“Appropriate” Appropriations Challenges after *Community Financial*

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Introduction

The standard federal agency must come to Congress each year, hat in hand, and request another round of congressional funding. This annual appropriations process ensures that Congress maintains at least *some* influence over the vast array of rules and regulations that govern Americans’ daily lives. Sure, Congress might have delegated broad authority to administrative agencies to develop national policy on Congress’s behalf. But an agency reliant on annual appropriations is an agency with the financial incentive to exercise its delegated authority with an eye toward pleasing congressional appropriators. The annual appropriations process is therefore a sensible (even if insufficient) step toward ensuring democratic oversight of how taxpayer dollars are spent. But in Washington, sensibility does not often win the day. And so it is little surprise that, when it came to designing the Consumer Financial Protection Bureau (CFPB), Congress sought to do things a bit differently.

Unlike the standard administrative agency, the CFPB never has to sink so low as to *request* that Congress fund its agency operations. Instead, a federal statute—referred to as Section 5497—purports to empower the Director of the CFPB to *demand* that the Federal Reserve (which is itself insulated from the congressional appropriations process) provide the CFPB with the funding it needs.[1] And just how

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[1] 12 U.S.C. § 5497.

much of the public's money can the CFPB demand? That decision is left to the discretion of the CFPB Director—at least up to a statutory limit set too high to be of any real relevance.[2] What's more, Section 5497 does not even require the Director to explain why the CFPB has demanded a certain amount of money. As one former CFPB Director put it: A funding demand could be accomplished by scribbling a handwritten note on a napkin, sending the demand over to the Federal Reserve, and waiting for the money to roll in.[3]

If you think that the manner in which the CFPB is funded sounds problematic, you are not alone. In 2018, an association of regulated entities filed a lawsuit alleging that Section 5497 ran afoul of the Constitution's Appropriations Clause. That Clause provides that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law."[4] The idea behind the lawsuit was that Section 5497 did not amount to a congressional "appropriation." The association argued that Section 5497 was not an appropriation because it purported to give the CFPB the power to demand funds from an entity outside of Congress into perpetuity.

The challengers to Section 5497 had some initial success. To wit, the United States Court of Appeals for the Fifth Circuit described Section 5497 as a "self-actualizing, perpetual funding mechanism" that constituted an unconstitutional "abdicat[ion]" of Congress's "appropriations power."[5] But this early success would not prove to

[2] *Id.* § 5497(2)(a)(iii) (capping the transfer amount at 12 percent of the Federal Reserve System's total operating expenses). "At present, the CFPB's maximum annual draw is nearly $750 million," and "unlike most agencies, [the CFPB] does not have to return any unspent funds to the Treasury." Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416, 450 (2024) (Alito, J., dissenting).

[3] Former CFPB Director John Michael "Mick" Mulvaney, Remarks at Gray Lecture Panel 2: Congress's Power of the Purse in the Modern Administrative State, at 32:05 (Mar. 31, 2023), https://vimeo.com/815046082 ("I could go down . . . and literally on a napkin write 'Please give me 180 million dollars' and [the Federal Reserve] would have to do that. That is not an exaggeration."); *id.* at 35:09 ("The funding flow is, there's a piece of paper that leaves the office of the Director of the CFPB. It is taken down to the Fed[eral Reserve]. And they say please move money into this account and they move money into that account. That is the process.").

[4] U.S. Const. art. I, § 9, cl. 7. Throughout this article, the capitalization of words in constitutional quotes has been normalized.

[5] Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 623, 638 (5th Cir. 2022).

be long lasting. Just last Term, in *CFPB v. Community Financial*,[6] the Supreme Court overturned the Fifth Circuit, explaining that Section 5497 satisfied the rather lax requirements of the Appropriations Clause.

According to the Supreme Court, the Appropriations Clause requires only that "a law . . . authorize[] the disbursement of specified funds for identified purposes."[7] Section 5497 identified both a "source" of funding (i.e., a Federal Reserve fund) and a general "purpose" for the funding (i.e., to pay the expenses of the CFPB in carrying out its "duties and responsibilities"). For those reasons, the Court held that the statute satisfied the limited demands imposed by the Appropriations Clause.[8]

As this article will explain, the Supreme Court got it right in *Community Financial*. But here's the kicker: That does *not* mean that Section 5497 is constitutional. As I've argued before and as the Supreme Court now agrees,[9] it is not the Appropriations Clause that vests Congress with the authority to appropriate funds. It is *other* constitutional text that vests Congress with the authority to enact appropriations laws. Thus, future "appropriate" appropriations challenges (as I have termed them) should focus on the limitations imposed by that *other* constitutional text—and not the Appropriations Clause itself. Understanding as much provides crucial context concerning the Court's careful effort in *Community Financial* to explain that its "narrow" holding was limited to the requirements of the Appropriations Clause alone. The Court explicitly declined to address "other constitutional checks on Congress' authority to create and fund an administrative agency."[10]

[6] 601 U.S. 416 (2024).

[7] *Id.* at 438.

[8] *Id.* at 422–23, 435, 441 (citing 12 U.S.C. § 5497(c)(1)).

[9] Chad Squitieri, *The Appropriate Appropriations Inquiry*, 74 Fla. L. Rev. F. 1, 8 (2023) ("[T]he Appropriations Clause simply offers a limitation: *if* an appropriation is to occur (pursuant to some other power vested elsewhere), *then* that appropriation must be 'made by law.'") (citing Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1348–49 (1988), and Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 27 (2004)) (citations omitted); *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 438 ("To be sure, the Appropriations Clause presupposes Congress' powers over the purse. But, its phrasing and location in the Constitution make clear that it is not itself the source of those powers.").

[10] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 441.

Part I of this article will begin with a brief overview of the Supreme Court's narrow Appropriations Clause holding in *Community Financial*—a holding that should be of only limited relevance to "appropriate" appropriations challenges going forward. Parts II and III will then use Section 5497 to demonstrate what should be the focus of "appropriate" appropriations challenges in the future.

In particular, Part II will elucidate the question that the Court was careful to *not* decide in *Community Financial*: whether Section 5497 ran afoul of the constitutional text that actually vests appropriations authority in Congress. As I will argue, the constitutional provisions that give Congress its best shot at lawfully enacting Section 5497 are the Necessary and Proper Clause and the Commerce Clause. Thus the "appropriate" appropriations question, for purposes of the CFPB's funding mechanism, asks whether Section 5497 is a "necessary and proper" means of carrying Congress's Commerce Clause power "into execution."

