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# Taking Appropriations Seriously

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# ARTICLES

## TAKING APPROPRIATIONS SERIOUSLY

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*Appropriations lie at the core of the administrative state and are becoming increasingly important as deep partisan divides have stymied substantive legislation. Both Congress and the President exploit appropriations to control government and advance their policy agendas, with the border wall battle being just one of several recent high-profile examples. Yet in public law doctrine, appropriations are ignored, pulled out for special legal treatment, or subjected to legal frameworks ill-suited for appropriations realities. This Article documents how appropriations are marginalized in a variety of public law contexts and assesses the reasons for this unjustified treatment. Appropriations' doctrinal marginalization does not affect the political branches equally, but instead enhances executive branch and presidential power over appropriations at the expense of Congress. Yet legal doctrines governing appropriations should have the opposite effect because constitutional text, structure, and history make clear the central importance of Congress's appropriations power. Appropriations' doctrinal marginalization undermines the separation of powers even further by undercutting political accountability through Congress and creating de facto presidential spending authority, with the executive branch able to violate governing statutes on appropriations with minimal legal consequences. This Article then turns to the question of what taking appropriations seriously might mean for public law doctrine. It concludes that appropriations exceptionalism is not problematic if it reflects the realities of the appropriations process and does not downplay appropriations' significance. Doctrines should attend to the separation of powers dynamics raised by appropriations and reinforce Congress's power of the purse. Among other consequences, this leads to jurisdictional doctrines that put primacy on congressional enforcement of appropriations limits in court.*

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## INTRODUCTION

Appropriations lie at the core of the administrative state. Without appropriations, the executive branch cannot act, and thus choices about agency funding have a fundamental impact on how the government operates. Long recognized as important, appropriations' centrality to government is even more true today. Deepening partisan divides, competitive politics, and divided government have stymied substantive legislation in Congress and caused greater exploitation of must-pass funding measures to advance political agendas. Policy battles between Congress and the President increasingly are fought on the terrain of the budget, leading to longer and more frequent government shutdowns, ongoing contestation over the use of appropriated funds, unfulfilled statutory promises, and little long-term policy resolution. Rather than amending or repealing substantive authorizations, Congress resorts to appropriations riders and funding denials as its tools of choice to control government policy.[1] The President, in turn, creatively interprets appropriations statutes, imposes new grant conditions, repurposes and withholds funds, and invokes inadequate funding as a basis for broad assertions of presidential discretion.[2] Meanwhile, dedicated funding streams and agency-generated funds are used to protect new regulatory initiatives against both congressional and presidential appropriations control.[3]

A high-profile example of appropriations' importance was the battle between President Trump and the Democratic-controlled House of Representatives over money to build a wall at the country's southern border that marked the second half of Trump's term in office. Disagreements over the border wall led to a record-setting thirty-five-day partial government shutdown from December 2018 to January 2019.[4] Immediately after signing an appropriations bill that included far less money for building a wall than he had sought, President Trump declared a national emergency

1. See infra section I.B.1.

2. See infra section I.B.2.

3. See infra text accompanying notes 104, 121–122.

4. See Glenn Thrush, In a Divided Washington, Congress Averted a Shutdown—But at a Price, N.Y. Times (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/border-wall-deal.html (on file with the *Columbia Law Review*).

and stated that his administration would transfer billions of dollars appropriated for other purposes to wall construction—sparking Democratic outrage and multiple lawsuits.[5] A California district court quickly granted a preliminary injunction that the Supreme Court ultimately stayed.[6] In June 2020, the Ninth Circuit upheld the district court's subsequent permanent injunction, and the case is currently before the Supreme Court.[7] Meanwhile, the D.C. Circuit recently held that the House of Representatives has standing to challenge the fund transfer as violating the Appropriations Clause.[8]

President Trump is hardly alone in his creative use of appropriations to push his policy priorities. Consider President Obama's efforts to fund key cost-sharing components of the Affordable Care Act (ACA), his signature political achievement. After no annual appropriation was enacted to cover the cost-sharing obligations the ACA imposes on insurers, the Obama Administration sought to use a permanent appropriation instead, an effort that was enjoined as a result of a lawsuit brought by the Republican-controlled House of Representatives.[9] Congress also adopted an appropriations rider preventing the use of annual appropriations to fund the ACA's risk-sharing program, leading insurers to file suit in the Court of Federal Claims. In *Maine Community Health Options v. United States*, the Supreme Court held that the government was liable for the unpaid risk corridor payments, which amounted to around $12 billion.[10]

Yet another recent instance of appropriations dominating the national political landscape involved the Trump Administration's withholding of military aid for Ukraine. It was this action that sparked President Trump's first impeachment; the House of Representatives determined that the withholding was part of an effort by Trump to encourage a foreign

5. See infra text accompanying notes 113–118.

6. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).

