the effect of the arrangements among constitutional provisions is like defining each of the words of a sentence while ignoring the collective meaning, a fallacy technically known as the *modo hoc* fallacy (or "fallacy of composition").[56] In simpler words, sometimes the whole is greater than the sum of its parts.

The Framers had good reasons to give the power over the purse to both houses of the legislature; namely, to give future Congresses the ability to restrict policy initiatives by the Executive with which a majority of *either* house of Congress disagrees. The Court's decision in *CFPB v. CFSA* undermines this power by requiring any restrictions on CFPB funding to be adopted by *both* houses of Congress *and* to survive a possible Presidential veto by amending the funding statute, just as Senator Warren intended. That requirement makes it very difficult, if not virtually impossible, for a majority in one house of Congress to use its power over the purse[57] to rein in

---

to agree with counsel for the challengers that the statute was "flipping the baseline" for changes by requiring concurrence of both houses and the president or super-majorities to override a presidential veto. *Id.* at 67.

55. *See* Barnett, *supra* note 34.

56. *See* Zack Smith, *Logical Fallacy: Modo Hoc*, FIRMITAS *https://firmitas.org/logic-modohoc* [https://perma.cc/VR8G-Y8ND].

57. In an attempt to save some residual Congressional power of the purse, the majority states somewhat cryptically near the end of the section of its opinion attempting to rebut what it deprecatingly calls the dissent's "legislative control theory" that "[a]lthough there may be other constitutional checks on Congress' authority to create and fund an administrative agency, specifying the source and purpose is all the control the Appropriations Clause requires." CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1489 (2024). However, the majority does not indicate what the source of those "other constitutional checks" might be.

attempts by the CFPB to use powers delegated to it in ways that could not be adopted in legislation because they are not acceptable to a majority in one of the houses of Congress.[58] Worse yet, the decision provides a blueprint for future Congresses in which a single political party holds temporary majorities in both houses and the Presidency to insulate its pet projects from the influence of future Congresses.

The *CFPB v. CFSA* decision fails to come to grips with interactive relationships between constitutional provisions that John Marshall called the "spirit" of the Constitution, and which Charles Black called "structure and relationships" in constitutional law.[59] By considering constitutional texts literally and in isolation, the Court misses the larger point.

III. HOW THE COURT SHOULD DECIDE SEPARATION OF POWERS CASES

The thoughtful dissent[60] in *CFPB v. CFSA* by Justice Alito, joined by Justice Gorsuch, is a good model for how the Supreme Court should decide separation of powers cases. Like the majority opinion, the dissent delves into history and prior practice, but unlike the majority, the dissent attempts to learn the *lessons* of history, not merely recite examples in a search for exact parallels.[61] Based on an extensive recounting of the history, both before and after the adoption of the Constitution, the dissenters reach the overall conclusion that

> [The] aim [of the Appropriations Clause] is to ensure that the people's elected representatives monitor and control the expenditure of public funds and the projects they finance, and it

58. *Cf.* West Virginia v. EPA, 142 S. Ct. 2587 (2022) (holding that administrative initiatives on certain "major questions" must be based on explicit statutory authority legislated by Congress).

59. See Black, *supra* note 30.

60. *CFPB v. CFSA*, 144 S. Ct. at 1493 (Alito, J., dissenting)

61. *See generally* AMAR, *supra* note 17.

> imposes on Congress an important duty that it cannot sign away.[62]

In sharp contrast, the majority opinion by Justice Thomas never addresses what the "aim" or purpose of the Appropriations Clause is, presumably because the author and those justices joining his opinion do not think it is a proper judicial function to deduce from the available information what purpose the drafters were trying to accomplish.

Judges blinding themselves to the purposes underlying the provisions they are construing out of devotion to judicial restraint is harmful in many areas of the law, but it is particularly harmful in separation of powers cases for two reasons: (1) as noted above, separation of powers cases frequently do not involve a specific text, but even more importantly, (2) the structure of the government of United States has changed profoundly since 1789. The most significant change is the huge expansion of the federal government through the rise of delegated administrative lawmaking primarily through the device of notice and comment rulemaking.

In recent years, I have been reflecting on the worst Supreme Court decisions in history. There are many different ways that Supreme Court decisions can be destructive, and it is difficult to rank them because their harms are incommensurable and difficult to compare. However, many of the worst Supreme Court decisions share the common feature of the judiciary being willing to uphold expansions of federal governmental power but not countervailing efforts to impose checks and balances on these newly expanded powers. Some examples include:

- the demise of the legislative veto,[63]
- retreating from judicial policing that federal spending must be for "the general Welfare" as opposed to special interests,[64]

---

62. *CFPB v. CFSA*, 144 S. Ct. 1493 – 94 (Alito, J., dissenting).