Part III will then answer that "appropriate" appropriations question and conclude that Section 5497 is unconstitutional. I will explain how Section 5497 can be distinguished from the various historical funding examples that served as a central (but fundamentally confused) focus in *Community Financial*. The upshot is that although Congress may be able to appropriate funds to some entities outside of the annual appropriations process (such as the Post Office, National Mint, or Customs Service and Revenue Officers), Congress cannot appropriate funds to the CFPB in the manner codified in Section 5497. That is partly because each of those previous, valid appropriations constituted exercises of *different* congressional powers.

I. Case Overview

Community Financial began as a challenge to the CFPB's Payday Lending Rule, which limits how loan payments may be collected.[11] A group of entities regulated by the Payday Lending Rule, referred to here collectively as "Community Financial," sued the CFPB on multiple grounds.[12] The most notable of these arguments was that

[11] *Id.* at 423 (citing 12 C.F.R. § 1041 (2018)).

[12] Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, 558 F. Supp. 3d 350, 356 n.1 (W.D. Tex. 2021).

the Payday Lending Rule was promulgated using funds that had been appropriated in violation of the Appropriations Clause.[13]

A. Appropriations Clause Arguments

The Appropriations Clause provides that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law."[14] The statutory provision addressing the funding of the CFPB, Section 5497, provides that

> [e]ach year . . . the Board of Governors [of the Federal Reserve] shall transfer to the [CFPB] from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the [CFPB] under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).[15]

Other portions of Section 5497 indicate that Congress made a conscious effort to insulate the CFPB from the congressional appropriations process. Those portions include a statement that "[f]unds obtained by or transferred to the [Federal Reserve fund set aside for the CFPB] shall not be construed to be Government funds or appropriated monies,"[16] and a statement that the CFPB's funds will not be "subject to review by the Committees on Appropriations."[17] The gist of Community Financial's Appropriations Clause argument was that the Payday Lending Rule could not be enforced because Section 5497 purported to fund the CFPB through means that did not conform to the requirements of the Appropriations Clause.

Given the way in which Community Financial structured its challenge, the parties' arguments naturally coalesced around different theories as to why Section 5497 either did or did not run afoul of the Appropriations Clause.[18] After considering those arguments, the U.S. Court of Appeals for the Fifth Circuit ruled in favor of

[13] *Id.* at 364.

[14] U.S. Const. art. I, § 9, cl. 7.

[15] 12 U.S.C. § 5497(a)(1).

[16] *Id.* § 5497(c)(2).

[17] *Id.* § 5497(a)(2)(C).

[18] *Cmty. Fin. Servs. Ass'n of Am.*, 558 F. Supp. 3d at 367 (describing the parties' arguments).

Community Financial.[19] Having lost at the Fifth Circuit, the government then sought review from the Supreme Court. The Supreme Court agreed to review the case to determine "[w]hether . . . the statute providing funding to the . . . CFPB . . . violates the Appropriations Clause . . . ."[20]

As could be expected, the parties' Supreme Court briefing continued to offer different arguments concerning the Appropriations Clause. The government, for example, argued that the Appropriations Clause "does not . . . limit the manner in which Congress itself may exercise its authority to make 'Appropriations' 'by law.'"[21] In contrast, Community Financial argued "that [Section 5497] is not a 'Law' making an 'Appropriation[],' but rather the repudiation of one" given that Section 5497 "cede[s] virtually unfettered discretion to an agency to determine the size of its own purse in perpetuity."[22]

B. The Majority Opinion

Having been asked to decide whether Section 5497 violates the Appropriations Clause, the Supreme Court dutifully limited itself to answering only that narrow question. Indeed, in the seven-Justice majority opinion authored by Justice Clarence Thomas, the Court stressed on two occasions that it was only tasked with answering a "narrow" question concerning Section 5497's compliance with the Appropriations Clause.[23]

Left unaddressed by the Court were "other constitutional checks on Congress' authority to create and fund an administrative agency."[24] The Court's willingness to refer to those "other constitutional checks"

[19] *Cmty. Fin. Servs. Ass'n of Am.*, 51 F.4th at 642.

[20] Petition for a Writ of Certiorari at I, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416 (2024) (No. 22-448). The question presented also asked whether "the court of appeals erred . . . in vacating a regulation promulgated at a time when the CFPB was receiving such funding." *Id.*

[21] *Id.* at 12.

[22] Brief in Opposition at 18, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416 (2024) (No. 22-448).

[23] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 421 ("In this case, we must decide the narrow question whether this funding mechanism complies with the Appropriations Clause."); *id.* at 424 ("We granted certiorari to address the narrow question whether the statute that provides funding to the Bureau violates the Appropriations Clause.").

[24] *Id.* at 441.

suggests that the Court was well aware of the fact that the Appropriations Clause is just one of many constitutional provisions that speak to Congress's power of the purse. Indeed, the majority explicitly stated that Consumer Financial had "err[ed] by reducing the power of the purse to only the principle expressed in the Appropriations Clause."[25]

Having limited its analysis to the requirements of the Appropriations Clause, the majority analyzed historical appropriations made in early England and the American colonies, as well as appropriations made by early Congresses.[26] After reviewing such history, the majority concluded that all the Appropriations Clause required is "a law that authorizes the disbursement of specified funds for identified purposes."[27] And because Section 5497 identified both a "source" of funding (i.e., a Federal Reserve fund), and a general "purpose" for the funding (i.e., to pay the expenses of the CFPB in carrying out its "duties and responsibilities"), Section 5497 satisfied the Appropriations Clause's limited demands.[28]

C. The Dissenting Opinion

Justice Samuel Alito authored a dissenting opinion, which was joined by Justice Neil Gorsuch. Like the majority, the dissent analyzed English and colonial history as well as the practices of early Congresses.[29] But unlike the majority, which maintained a narrow focus on the Appropriations Clause, the dissent drifted into discussions of the "power of the purse" more generally. For example, the dissent invoked Montesquieu to argue that "a legislature will lose its power of the purse if it passes an appropriation that lasts 'forever.'"[30] The dissent also explained how "the power of the purse played a central role in disputes between the Crown and Parliament,"[31] and that the Supreme Court's decision in *Seila Law v. CFPB*[32] "made the

[25] *Id.* at 438.

[26] *Id.* at 427–33.

[27] *Id.* at 438.

[28] *Id.* at 422–23, 435, 441 (citing 12 U.S.C. § 5497(c)(1)).

[29] *Id.* at 453–63 (Alito, J., dissenting).

[30] *Id.* at 448.

[31] *Id.* at 455.

[32] In *Seila Law*, the Court held that "the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers." Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 213 (2020).