7. See California v. Trump, 963 F.3d 926, 932 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618 (2020); Sierra Club v. Trump, 963 F.3d 874, 880 (9th Cir. 2020), cert. granted, 141 S. Ct. 618 (2020). The Court had scheduled *Sierra Club* for oral argument in February but removed the case from its calendar in response to a request from the Biden Administration, which is reviewing the border wall transfers. See Motion of the Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar at 1–2, Biden v. Sierra Club, No. 20-138 (U.S. Feb. 3, 2021); Amy Howe, Justices Take Immigration Cases Off February Calendar, SCOTUSBlog (Feb. 3, 2021), https://www.scotusblog.com/2021/02/justices-take-immigration-cases-off-february-calendar [https://perma.cc/M8B5-W36F]. For further discussion of this case, see infra text accompanying notes 114–117, 246–255, and section IV.C. The Ninth Circuit also invalidated a separate transfer of funds for the border wall in Sierra Club v. Trump, 977 F.3d 853, 861 (9th Cir. 2020), petition for cert. filed, No. 20-685 (U.S. Nov. 17, 2020).

8. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 13 (D.C. Cir. 2020).

9. See U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168 (D.D.C. 2016), vacated in part sub nom. U.S. House of Representatives v. Azar, No. 14-1967 (RMC), 2018 WL 8576647 (D.D.C. May 18, 2018).

10. 140 S. Ct. 1308, 1315, 1318 (2020).

government's interference in the U.S. presidential election by pressuring Ukraine to investigate his presidential rival, now-President Joe Biden.[11] Also in the news in 2020 was the Trump Administration's withholding of appropriated funds from Puerto Rico, Native American tribes, and the World Health Organization, as well as President Trump's threat to deny funds to states expanding absentee voting.[12] Trump additionally directed high-level officials in his administration to identify a list of "anarchist jurisdictions" that would be ineligible to receive discretionary federal funds, promised $200 drug-discount cards to seniors, and threatened to deny funds to schools that did not reopen in the fall of 2020.[13] Meanwhile any doubt about the policy and separation of powers significance of appropriations should be erased by the COVID-19 pandemic. Massive appropriations lie at the heart of the federal government's response, with partisan fights over new funding and interbranch battles over oversight and allocation of the funds.[14]

Of particular note, these recent appropriations disputes are often taking a legal as well as political guise. Federal courts are seeing a broad array of litigation involving appropriations and funding, including not just

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11. Nicholas Fandos & Michael D. Shear, Trump Impeached for Abuse of Power and Obstruction of Congress, N.Y. Times (Dec. 18, 2019), https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html (on file with the *Columbia Law Review*) (last updated Feb. 10, 2021).

12. Berkeley Lovelace Jr. & Noah Higgins-Dunn, Trump Halts U.S. Funding for World Health Organization as It Conducts Coronavirus Review, CNBC (Apr. 14, 2020), https://www.cnbc.com/2020/04/14/trump-calls-for-halt-to-us-funding-for-world-health-organization-amid-coronavirus-outbreak.html [https://perma.cc/4KHT-JQDD]; Brett Neely, Trump Repeats Unfounded Claims About Mail-In Voting, Threatens Funding to 2 States, NPR (May 20, 2020), https://www.npr.org/2020/05/20/859333693/trump-repeats-unfounded-claims-about-mail-in-voting-threatens-funding-to-some-st [https://perma.cc/9DLZ-MDBU]; Mark Walker & Emily Cochrane, Native American Tribes Sue Treasury over Stimulus Aid as They Feud over Funding, N.Y. Times (May 1, 2020), https://www.nytimes.com/2020/05/01/us/politics/coronavirus-native-american-tribes-treasury-stimulus.html (on file with the *Columbia Law Review*); Justin Wise, Trump Administration Ending Delay for over $8 billion in Puerto Rico Disaster Aid, Hill (Jan. 15, 2020), https://thehill.com/homenews/administration/478332-trump-admin-ending-delay-for-over-8-billion-in-puerto-rico-disaster [https://perma.cc/5VPB-7PPV].