63. INS v. Chadha, 462 U.S. 919 (1983). *See also* Elliott, *supra* note 3.

64. 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."). For a critique, *see* E. Donald

- striking down the Graham-Rudman-Hollings law to try to control deficit spending,[65]
- striking down the line-item veto,[66]
- grudgingly narrow interpretations of the Administrative Procedure Act,[67]
- ruling that *Chevron* deference applied to agency interpretations of the scope of their own authority in violation of the basic principle immanent in the Constitution that no institution should be the sole judge of its own powers.[68]

A particularly egregious illustration of the perils of monomaniacal textualism is the Court's decision in *Pension Benefit Guaranty Corporation*.[69] In that case, the Supreme Court held that a provision of the Administrative Procedure Act[70] that gave interested parties a right to "appear" and be heard before an agency did *not* require them to be told what the issues to be decided were. As I have noted elsewhere, "even Kafka couldn't make that up"![71]

Elliott, *Another Contender for the Worst Supreme Court Decision in History*, AM. SPECTATOR (Jan. 19, 2023), *https://spectator.org/another-contender-for-the-worst-supreme-court-decision-in-history/* [https://perma.cc/Z535-S75Y].

65. Bowsher v. Synar, 478 U.S. 714 (1986).

66. Clinton v. City of New York, 524 U.S. 417 (1998). For a critique, *see* E. Donald Elliott, *The Worst Supreme Court Decision in History*, AM. SPECTATOR (Dec. 30, 2022), *https://spectator.org/worst-supreme-court-decision-in-history/* [https://perma.cc/QH92-HAHA].

67. E. Donald Elliott, *How the Supreme Court Blocked Congress's Effort to Redeem the Administrative state Over and over the Court vetoed reform*, AM. SPECTATOR

(Aug. 21, 2022), *https://spectator.org/how-the-supreme-court-blocked-congresss-effort-to-redeem-the-administrative-state/* [https://perma.cc/4J6S-6LZV].

68. City of Arlington v. FCC, 569 U.S. 290 (2013). One source summarized the holding as follows: "Justice Antonin Scalia, writing [for] himself and four other justices, held that courts must apply the *Chevron* doctrine and defer to an agency's interpretation of its jurisdiction when that jurisdiction is called into question. . . . The Court held that there was no significant difference between "run-of-the-mill" ambiguity and important, "jurisdictional" ambiguity." *City of Arlington v. FCC*, OYEZ (May 20, 2013), *https://www.oyez.org/cases/2012/11-1545* [https://perma.cc/QUX6-ABAP].

69. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990).

70. 5 U.S.C. § 555.

71. Elliott, *supra* note 66 ("[I]n the *PBGC* case, an opinion by Justice Harry Blackmun . . . held that § 555 of the APA does not require an agency to identify the issues that are going to be decided in a proceeding. That is odd because that section explicitly gives

A single-minded devotion to judicial restraint unalloyed by other competing values can result in the Supreme Court failing to perform its essential function of keeping the other institutions of government within their proper lanes, as Professor Randy Barnett foresaw more than a decade ago.[72] What is even worse is a Court that is willing to uphold expansions of federal power but not reasonable efforts consistent with the structure of the Constitution to try to impose checks and balances on the ever-expanding powers of the federal administrative state.

---

any 'interested person' the right to 'appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy.' Thus, according to the Supreme Court, the right to appear and be heard does not mean that someone is entitled to know what the issues are that they are supposed to address! Really? Even Kafka couldn't make that up. Any first-year law student, even one of the less gifted ones, would see that a right to be heard is meaningless if the decision-maker doesn't have to identify what the issues are that a person is entitled to be heard about. And to add insult to injury, in order to reach that truly inane result, Blackmun had to distinguish a 1974 Supreme Court precedent that had held, 'A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it.' Blackmun tried to distinguish that prior precedent by saying, in essence, 'Oh, but that was a *formal* adjudication, but this case involves an *informal* adjudication.' That is what we lawyers call a distinction without a difference, as nary a word was devoted as to *why* one should be entitled to know the issues in one type of procedure for adjudicating someone's rights but not the other.") (citing Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281 (1974)).

72. Barnett, *supra* note 34.