CFPB accountable to the President, but . . . did nothing to protect Congress's power of the purse."[33]

To be sure, the dissent did focus parts of its analysis on the Appropriations Clause specifically (rather than Congress's power of the purse more generally). For example, the dissent explained that Congress's power of the purse was "protect[ed]" by the Appropriations Clause.[34] And the dissent explained that the Appropriations Clause "specifically addresses the question at hand."[35] But in the end, the majority was unconvinced by the dissent's efforts to funnel its broad, power-of-the-purse arguments into the specific text of the Appropriations Clause. As the majority explained, although the dissent "wind[s] its way through English, Colonial, and early American history about the struggle for popular control of the purse," the dissent "never connects its summary of history back to the word 'Appropriations.'"[36]

D. The Concurring Opinions

Two Justices authored concurring opinions. Justice Elena Kagan authored the lead concurrence, which was joined by Justices Sonia Sotomayor, Brett Kavanaugh, and Amy Coney Barrett.[37] Justice Kagan's concurrence, which was less than five pages long, offered a relatively breezy analysis.[38] What it added to the majority opinion (which all the concurring Justices joined) was a reference to 19th-, 20th-, and 21st-century congressional practice. Justice Kagan felt that this more modern practice underscored the ratification-era evidence highlighted in the majority opinion. As she explained, "[t]he founding-era practice" outlined by the majority opinion "became the 19th-century practice, which became the 20th-century practice, which became today's."[39]

[33] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 467 (Alito, J., dissenting).

[34] *Id.* at 447.

[35] *Id.* at 471 n.20. This comment was in part a response to the majority's reference to other constitutional principles, located outside of the Appropriations Clause, which speak to Congress's power of the purse.

[36] *Id.* at 438–39 (majority opinion).

[37] *Id.* at 441 (Kagan, J., concurring). All four of these concurring Justices also joined the majority opinion.

[38] This may have been because the Justices who joined the lead concurrence also joined the majority opinion (although the 22-page majority opinion was itself fairly short). *See* Divided Argument, *p(doom)*, at 42:01 (May 24, 2024), https://dividedargument.com/episodes/pdoom-6mmWoT6t?t=42m01s (Professor Daniel Epps noting that the majority opinion was "not as long as it could be for a big case involving constitutional law").

[39] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 442 (Kagan, J., concurring).

Justice Kagan wished to "therefore add one more point to the Court's opinion."[40] Namely, that in addition to "the Appropriations Clause's text and founding-era history," the "continuing tradition" of congressional appropriations practice in the 19th, 20th, and 21st centuries offered another reason to uphold the constitutionality of Section 5497.[41]

Justice Ketanji Brown Jackson authored her own solo concurrence.[42] In it, she stated that "nothing more" than "the plain meaning of the text of the Appropriations Clause" was "needed to decide th[e] case."[43] She also expressed her view concerning the proper judicial role. As she explained, "When the Constitution's text does not provide a limit to a coordinate branch's power, we should not lightly assume that Article III implicitly directs the Judiciary to find one."[44] Because she concluded that Consumer Financial's argument would require the Court to "find unstated limits in the . . . text" of the Appropriations Clause, she thought that the Court was right in its decision not to "undercut the considered judgments" of Congress.[45]

II. Elucidating the "Appropriate" Appropriations Question

To be blunt, the Supreme Court was asked to answer the wrong question. As noted above, the question presented in *Community Financial* asked the Court to determine whether Section 5497 violates the Appropriations Clause.[46] But that question does not get at the core of the issue, which concerns whether Congress has the underlying authority to enact Section 5497.[47]

[40] *Id.* at 445.

[41] *Id.*

[42] *Id.* (Jackson, J., concurring).

[43] *Id.*

[44] *Id.* at 446.

[45] *Id.* at 447.

[46] Petition for a Writ of Certiorari, *supra* note 20, at I.

[47] The limitations inherent in how the parties framed the case are the reasons why I previously argued that the Court should either dismiss the writ of certiorari as improvidently granted, or at least request supplemental briefing so that further argument could develop concerning the constitutional source (and thus constitutional limitations) of Congress's authority to enact appropriation statutes. *See, e.g.*, Chad Squitieri, *Which Appropriations Power?: Getting Back to Basics in the Supreme Court's Upcoming CFPB Funding Case*, Yale J. on Regul., Notice & Comment Blog (July 5, 2023), https://www.yalejreg.com/nc/which-appropriations-power-getting-back-to-basics-in-the-supreme-courts-upcoming-cfpb-funding-case-by-chad-squitieri/.

To determine whether Congress has the authority to enact a particular appropriations statute, a court must first identify the constitutional text that arguably vests Congress with the authority to enact appropriations statutes. A court must then determine whether the appropriations statute at issue runs afoul of that text. Part II will therefore apply the first step of that two-step framework to Section 5497 and conclude that the Necessary and Proper Clause and the Commerce Clause offer Section 5497 its best bet at constitutionality. Part III will then turn to the second step of that two-step framework and conclude that Section 5497 runs afoul of the power vested in Congress by the Necessary and Proper Clause and Commerce Clause.

A. Constitutional Allusions

Where, precisely, is Congress vested with the authority to enact appropriations statutes? Two natural places to look are the Constitution's two references to appropriations. The first reference is the Appropriations Clause of Article I, Section 9, Clause 7, which provides that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law."[48] The second reference is offered in Article I, Section 8, Clause 12, which provides that Congress shall have the power "[t]o raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."[49]

Those two constitutional provisions certainly *allude* to Congress having appropriations authority. But a close reading of the clauses reveals that neither clause actually vests Congress with the authority to appropriate funds unrelated to the military.[50] As the Supreme Court explained in *Community Financial*, although "the Appropriations Clause presupposes Congress' powers over the purse," the "phrasing and location [of the Appropriations Clause] in the Constitution make clear that [the Appropriations Clause] is not itself the source of those powers."[51] Instead, the Appropriations Clause (like

[48] U.S. Const. art. I, § 9, cl. 7.

[49] *Id.* § 8, cl. 12.

[50] Article I, Section 8, Clause 12 could be interpreted as vesting in Congress the authority to appropriate military funds to the extent that doing so inheres in "rais[ing] and support[ing] armies." *Id.*

[51] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 438.

other limitations outlined in Article I, Section 9) constitutes a "limitation" on congressional power, not a grant of power.[52]

Another sensible place to look for Congress's appropriations authority is the Taxing Clause of Article I, Section 8.[53] The Taxing Clause states that "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[54] The Taxing Clause is sometimes referred to as the Spending Clause. That misleading name is a reference to the latter portion of the clause, which refers to "pay[ing] the debts and provid[ing] for the common defense and general [w]elfare."[55] But for reasons that others have explained in detail, it cannot be the case that the Taxing Clause gives Congress a free-floating power to spend money.[56] To the contrary, the best reading of the Taxing Clause recognizes that the phrase "to pay the debts and provide for the common defense and general welfare" constitutes a *limitation* on Congress's authority to "lay and collect taxes, duties, imposts and excises."[57] As Justice Thomas has explained elsewhere, "the only authority vested by [the Taxing Clause] is a power to 'lay and collect Taxes, Duties, Imposts and Excises,'" which is a power that is further "qualified by the Debts and General Welfare Clauses, which limit the objects for which Congress can exercise that power."[58]

[52] *Id.*

[53] Squitieri, *supra* note 9, at 2–3.