13. See Memorandum on Reviewing Funding to State and Local Government Recipients that are Permitting Anarchy, Violence, and Destruction in American Cities, 2020 Daily Comp. Pres. Doc. § 3 (Sept. 2, 2020); Peter Baker, Erica L. Green & Noah Weiland, Trump Threatens to Cut Funding if Schools Do Not Fully Reopen, N.Y. Times (July 8, 2020), https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html (on file with the *Columbia Law Review*) (last updated July 24, 2020); Margot Sanger-Katz & Noah Weiland, Trump Promised Seniors Drug Discount Cards. They May Be Illegal., N.Y. Times (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/us/politics/trump-prescription-drugs.html (on file with the *Columbia Law Review*).

14. See Charlie Savage & Peter Baker, Trump Ousts Pandemic Spending Watchdog Known for Independence, N.Y. Times (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/us/politics/trump-coronavirus-watchdog-glenn-fine.html (on file with the *Columbia Law Review*).

the border wall and ACA-related lawsuits but also states' challenges to the Trump Administration's efforts to deny funds to sanctuary jurisdictions,[15] criminal defendants' challenges to prosecution for marijuana offenses in violation of an appropriations rider,[16] and challenges involving the government's failure to meet statutory obligations due to inadequate funding.[17] This increasing legal dimension is a relatively new phenomenon. To be sure, prior political clashes over spending have sometimes resulted in litigation, but the number of high-profile cases today in which courts are grappling with appropriations matters is unusual.[18]

This increase in appropriations lawsuits is part of a broader trend in which courts are stepping into political battles in our polarized age, resulting in a marked expansion in separation of powers–infused litigation.[19] Yet legal challenges to appropriations actions raise unique problems and concerns for two reasons. The first is that, despite their centrality to government operations, appropriations are marginalized in public law doctrine. The second is that the resultant rules courts apply to appropriations disputes serve to enhance executive branch and presidential power over appropriations at the expense of Congress.

The marginalization of appropriations in public law doctrine takes several forms. Many public law doctrines apply appropriations exceptionalism, pulling appropriations out from governing legal frameworks and employing sometimes arcane appropriations-specific rules. Others engage in appropriations silence, either ignoring appropriations altogether or simply assimilating appropriations to existing frameworks without acknowledging that those frameworks ill-fit appropriations realities. And often marginalization takes the form of jurisdictional exclusion of appropriations disputes, whether as the result of appropriation-specific jurisdictional rules or application of existing jurisdictional requirements that appropriations disputes cannot easily satisfy.

For instance, constitutional jurisprudence on congressional delegation rarely engages with the implications of appropriations, and the same is true of separation of powers cases more broadly.[20] Expand from separation of powers to cases involving the spending of government funds

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15. E.g., City & County of San Francisco v. Barr, 965 F.3d 753 (9th Cir. 2020), cert. dismissed per stipulation sub nom. Wilkinson v. City & County of San Francisco, No. 20-666, 2021 WL 1081230 (mem.) (U.S. Mar. 4, 2021).

16. E.g., United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).

17. E.g., In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013).

18. The numerous lawsuits triggered by President Nixon's impoundments serve as an earlier example of a burst of appropriations-related litigation. See generally Ralph S. Abascal & John R. Kramer, Presidential Impoundment Part II: Judicial and Legislative Responses, 63 Geo. L.J. 149 (1974) (describing impoundment cases).

19. See Trump v. Mazars, 140 S. Ct. 2019, 2031 (2020); Gillian E. Metzger, The Roberts Court and Administrative Law, 2019 Sup. Ct. Rev. 1, 2.

20. See infra sections II.A.1, II.A.3.

and this exclusion might seem less severe. Courts regularly consider constitutional limits on government funds in individual rights and federalism contexts.[21] Yet even here, special rules often govern when government funds are involved. As just one example, the Supreme Court has indicated that the involvement of government funds may pull agency action outside of otherwise applicable structural constitutional constraints, such as Article III or the commandeering doctrine.[22]

The marginalization of appropriations is even clearer in administrative law and statutory interpretation. Appropriations actions are often exempt from standard procedural requirements, and barriers to judicial review of appropriations decisions are common.[23] Even the personnel and offices involved in appropriations and budget matters differ from the administrative law norm. Within the executive branch, budget and accounting offices rather than substantive program divisions are the appropriations frontline, and appropriations also involve different centralized executive branch overseers.[24] A number of other less familiar entities play starring roles as well, such as the Government Accountability Office (GAO), the Congressional Budget Office (CBO), and the Court of Federal Claims. When appropriations questions do surface in court, it is often in a statutory interpretation guise, resulting in a number of appropriations-specific doctrines that minimize the impact of appropriations measures on substantive law.[25]

Appropriations' marginalization in doctrine does not necessarily entail marginalization in practice. Sometimes doctrinal marginalization actually serves to make appropriations a more potent tool for the political branches by freeing appropriations from legally enforceable constraints.[26] Indeed, appropriations play a much more starring role in nondoctrinal public law. A well-established statutory and regulatory framework—replete with a substantial body of guidance, internal executive and legislative branch decisions, and longstanding norms—governs agency budgeting

21. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 575–86 (2012) (holding that Congress could not withhold existing funds from states that declined to expand Medicaid eligibility under the ACA).

22. See New York v. United States, 505 U.S. 144, 161, 167–68 (1992); infra section II.B.2.

23. See infra section II.B.

24. See Christopher J. Walker, Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting: Final Report to the Administrative Conference of the United States 10, 14–16, 30–31, 37–38 (2015), https://www.acus.gov/sites/default/files/documents/technical-assistance-final-report.pdf [https://perma.cc/CKM2-3L9E] (concluding that agency budget offices "often provide technical drafting assistance on legislation that directly affects those agencies"); Eloise Pasachoff, The President's Budget as a Source of Agency Policy Control, 125 Yale L.J. 2182, 2199–201 (2016) [hereinafter Pasachoff, The President's Budget] (describing resource management offices in OMB as centralized budget overseers).

25. See infra section II.C.

26. See infra section II.E.

and spending. This framework is primarily enforced by legislative and executive branch entities, making only rare appearances in court. Yet even this political branch public law of appropriations is increasingly marginalized, with appropriations norms and practices being undermined by partisan disagreements and policy disputes between the legislative and executive branches.[27]

Importantly, moreover, appropriations' doctrinal marginalization does not affect the political branches equally. Especially combined with the erosion of appropriations norms and practices that reinforce congressional control, such doctrinal marginalization redounds to the executive branch's benefit. This is especially true of doctrines that exclude appropriations challenges from the jurisdiction of the federal courts. The cumulative effect is the creation of a de facto presidential spending authority and a corresponding weakening of congressional control of the purse.

Appropriations have long received substantial attention from political scientists and congressional scholars, who have examined among other things the political dynamics of the appropriations process and how Presidents wield influence over federal spending.[28] But the marginalization of appropriations also exists in public law scholarship, which has largely ignored issues of agency funding.[29] This blindness to appropriations is beginning to change, with a growing body of scholarship documenting the importance of appropriations to the administrative state. This work has opened a window on appropriations, offering rich accounts of how Congress,[30] the President,[31] and agencies[32] use funding measures

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27. See infra section II.E.

28. See, e.g., Richard F. Fenno, Jr., The Power of the Purse: Appropriations Politics in Congress, at xiii (1966) (providing an "empirical description of the contemporary appropriations process"); John Hudak, Presidential Pork: White House Influence over the Distribution of Federal Grants 3 (2014) (discussing whether and how presidents engage in "pork barrel politics"); D. Roderick Kiewet & Mathew D. McCubbins, The Logic of Delegation: Congressional Parties and the Appropriations Process 3–4 (1991) (analyzing "key issues involving congressional parties and the delegation of policy-making authority in the context of the annual appropriations process").

29. See, e.g., Pasachoff, The President's Budget, supra note 24, at 2186 ("The budget itself . . . is a key tool for controlling agencies. Yet the mechanisms of control through the executive budget process remain little discussed and insufficiently understood.").

30. See, e.g., Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61, 84–90 (2006) (describing how "Congress has supervised agencies with great particularity . . . through the appropriations process"); Matthew B. Lawrence, Disappropriation, 120 Colum. L. Rev. 1, 26–44 (2020) [hereinafter Lawrence, Disappropriation] (discussing examples of how Congress has increasingly failed to fund mandatory obligations).

31. See, e.g., Pasachoff, The President's Budget, supra note 24, at 2207–08; Note, Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection, 125 Harv. L. Rev. 1822, 1827–29 (2012) (describing methods of presidential control over policy through appropriations).

32. See, e.g., Christopher C. DeMuth, Sr. & Michael S. Greve, Agency Finance in the Age of Executive Government, 24 Geo. Mason L. Rev. 555, 583–87 (2017) (discussing the

to advance their policy priorities. Scholars are also developing nuanced analyses of how appropriations fit into the constitutional separation of powers framework,[33] a subject that has received little sustained engagement since the 1980s in the aftermath of Iran–Contra.[34] Still, the marginalization of appropriations in public law doctrine has gone mostly unremarked, and a comprehensive analysis of how courts do and should approach appropriations remains lacking.