[54] U.S. Const. art. I, § 8, cl. 1.

[55] *Id.*

[56] Lawson & Seidman, *supra* note 9, at 24–25.

[57] U.S. Const. art. I, § 8, cl. 1; Squitieri, *supra* note 9, at 3.

[58] Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 206 (2023) (Thomas, J., dissenting). At least one scholar has argued that Congress's spending authority is connected to the Article IV Property Clause. *See* David E. Engdahl, *The Basis of the Spending Power*, 18 Seattle U. L. Rev. 215, 216 (1995). That clause empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. "According to Professor Engdahl, the phrase 'Territory or other Property' includes not only real property, but federal funds, and thus Congress's power to 'dispose of' such property includes a power to dispose of (*i.e.*, appropriate) federal funds." Squitieri, *supra* note 9, at 14 n.64 (quoting Engdahl, *supra,* at 250). For reasons I have explained in earlier work, I "agree with Professors [Gary] Lawson and [Guy] Seidman that 'the Property Clause can[not] bear th[e] . . . weight' that Professor Engdahl places upon it." *Id.* (quoting Lawson & Seidman, *supra* note 9, at 28).

B. The Necessary and Proper Clause

So where, then, is Congress vested with the authority to enact appropriations statutes? I argue that Congress's appropriations authority is vested by the interplay between two categories of constitutional provisions.[59] The first category contains those provisions vesting Congress (and other federal actors) with various substantive powers. Those substantive powers include Congress's powers to regulate various forms of commerce,[60] constitute tribunals,[61] punish piracies,[62] and so on. The second category concerns the powers vested in Congress by the Necessary and Proper Clause, which provides Congress with the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer."[63]

The Necessary and Proper Clause is particularly important because it is the portion of the Constitution that actually vests Congress with its familiar authority to "make . . . laws."[64] And as will prove crucial, the Necessary and Proper Clause makes clear that Congress's authority to "make . . . laws" is *limited* by the requirement that any such laws "*shall* be necessary and proper" means of "carrying into execution" some other power vested elsewhere in the Constitution.[65] So if Congress relies on its Necessary and Proper Clause authority to make laws (including appropriations laws), then such

[59] *See* Squitieri, *supra* note 9, at 3.

[60] U.S. Const. art. I, § 8, cl. 3 (vesting Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[61] *Id.* cl. 9 (vesting Congress with the power "[t]o constitute Tribunals inferior to the supreme Court").

[62] *Id.* cl. 10 (vesting Congress with the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations").

[63] *Id.* cl. 18.

[64] *Id.*

[65] *Id.* (emphasis added).

laws "shall" be a "necessary and proper" means of carrying some other power into execution.[66]

In sum, it is the interplay between Congress's substantive powers and Congress's Necessary and Proper Clause authority that vests Congress with the authority to enact a limited category of appropriations laws—namely, appropriations laws which are a "necessary and proper" means of carrying some other power "into execution."[67] To offer one example, "a necessary and proper method for Congress to carry its power to 'punish piracies' into execution might be for Congress to enact a statute appropriating funds to pay for efforts to intercept pirates on the high seas."[68] Similarly, a "necessary and proper" component of Congress carrying its power to "constitute Tribunals inferior to the supreme Court" into execution might be to enact an appropriations statute funding the construction of a federal courthouse.[69]

C. The Commerce Clause

What substantive power might Congress have sought to carry "into execution" by enacting Section 5497? An analysis of Section 5497 reveals that its best shot at constitutionality rests on the argument that the statute is a "necessary and proper" means of carrying Congress's *Commerce Clause* power "into execution." To better see why, let's break that conclusion down into its integral parts.

[66] Congress may be able to rely on other authority to enact legal mandates, although in instances unrelated to the CFPB. For example, Article I, Section 8, Clause 17 empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over" Washington, D.C. And Article IV, Section 3, Clause 2 empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." One might argue that such text empowers Congress to enact *un*necessary and *im*proper "Legislation" (including appropriations legislation) concerning Washington, D.C., and *un*necessary and *im*proper "Rules and Regulations" (including appropriations rules and regulations) concerning U.S. territories. The merits of such arguments fall outside the scope of this article.

[67] Squitieri, *supra* note 9, at 4.

[68] *Id.* (citing U.S. Const. art. I, § 8, cl. 10).

[69] *See* U.S. Const. art. I, § 8, cl. 9.

Section 5497 purports to empower the CFPB to demand funds from the Federal Reserve to pay for the CFPB's "duties and responsibilities."[70] That vague reference to the CFPB's "duties and responsibilities" is precisely what allowed the Supreme Court to conclude in *Community Financial* that Section 5497 offered a "purpose" sufficient to satisfy the Appropriations Clause's "source" and "purpose" requirements.[71]

So what are the CFPB's "duties and responsibilities"? A related statutory provision informs us that the CFPB has the statutory mandate to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[72] Another statutory provision indicates that the CFPB is empowered to "ensur[e] that," among other things, "consumers are provided with timely and understandable information to make responsible decisions about financial transactions," "consumers are protected from unfair, deceptive, or abusive acts and practices," and "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[73]

Together, these statutory provisions indicate that the CFPB's responsibilities and duties relate to consumers and economic markets. It is thus the Commerce Clause—which empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"—that offers Section 5497 its best bet at constitutionality.[74]

To view the question from the inverse perspective: What other power, besides the Commerce Clause, could Congress have possibly relied on to fund an agency tasked with regulating consumer and economic matters on Congress's behalf? When faced with an "appropriate" appropriations challenge, the government should, of course, be free to defend the constitutionality of an appropriations statute by demonstrating that the statute was enacted pursuant to some other,

[70] 12 U.S.C. § 5497(c)(1).

[71] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 435 (citing 12 U.S.C. § 5497(c)(1)).

[72] 12 U.S.C. § 5491(a).

[73] 12 U.S.C § 5511(b); *see also id.* § 5511(c) (the CFPB's "primary functions" include "conducting financial education programs" and "collecting, investigating, and responding to consumer complaints").

[74] U.S. Const. art. I, § 8, cl. 3.

less obvious source of power.[75] But a reviewing court should not be required to think up fanciful arguments on the government's behalf.

To be sure, it is not clear that an original understanding of the Commerce Clause would permit Congress to regulate (either directly, or by delegating regulatory authority to an agency) or fund the various matters that fall within the CFPB's broad remit.[76] And I do not claim that the CFPB's regulatory authority is consistent with an original understanding of the Commerce Clause. Instead, I merely posit that, if *any* of Congress's powers enable Congress to create and fund the CFPB as it exists in current form, then it has got to be Congress's Commerce Clause power. This is what I mean when I say that the Necessary and Proper Clause and the Commerce Clause give Section 5497 its "best bet" at constitutionality.

Having identified the precise constitutional text that Congress presumably sought to rely on to enact Section 5497, the dispositive question for determining the constitutionality of Section 5497 becomes clear. To wit, the dispositive question (i.e., the "appropriate" question) asks whether Section 5497 is a "necessary and proper" means of carrying Congress's Commerce Clause power "into execution."[77]

III. Answering the "Appropriate" Appropriations Question

The narrow Appropriations Clause holding in *Community Financial* should be of only limited relevance to future courts tasked with answering the "appropriate" appropriations question identified above. That is because the holding in *Community Financial* does not speak to the constitutional text that vests Congress with appropriations authority. How, then, should courts go about interpreting the limitations imposed by the constitutional text that vests Congress with appropriations authority? Part III will offer an answer.

In particular, Part III.A will outline what might be two different methodologies offered by the Justices in *Community Financial*, arguing that both methodologies should determine the constitutionality

[75] *See* Squitieri, supra note 9, at 19 (proposing questions that the Justices could ask the government concerning other potential sources of congressional authority).

[76] *See, e.g.*, Randy E. Barnett, *Why Congress and the Courts Should Obey the Original Meaning of the Commerce Clause*, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/752 (discussing "the original meaning of the Commerce Clause") (last visited July 26, 2024).

[77] U.S. Const. art. I, § 8, cl. 17; *see also* Squitieri, *supra* note 9, at 17–18.

of appropriations statutes by conducting a power-specific analysis. Part III.B will focus primarily on the methodology that is currently dominant at the Court (originalism) and use that methodology to conduct a power-specific analysis of Section 5497. Under this analysis, Section 5497 runs afoul of the power vested in Congress by the Necessary and Proper Clause and Commerce Clause. Finally, Part III.C will conclude by explaining that, although the Justices telegraphed a lack of interest in hearing appropriations challenges in the future, that preference may not be satisfied given that lower courts do not enjoy the same luxury in shaping their dockets.

A. Two Methodologies

Justice Thomas's majority opinion employed an interpretative methodology that is currently dominant at the Court: originalism. Originalism is defined by two core tenets: first, that the meaning of the Constitution became fixed at the time it was ratified, and second, that this fixed meaning constrains government action today.[78] Today, the most prominent form of originalism focuses on elucidating a text's "original public meaning," which "roughly" refers to "the meaning that the text had for competent speakers of American English at the time each provision of the text was framed and ratified."[79] Justice Thomas's majority opinion analyzed the Appropriation Clause's "text, the history against which that text was enacted, and congressional practice immediately following ratification."[80] The opinion thus falls comfortably within the confines of original public meaning originalism.

Justice Kagan's concurring opinion showcased what is arguably a second methodology: traditionalism.[81] The precise contours of traditionalism (including the extent to which it overlaps with, or is encompassed by, originalism) are still being worked out.[82] But I will

[78] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 1 (2015) (referring to the Fixation Thesis and the Constraint Principle).

[79] Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. Rev. 1953, 1957 (2021).

[80] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 426.

[81] *See* Josh Blackman, CFPB v. CFSAA*: Originalists v. Traditionalists*, Volokh Conspiracy (May 17, 2024, 3:29PM), https://reason.com/volokh/2024/05/17/cfpb-v-cfsaa-originalists-v-traditionalists/.

[82] *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1916 n.4 (2024) (Kavanaugh, J., concurring) (flagging open questions and collecting scholarship).

presume for the moment that traditionalism offers a distinct methodology that may appeal to some Justices. It is therefore useful to briefly define traditionalism.

On one account, traditionalism is "defined by two key elements."[83] The first is that "concrete practices, rather than principles, ideas, judicial precedents, and so on, [are] the determinants of constitutional meaning and law."[84] The second element considers "the endurance of those practices as a composite of their age, longevity, and density, evidence for which includes the practice's use before, during, and after enactment of a constitutional provision."[85] Justice Kagan's attempt to connect Section 5497 to "more than two centuries [of] unbroken congressional practice" can therefore be characterized as traditionalist.[86]

The distinction between originalism and traditionalism can seem slight, in part because many originalists (like traditionalists) also examine concrete practice. Justice Thomas's majority opinion, for example, examined "[t]he practice of the First Congress."[87] Moreover, aspects of Justice Kagan's concurrence could be characterized as employing a form of "liquidated originalism," which is distinct from traditionalism because it gives special attention to practice in order to "settle practically underdeterminate new law by adopting one permissible interpretation rather than another."[88]

[83] Marc O. DeGirolami, *Traditionalism Rising*, 24 J. of Contemp. Legal Issues 9, 14 (2022).

[84] *Id.*

[85] *Id.*

[86] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 445 (Kagan, J., concurring).

[87] *Id.* at 432 (majority opinion).

[88] Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 Geo. L.J. 97, 142 (2016); *see also* Elias Neibart, *Methodological Convergence in* Community Financial Services, Harv. L. Rev. Blog (May 26, 2024), https://harvardlawreview.org/blog/2024/05/methodological-convergence-in-community-financial-services/ (arguing that the opinions in "*Community Financial Services* suggest[] that we are all (still) originalists," in part because "Justice Kagan agreed with the majority that the fixed original meaning should control."). The best reading of Justice Kagan's concurrence is that it was written in consciously broad terms so that different Justices (with different interpretive theories) could speak as a single cohort. *See* Divided Argument, *p(doom)*, at 1:00:54, https://dividedargument.com/episodes/pdoom-6mmWoT6t?t=1h0m54s (Professor William Baude stating that "the whole [concurrence] is phrased in a sufficiently broad way that . . . [the concurring Justices] can all join [the concurrence] comfortably").

But the two methodologies consider historical practice for different reasons.