This Article aims to provide that analysis and explore the implications of taking appropriations seriously in public law doctrine. The disconnect between the lived appropriations-centric reality of administrative governance and the appropriations-excluded doctrinal rubrics of public law raises several questions: What explains the marginalization of appropriations in public law doctrine? Is this marginalization constitutionally justified? And what would happen if we rethink public law by putting government funding at the core of the doctrinal analysis rather than pushing it to the periphery?

Appropriations marginalization has several sources. One is the courts' traditional reluctance to impose financial penalties or funding obligations on governments, which is connected to a belief that resource allocations are core policy and sovereign determinations that belong in the political branches. Put differently, the marginalization of appropriations in public law doctrine is closely linked to the centrality of appropriations in the political arena. At the same time, however, the doctrinal marginalization of appropriations also embodies normative judgments made by courts about how Congress should operate. In particular, a central basis is judicial prioritization of substantive legislative enactments over appropriations and skepticism of appropriations as a policymaking tool.

These rationales fail to justify the current doctrinal marginalization of appropriations. For starters, this marginalization creates a disconnect between contemporary governance reality and governing legal frameworks. More importantly, the downplaying of appropriations and corresponding elevation of substantive legislative enactments is at odds with the Constitution. Constitutional text, structure, and history make clear the central importance of Congress's appropriations power. Legal doctrines

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consequences of agency self-funding); Mila Sohoni, On Dollars and Deference: Agencies, Spending, and Economic Rights, 66 Duke L.J. 1677, 1701–05 (2017) (describing how agencies use spending to advance policy goals).

33. See, e.g., Zachary S. Price, Funding Restrictions and Separation of Powers, 71 Vand. L. Rev. 357, 361 (2018) (theorizing the extent of the President's independent spending authority).

34. See J. Gregory Sidak, The President's Power of the Purse, 1989 Duke L.J. 1162, 1183–202 (arguing that the Constitution grants the President power to spend the minimum necessary to perform constitutional functions); Kate Stith, Congress's Power of the Purse, 97 Yale L.J. 1343, 1381–86 (1988) (articulating constitutional limits on congressional and presidential spending authority). Louis Fisher is an exception here. See generally Louis Fisher, Presidential Fiscal Accountability Following the Budget Act of 1974, 67 Me. L. Rev. 286, 302–09 (2015) (describing spending disputes from the 1990s to the early 2010s).

governing appropriations therefore should seek to empower congressional control of appropriations. Yet as noted above, doctrines that marginalize appropriations often have the opposite effect. They also serve to undercut political accountability through Congress, because appropriations are one of the most available means by which Congress can shape policy today. The doctrinal marginalization of appropriations additionally threatens the rule of law by freeing government from legally enforceable checks with respect to appropriations. And appropriations' doctrinal marginalization undermines the separation of powers even further by creating de facto presidential spending authority, enabling the executive branch to violate governing statutes on appropriations without legal consequences.

This is not to deny that increased judicial involvement in appropriations carries separation of powers risks of its own. The concern that bringing appropriations into the public law mainstream will expand judicial power at the political branches' expense is real and legitimate. But this fear must be balanced against the very serious separation of powers harms caused by appropriations' exclusion in our current polarized era. The erosion of longstanding norms and practices in the wake of polarization means that political branch public law is increasingly unable to enforce congressional control over appropriations on its own. Moreover, courts are being dragged into appropriations disputes already, suggesting that the issue is not one of whether courts should play a role in such matters but rather what rules should govern the role they play.

That leaves the question of what taking appropriations seriously might mean for public law doctrine. Here it is helpful to differentiate among the different forms that appropriations' doctrinal marginalization takes. Appropriations silence is the most difficult to justify; at a minimum, taking appropriations seriously should mean that courts engage expressly with the import of appropriations and incorporate appropriations into their analysis. But rules that pull appropriations out for special treatment are not necessarily problematic, provided such appropriations exceptionalism reflects the realities of the appropriations process and is not an effort to downplay appropriations. Indeed, appropriations-specific rules can provide an important means of balancing different imperatives, such as enforcing congressionally imposed limits while also preserving needed budget flexibility. Taking appropriations seriously also entails paying special attention to the separation of powers dynamics raised by appropriations, with interpretive doctrines structured so as to reinforce Congress's power of the purse over the executive branch. It further requires including assessment of appropriations measures in separation of powers analysis. More radically yet, taking appropriations seriously—and also acknowledging the risks posed by expanding the judicial role in appropriations disputes—suggests rethinking jurisdictional doctrines to put primacy on congressional enforcement of appropriations limits in court.