For originalists, historical practice offers a means of elucidating the Constitution's *original* meaning. Traditionalists, by contrast, are more comfortable focusing on the Constitution's *present* meaning (so long as that meaning is a faithful development of its initial source). Thus, some "originalists will assign much more weight to practices at enactment (or immediately post-enactment) than to pre-enactment or later post-enactment practices, while this is not so for traditionalists."[89] This distinction might explain why Justice Kagan was more comfortable than Justice Thomas with concluding that Section 5497 would "fit right in" with congressional practice from the 20th and 21st centuries.[90] Indeed, one of the few historical funding statutes that Justice Kagan cited was a national defense funding statute from 1989—a statute enacted more than two centuries after the Constitution's ratification.[91]

Future litigants would be wise to acknowledge that a methodological split may be growing at the Court—although several Justices have suggested that they consider tradition only within the confines of an originalist framework.[92] For now, I wish to highlight something common to both methodologies. When it comes to answering the "appropriate" appropriations question, both originalists and traditionalists should pay special attention to the *precise* power that Congress must rely on to enact a particular appropriations statute.

Originalism focuses on elucidating the original meaning of *specific* constitutional text vesting *specific* congressional powers. And traditionalism, properly applied, should also employ a power-specific analysis. Traditionalists should avoid relying on a "tradition" set at

[89] DeGirolami, *supra* note 83, at 27.

[90] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 442 (Kagan, J., concurring).

[91] *Id.* at 443 (citing Act of Nov. 29, 1989, § 1605(a), 103 Stat. 1598).

[92] *See, e.g.*, Vidal v. Elster, 602 U.S. 286, 323 (2024) (Barrett, J., concurring in part) (citing Justice Kagan's *Community Financial* concurrence as an example of "longstanding practice of the political branches" serving to "reinforce our understanding of the Constitution's original meaning," but cautioning that "tradition is not an end in itself"); Michael Ramsey, *Originalism-fest in* Rahimi v. United States, Originalism Blog (June 22, 2024), https://originalismblog.typepad.com/the-originalism-blog/2024/06/originalism-fest-in-rahimi-v-united-statesmichael-ramsey.html (noting that each of Justices Gorsuch's, Kavanaugh's, and Barrett's concurring opinions in *United States v. Rahimi* "reaffirms a commitment to originalism").

such a high level of generality that it conflicts with the Constitution's fundamental structure. That structure imposes higher-order limitations on Congress's ability to develop or embrace new governmental practices.[93] A congressional "tradition" that allows Congress to vest itself with new power (by, say, claiming new appropriations authority from sources located outside of the enumerated list of powers vested by the Constitution) would permit Congress to transform itself into something it is not. And while other forms of government may permit a legislature to redefine its own *type*, ours does not. Instead, our government locates the sovereignty to change its form not in the legislature, but in "We the People"—whose Constitution established a Congress of carefully enumerated powers.[94]

B. Conducting a Power-Specific Analyses

Given originalism's dominance at the Court, I present here a power-specific analysis on primarily originalist terms. The analysis begins with a consideration of historical practice, which reveals an unmistakable conclusion: Annual appropriations have been a dominant way to fund governmental operations for quite some time.

In particular, the English Parliament, American colonial legislatures, and early Congresses all used the annual appropriations process in the normal course.[95] Given this history, annual

[93] *See* A.C. Pritchard & Todd J. Zywicki, *Constitutions and Spontaneous Orders: A Response to Professor McGinnis*, 77 N.C. L. Rev. 537, 538–39 (1999) (arguing that, "[w]hen operating as the Framers intended, federalism and the separation of powers pit government actors in a zero-sum game," and that government actors locked in a "zero-sum game inevitably will try to change the rules to make it a positive-sum game for themselves"); *see also* DeGirolami, *supra* note 83, at 35 (discussing the level-of-generality objection to traditionalism and explaining that "[d]rawing [a tradition] too broadly will dilute the tradition to the point where [traditionalism] begins to resemble something else altogether—often something like principle-driven adjudication").

[94] This would limit traditionalism's ability to "base[] its application of a text" on past interpretations of "some *other* text." Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477, 1491 n.65 (2023). This limit would apply at least in cases concerning the *source* of governmental power, rather than the scope of a *right*. *Cf. Rahimi*, 144 S. Ct. at 1940 n.6 (Thomas, J., dissenting) (concluding that, although the challenged statute fell outside of the nation's tradition of firearm regulation (and thus constituted a violation of the challenger's Second Amendment *right*), it was "doubt[ful]" that the challenged statute was "a proper exercise of Congress's *power* under the Commerce Clause") (emphasis added).

[95] Squitieri, *supra* note 9, at 21–22.

appropriations offer "something of a constitutional safe harbor (*i.e.*, a manner of funding the government that was so familiar to the objective reader [at the time of ratification] that its necessity and properness can rarely if ever be called into question)."[96]

Of course, even if the annual appropriations process offers a constitutional safe harbor, that does not mean Congress may *never* stray from that safe harbor. Congress can choose an alternative funding mechanism when doing so is a "necessary and proper" means of carrying some power "into execution." But absent a historical example of Congress using one of its enumerated powers to deviate from the annual appropriations process, "judicial suspicions should be heightened."[97] And this brings us to the fundamentally confused way in which various historical funding statutes were analyzed in *Community Financial*.

In *Community Financial*, the government defended the constitutionality of Section 5497 by comparing it to historical statutes funding other agencies (such as the Post Office and National Mint) through fees collected outside of the annual appropriations process.[98] The government argued that since those other agencies could be funded by fees earned outside of the annual appropriations process, the CFPB could also be funded outside of the annual appropriations process. Community Financial responded with a conduct-based argument. That conduct-based argument contended that agencies such as the Post Office and National Mint were "inherently constrained" because "the public can . . . refuse to buy the agencies' services to influence [the agencies'] conduct," whereas the public's refusal to buy the CFPB's services could not influence the CFPB's funding.[99] In the end, the Court dismissed Community Financial's conduct-based argument on the grounds that it made "no attempt to explain

[96] *Id.* at 23.

[97] *Id.* To say that judicial suspicions should be heightened is not to say that a court should adopt a "'use it or lose it' view of legislative authority." *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring). The failure to exercise power in a particular way is not dispositive proof that such an exercise is unlawful; it simply gives courts reason to carefully consider whether the exercise is lawful. *Cf.* Chad Squitieri, *"Recommend . . . Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 Baylor L. Rev. 706, 761 (2023) ("When the President purports to find a particularly new power in a particularly old statute . . . there is increased reason to" be "suspect.").

[98] *E.g.*, Petition for a Writ of Certiorari, *supra* note 20, at 14.

[99] Brief in Opposition, *supra* note 22, at 22.

why the possibility that the public's choices could restrain fee-based agencies' revenue is relevant to the question whether a law complies with the constitutional imperative that there be an appropriation."[100]

The Court correctly concluded that Community Financial's conduct-based argument was immaterial to the question of what the *Appropriations Clause* requires. But the immateriality of the distinctions for purposes of the Appropriations Clause does not mean that the distinctions between Section 5497 and the historical funding examples are not important *at all*. To the contrary, the distinctions reveal quite a bit. The historical funding examples all speak to what past Congresses thought to be "necessary and proper" exercises of non-*Commerce Clause* powers. They thus offer little to no historical support for the argument that Section 5497 constitutes a "necessary and proper" means of carrying Congress's *Commerce Clause* power into execution.

Start with the government's argument that "[i]n 1792, Congress established a national Post Office, to be funded through its collection of postage rates."[101] That funding statute offers an example of what an early Congress thought to be a "necessary and proper" means of carrying into execution Congress's power to "[t]o establish post offices and post roads."[102] As I've argued before, the history of postal funding demonstrates that funding postal systems through postal fees was a constitutional (i.e, necessary and proper) departure from the annual appropriations safe harbor. "[P]rior to the Constitution, the Articles of Confederation had ensured that 'postage' could be 'exact[ed] . . . on the papers passing thro' [one state to another] as may be requisite to defray . . . expenses,'" and "postal systems in both the American colonies and England had been funded historically through the collection of postage fees."[103] The upshot of this history is that "maintaining a postal funding scheme similar to the ones that had existed in England, the colonies, and early America would have no doubt been understood by the objective reader in 1788 to be a 'necessary and proper' means of carrying Congress's postal powers 'into execution.'"[104] But an exercise of Congress's *postal*

[100] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 437.

[101] Petition for a Writ of Certiorari, *supra* note 20, at 14.

[102] U.S. CONST. art. I, § 8, cl. 7.

[103] Squitieri, *supra* note 9, at 25.

[104] *Id.*

powers is of little to no relevance to elucidating Congress's ability to exercise its *Commerce Clause* authority.

Consider also the government's argument that, in 1792, Congress "created a national mint, to be funded in part through its collection of fees."[105] That statute could offer an example of what an early Congress thought to be a "necessary and proper" means of carrying into execution Congress's power to "coin money."[106] And as I have demonstrated elsewhere, state governments operating under the Articles of Confederation funded the coining of their state currencies outside of the annual appropriations process.[107] This history suggests that the ordinary reader in 1788 "would have thought that maintaining a funding scheme for federal coin that was similar to how coining operations were funded prior to the Constitution was a 'necessary and proper' means of carrying Congress's *coining* power into execution."[108] But again, a 1792 exercise of Congress's *coining* power does not speak to the original meaning of Congress's *commerce* power.

In *Community Financial*, the government also cited the First Bank of the United States (which was funded through the sale of stock) as an example of Congress funding an entity outside of the annual appropriations process.[109] But "even assuming that the First Bank was established pursuant to a *constitutional* exercise of Congress's *Commerce Clause* authority (as compared to an (un)constitutional exercise of that or some other power),"[110] the First Bank does not lend sufficient support for the idea that Section 5497 is a constitutional exercise of Congress's Commerce Clause authority. "That is because funding central banks through the sale of stock has a historical pedigree," which indicates that a stock-funding regime constitutes a constitutional "departure from the standard method of funding government through annual appropriations."[111] This historical pedi-

[105] Petition for a Writ of Certiorari., *supra* note 20, at 14.

[106] U.S. Const. art I, § 8, cl. 5.

[107] Squitieri, *supra* note 9, at 25–26.

[108] *Id.* at 26 (emphasis added).

[109] Brief for the Petitioners at 22, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416 (2024) (No. 22-448) (citation omitted).

[110] Squitieri, *supra* note 9, at 27.

[111] *Id.* (referring to the Bank of England (1694), Bank of North America (1781), and the Bank of New York (1784)).

gree "demonstrate[s] that . . . it would not be out of the norm to fund that bank through private funds."[112] But "a long history of funding banks through private investments," which "might lend constitutional legitimacy to funding the First Bank through similar means, . . . does not offer support for the argument that the federal government could fund the enforcement of its consumer protection laws via a statute like Section 5497."[113]

As a final historical example, consider the government's 11th-hour argument that the "First Congress funded the Customs Service and Revenue Officers in part through the officers' collection of 'penalties, fines and forfeitures.'"[114] At oral argument, the government conceded that the Customs Service offered the government its "best example historically."[115] The concession was notable, given that the government did not mention this "best" example until its final reply brief.[116] But even this "best" example is readily distinguishable from Section 5497.

To start, the First Congress's funding of the Customs Service need not be understood as an exercise of Congress's Commerce Clause authority. Instead, the funding of the Customs Service, which Congress established to enforce "import and tonnage duties,"[117] is perhaps best understood as an exercise of Congress's Taxing Clause authority "[t]o lay and collect Taxes, Duties, Imposts and Excises."[118] This point is even more obvious when it comes to deducing the power that the First Congress relied on to fund Revenue Officers, who were tasked with "enforc[ing] the nation's first internal *tax*."[119] Recognizing the customs and revenue examples as exercises of Congress's

[112] *Id.* at 28.

[113] *Id.*

[114] Reply of Petitioners at 17, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416 (2024) (No. 22-448).

[115] Transcript of Oral Argument at 31, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416 (2024) (No. 22-448).

[116] This timing suggests the value of a well-written amicus brief, as the Customs Service was highlighted in an amicus brief filed before the government's reply. *See* Brief of Professors of History and Constitutional Law as Amici Curiae in Support of Petitioners at 3, 22–24, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416 (2024) (No. 22-448) [hereinafter Amicus Brief].

[117] *Id.* at 22 (citations omitted).

[118] U.S. Const. art. I, § 8, cl. 1.

[119] Amicus Brief, *supra* note 116, at 3 (emphasis added).

Taxing Clause authority would indicate that even the government's "best" example is (like most of the government's other examples)[120] an example of Congress invoking something *other than* Congress's Commerce Clause authority.

With that said, an originalist might conclude that the customs and revenue examples lend *some* support to the idea that Section 5497 is a "necessary and proper" means of carrying Congress's Commerce Clause power into execution. After all, the First Congress might have thought itself to be exercising its Commerce Clause power. And more fundamentally, in early America, "the word 'duties'" (which at least in England may have been partially interchangeable with the word "customs") was understood to "include[] levies on imports and exports, whether imposed for revenue or to *regulate commerce*."[121] Given as much, even the First Congress's exercise of its power to impose customs and duties might offer some insight into the contours of Congress's related power to regulate *commerce*.

But even if historical evidence speaking to Congress's Taxing Clause power helps inform the original meaning of Congress's Commerce Clause power, the customs and revenue examples are distinguishable from Section 5497. On this point the full relevance of the dissenting arguments in *Community Financial* comes into focus.