In what follows, Part I begins by outlining the traditional frameworks and institutional arrangements that govern appropriations. It then describes appropriations' current centrality to administrative government and contemporary separation of powers disputes. Part II turns to documenting how, despite this importance, appropriations are marginalized in public law. It begins by identifying the different analytic mechanisms by which this sidelining of appropriations occurs and then looks in detail at how these mechanisms surface in constitutional and administrative law, statutory interpretation, and political branch public law. Part III takes a step back to assess appropriations marginalization in public law, first identifying the rationales on which such marginalization rests and then arguing that these rationales fail to justify the sidelining of appropriations. It contends that the current marginalization is at odds with the constitutional importance of Congress's appropriations power and undermines political accountability, the rule of law, and the separation of powers. Part IV turns to the reconstructive project, exploring what taking appropriations seriously might mean in practice and examining the implications of such a new approach to appropriations for the border wall funding dispute.

A note on terminology is warranted. This Article uses the term "appropriations" expansively, including under its embrace not simply legislation allocating budget authority to different government functions—the traditional definition of appropriations—but also administrative actions implementing those allocations and making expenditures that more often are classified as involving government spending. Both appropriations and spending involve provision of government funds and are manifestations of the same congressional power of the purse. But spending is the term generally applied to grants of funds outside of the federal government, especially to state and local governments or private actors, whereas appropriations is used to refer to funding the federal government. The term appropriations is thus particularly tied to the separation of powers issues that dominate the analysis here. However, spending disputes often carry separation of powers dimensions, especially today, and thus merit inclusion in the discussion as well.[35]

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35. One could expand the lens even further to include other closely associated forms of government action, such as government contracting or revenue-raising activities. Indeed, government contracting and revenue-raising are in many ways similarly marginalized in existing public law doctrine. See Jody Freeman & Martha Minow, Reframing the Outsourcing Debate, *in* Government by Contract: Outsourcing and American Democracy 1, 4–5 (Jody Freeman & Martha Minow eds., 2009) (describing concerns that private contractors fall outside of existing government accountability regimes); Lawrence Zelenak, Maybe Just a Little Bit Special, After All?, 63 Duke L.J. 1897, 1898–900 (2014) (describing tax exceptionalism). Yet each of these modes of government functioning has distinct features not present in the case of appropriations and spending—in the case of government contracting, the frequent transfer of government power to private hands; in the case of revenue-raising, the governmental power to obtain an exaction from private actors. Intragovernmental contracting may come closest—and, like appropriations, it is an area governed by arcane legal

## I. THE CONTEMPORARY IMPORTANCE OF APPROPRIATIONS

Appropriations have always been a central site of political contestation in the United States and pivotal for the functioning of administrative government.[36] In today's polarized world, the critical importance of appropriations is only greater. Both Congress and the President are increasingly resorting to appropriations to advance their policy agendas and exert control over the administrative state. To place these developments in context, this Part begins with a brief overview and history of the appropriations and budget process. It then turns to depicting appropriations' changing role and contemporary significance.

### A. *The Appropriations and Budget Process Over Time*

Struggles over appropriations have a very long history, with appropriations representing a central means by which Parliament established its dominance over the British king.[37] Concern over the corrupting power of government spending, as well as the danger that profligate spending would necessitate higher taxes, led the Framers to firmly vest control over appropriations in Congress.[38] The Appropriations Clause provides, "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."[39] This requirement of legislative authorization for appropriations is accompanied by other constitutional provisions reinforcing Congress's control of the federal fisc, including Congress's authority to "lay and collect Taxes," "pay the Debts," "provide for the common Defence and general Welfare," and "borrow Money on the credit of the

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requirements overwhelmingly enforced by the political branches. See Eloise Pasachoff, Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics, 37 Yale J. on Regul. 573, 577, 582–92 (2020); see also Bridget A. Fahey, Federalism by Contract, 129 Yale L.J. 2326, 2329 (2020) (emphasizing the "thousands of written agreements that facilitate shared governance among levels of government"). On the other hand, substantial overlap exists between intragovernmental contracting and federal spending programs in practice, as federal grants are frequently implemented through intragovernmental contracts. Fahey, supra, at 2339–43. In any event, the limited inclusion of spending within the appropriations umbrella here is not meant to preclude the possibility that other federal government fiscal activities could also be profitably linked.