Justice Alito's dissent took aim at the government's reliance on the Customs Service. Unlike the Customs Service, he explained, "[t]he CFPB . . . is an entirely different creature," with uniquely "broad and vast" powers and "discretionary authority."[122] Further unlike the Customs Service, the CFPB "does not collect fees from persons and entities to which it provides services or persons and entities that are subject to its authority," and the CFPB "is permitted to keep and invest surplus funds."[123] What's more, Justice Alito high-

[120] The government also relied on statutes enacted long after the Constitution's ratification. Squitieri, *supra* note 9, at 29 n.141 (collecting citations). I do not analyze those statutes here because, "even if" they were "exercises of Congress's . . . Commerce Clause authority," they are "less probative to an originalist inquiry." *Id.*

[121] Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 Case W. Rsrv. L. Rev. 297, 321 (2015) (emphases added).

[122] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 466 (Alito, J., dissenting).

[123] *Id.*

lighted how the text of Section 5497 (quoted earlier)[124] demonstrated a conscious effort to limit Congress's control over appropriations.[125] After considering these unique features of Section 5497, Justice Alito concluded that the statute "blatantly attempts to circumvent the Constitution."[126]

Justice Alito's argument was, at its core, an argument concerning the *necessity and properness* of Section 5497. That argument had a clear *structural* dimension: It focused on the ways in which Section 5497's unique characteristics permitted Congress to undermine the constitutional decision to place the power of the purse in the hands of an accountable Congress rather than the Executive Branch.[127] The argument also had a clear *historical* dimension: It explored the historical disputes that resulted in a need for legislative control of the purse strings.[128] The problem with the argument, however, was that it focused on the wrong constitutional *text*. Given the way in which the parties had litigated the case, the dissent's argument was judged by the majority for its ability to inform the language of the Appropriations Clause.[129] But the argument's persuasiveness is only fully understood when it is considered in terms of the Necessary and Proper Clause.

And so yes, the majority might have been correct to conclude that the dissent's "attempt to distinguish the Customs Service . . . from the [CFPB]" was not "convincing" because "it is unclear why these differences matter" for purposes of the *Appropriations Clause*.[130] But that narrow focus on the *Appropriations Clause* was precisely the problem. When the dissent's arguments are freed from the artificial constraints imposed by an unduly narrow focus on the Appropriations Clause, the import of the distinctions highlighted by the dissent becomes clearer.

However, the question that seems to lie—in unelucidated form—at the core of the dissent's analysis will be left to a future court to bring

[124] *Supra* Part I.A. (quoting 12 U.S.C. §§ 5497(a)(2)(C), (c)(2)).

[125] *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 451 (Alito, J., dissenting) (citations omitted).

[126] *Id.* at 471.

[127] *See id.* at 467–68.

[128] *See id.* at 448–49, 453–58.

[129] *Id.* at 438 (majority opinion).

[130] *Id.* at 441.

to the forefront. Section 5497 consciously seeks to undermine the Constitution's historically informed structure. It permits Congress to severely limit its own ability to control the funding of an agency tasked with regulating commerce on Congress's behalf. The question therefore remains: Is such a statute a "necessary and proper" means of carrying Congress's Commerce Clause power "into execution"? When viewed in those more appropriate terms, the question would seem to answer itself.

C. Telegraphing a Lack of Interest

This article would be missing something important if it did not conclude by mentioning a point that the majority and lead concurrence seemed to telegraph, even if those opinions did not make the point explicit. Put more directly: The majority and lead concurrence signaled a lack of interest in entertaining future appropriations challenges.

This point is perhaps most palpable in the lead concurrence by Justice Kagan, which four Justices joined despite their all joining a majority opinion that offered a sufficient basis to resolve the case. Recall that the lead concurrence explained that modern congressional practice offered an additional reason (beyond ratification-era evidence) to conclude that Section 5497 satisfied the Appropriations Clause. With the obvious caveat that one should be careful before placing too much weight on judicial tea-leaf-reading, the concurrence's focus on modern practice seemed to express a desire to let sleeping dogs lie and not to unravel the various ways that modern Congresses have sought to fund the federal government.

To a lesser extent, the majority can also be read as signaling a lack of interest in upsetting the apple cart. It would have been relatively simple for the majority to briefly expand on its point that there may be "other constitutional checks on Congress' authority to create and fund an administrative agency."[131] Indeed, Justice Thomas has elsewhere explained in a dissenting opinion that "there are serious problems" with the "Court's modern doctrine" concerning Congress's authority to spend funds.[132] And in making that point, Justice Thomas explained that "the Necessary and Proper Clause is a natural candidate for the spending power because spending funds may be 'necessary and proper for carrying into Execution' the Federal Government's

[131] *Id.*

[132] *Talevski*, 599 U.S at 206 (Thomas, J., dissenting).

enumerated powers."[133] The fact that Justice Thomas did not take the time to offer similar guidance regarding the textual hook for Congress's appropriations authority in *Community Financial* seems important. But of course, the distinction between Justice Thomas's two opinions could be chalked up to the difference between a single-Justice dissent and a seven-Justice majority. The latter leaves the authoring Justice less freedom to expand on nondispositive topics (particularly when a four-Justice concurrence stands ready at the door).

Regardless of whether the majority and lead concurrence should be read as suggesting a lack of interest in considering future appropriations challenges, the Court might have little choice in the matter. Typically, lower federal courts must entertain cases as they are presented. Therefore, a lower court presented with an appropriations challenge based on the sort of power-specific analysis proposed in this article would have to consider the relevant analysis head on. And were the lower court to hold an appropriations statute unconstitutional, the Supreme Court would no doubt seek to review the constitutionality of the statute itself. Were it to do so, the Court would not be able to resolve the case by citing to its Appropriations Clause holding in *Community Financial*. Nor would originalist Justices be able to convincingly rely on congressional practice relating only to unrelated congressional powers. Instead, an originalist Court seeking to resolve the issue convincingly should consider the limitations imposed by the actual text that Congress presumably relied on to enact the appropriations statute at issue.

Conclusion

In *Community Financial*, the Court offered a narrow holding that spoke to the requirements imposed by the Appropriations Clause. But that holding should be of only limited relevance to "appropriate" appropriations challenges—that is, future challenges based on the constitutional text that actually vests Congress with authority to enact appropriations statutes. With regard to Section 5497, the "appropriate" appropriations question asks whether Section 5497 constitutes a "necessary and proper" means of carrying Congress's Commerce Clause authority "into execution." For the reasons sketched out above, the answer to that question is "no."

[133] *Id.* at 209.