36. See generally Lucius Wilmerding, Jr., The Spending Power: A History of the Efforts of Congress to Control Expenditures (1971) (providing a history of disputes over federal expenditures from the Framing to the early decades of the twentieth century).

37. William C. Banks & Peter Raven-Hansen, National Security Law and the Power of the Purse 11–18 (1994); Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 45–52 (2017) [hereinafter Chafetz, Congress's Constitution].

38. Chafetz, Congress's Constitution, supra note 37, at 54–57.

39. U.S. Const. art. I, § 9, cl. 7.

United States," as well as the Constitution's stipulation that "All Bills for raising Revenue shall originate in the House of Representatives."[40]

Besides specifying that no appropriation for the army shall last longer than two years,[41] however, the Constitution is silent on how the principle of congressional control of the purse should be implemented. A few appropriations practices have existed since the Founding—such as annual appropriations,[42] appropriations being separate from legislation,[43] and origination of appropriations measures in the House[44]—although all of these practices have experienced some erosion over time. Other aspects of the process for appropriating and spending federal funds have changed more dramatically, in response to new national needs, wars, political developments, and institutional rivalries.[45]

One particularly important institutional rivalry is the enduring battle between Congress and the President for control of appropriations. The constitutional principle of congressional control of the purse has always coexisted with substantial executive branch influence on appropriations.[46] After initially deferring broadly to estimates provided by Treasury Secretary Alexander Hamilton in the early years of the Washington Administration, Congress soon pushed for more control, with Representative Albert Gallatin prevailing in his quest for line-item appropriations over Hamilton's resistance.[47] Appropriations bills continued to include substantial detail until the growing complexity and size of the federal government

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40. Id. §§ 7–8; see also Lawrence, Disappropriation, supra note 30, at 11–14 (adopting a more capacious definition of Congress's power of the purse that includes all "means of economic inducement potentially wielded by the government"); Price, supra note 33, at 366 ("The Constitution thus ensures that Congress, with its distributed representation and resulting capacity for bargained trade-offs, holds ultimate authority over both collection and distribution of public resources.").

41. U.S. Const. art. I, § 8, cl. 12.

42. Chafetz, Congress's Constitution, supra note 37, at 58–61.

43. James V. Saturno & Brian T. Yeh, Cong. Rsch. Serv., R42098, Authorization of Appropriations: Procedural and Legal Issues 1–2 (2016); Allen Schick, Cong. Rsch. Serv., Rep. No. 84-106 GOV, Legislation, Appropriations, and Budgets: The Development of Spending Decision-Making in Congress 8–17 (1984).

44. Allen Schick, The Federal Budget: Politics, Policy, Process 217, 232 (3d ed. 2007) [hereinafter Schick, Federal Budget].

45. See id. at 13–14. For a detailed account of the changes in the appropriations process over the period 1865–1921, see Charles H. Stewart III, Budget Reform Politics: The Design of the Appropriations Process in the House of Representatives 1865–1921, at 79–132 (1989).

46. See Louis Fisher, Presidential Spending Power 10–19, 21–58 (1975) [hereinafter Fisher, Presidential Spending Power] (discussing the President's role in federal spending decisions from 1789 to 1974).

47. Gerhard Casper, Appropriations of Power, 13 U. Ark. Little Rock L. Rev. 1, 9–22 (1990); Chafetz, Congress's Constitution, supra note 37, at 58–59.

that developed over the twentieth century—and concomitant need for flexibility—led to broader lump-sum appropriations.[48]

Over time, Congress enacted a variety of framework measures to control executive branch spending, even as it also granted the presidency a central role in the budgeting process. A critical statute is the Antideficiency Act, first enacted in 1870 as a response to executive officials' practices of "coercing" Congress to make additional appropriations, for example by spending their entire annual appropriations quickly or entering into contracts they lacked funds to cover.[49] Subsequently amended several times, the Antideficiency Act prohibits federal officers or employees from spending or obligating federal funds in excess of the amount currently available in an appropriation.[50] The Act also bars receipt of voluntary services, except when "authorized by law" or for "emergencies involving the safety of human life or the protection of property."[51] It is reinforced by the Miscellaneous Receipts Act, which requires that a government official "receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable."[52] Agencies thus need congressional authorization to retain and spend funds they independently collect.[53] The "purpose statute," another cornerstone measure initially adopted in 1809, provides that "[a]ppropriations shall be applied only to the objects for which [they] . . . were made . . . ."[54] Congress also has sought to prevent the President and executive branch from refusing to spend appropriated funds through the Impoundment Control Act of 1974 (ICA). The ICA requires congressional approval for any permanent impoundment—termed a rescission—of appropriated funds and otherwise limits Presidents to within-fiscal-year deferrals that cannot be based on policy disagreement absent congressional approval.[55] Despite these multiple enactments, the nature and size of the federal budget leaves agencies and the President with substantial legal discretion over federal

48. Fisher, Presidential Spending Power, supra note 46, at 59–76. Lump-sum appropriations "cover a number of specific programs, projects, or items" and allow the executive branch to determine their specific use, whereas line-item appropriations are "available only for the specific object described." 2 U.S. Gov't Accountability Off., GAO-06-382SP, Principles of Federal Appropriations Law ch. 6, at 5–7 (3d ed. 2006).

49. Gary L. Hopkins & Robert M. Nutt, The Anti-Deficiency Act (Revised Statutes 3679): and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51, 56–60 (1978); Stith, supra note 34, at 1370–77.

50. 31 U.S.C. § 1341(a)(1) (2018).

51. Id. § 1342.

52. Id. § 3302(b); Stith, supra note 34, at 1364–70.

53. U.S. Gov't Accountability Off., GAO-16-464SP, Principles of Federal Appropriations Law ch. 2, at 5–6 (4th ed. 2016) [hereinafter GAO Red Book, GAO-16-464SP].

54. 31 U.S.C. § 1301(a); see also U.S. Gov't Accountability Off., GAO-17-797SP, Principles of Federal Appropriations Law ch. 3, at 9–10 (4th ed. 2017).

55. 2 U.S.C. §§ 683–684, 688 (2018).

spending, even if subject to political and informal constraints from Congress.[56] This institutional rivalry is also reflected in the presence of two simultaneously created government agencies with appropriations enforcement responsibilities: GAO, understood to be affiliated with Congress, and the Office of Management and Budget (OMB), the executive branch's central appropriations and budget actor.[57]

A second set of institutional rivalries has existed within Congress. Ever since appropriations committees were created after the Civil War, they have fought subject-area "authorizing committees" for control over spending.[58] The longstanding principle that appropriations are distinct from legislation translates into a requirement that appropriations be separately authorized, a responsibility that falls to authorizing committees.[59] The result is a two-step appropriations process with enactment of legislation authorizing activities and expenditures up to a certain level occurring first, followed by enactment of appropriations legislation specifying the actual amount to be spent on authorized activities in a given year.[60] This division is enforced by House and Senate Rules that allow a member of each chamber to raise a point of order against nonconforming measures.[61] Yet departures from this model have been frequent.[62] In particular, the development of the twentieth-century welfare state led to enactment of substantive statutes that directly mandated spending and sometimes provided permanent appropriations, with mandatory spending now

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56. See Pasachoff, The President's Budget, supra note 24, at 2188, 2207–43; David E. Lewis, Political Control and the Presidential Spending Power 9, 24–28 (Vanderbilt Univ. Ctr. for the Study of Democratic Insts., Working Paper No. 1-2017, 2017), https://www.vanderbilt.edu/csdi/includes/WP_1_2017_final.pdf [https://perma.cc/7ZEY-3U85].

57. Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920, at 207 (1982); Jesse M. Cross & Abbe R. Gluck, The Congressional Bureaucracy, 168 U. Pa. L. Rev. 1541, 1587–94 (2020). CBO is another later-created congressional budget agency. Id. at 1573–78.

58. Schick, Federal Budget, supra note 44, at 203. These fights were not just institutional turf wars but reflected broader factors such as partisanship, economic policy disagreements, interparty dynamics, and coordination needs. See Fenno, supra note 28, at 43–46; Kiewet & McCubbins, supra note 28, at 63–72; Stewart, supra note 45, at 79–80, 85–87, 128–30.

59. See Schick, Federal Budget, supra note 44, at 194–99; Amanda Chuzi, Note, Defense Lawmaking, 120 Colum. L. Rev. 995, 1002–04 (2020).

60. Bill Heniff Jr., Cong. Rsch. Serv., RS20371, Overview of the Authorization-Appropriations Process 1 (2012).

61. Schick, Federal Budget, supra note 44, at 250–57; see also Karen L. Haas, H. Comm. on Rules, 116th Cong., Rules of the House of Representatives 35 (2019); Standing Rules of the Senate, S. Doc. No. 113-18, r. XXV, at 20 (2013).

62. Louis Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Cath. U. L. Rev. 51, 53 (1979) ("The real world of the legislative process differs considerably from the idealized model of the two-step authorization-appropriation procedure.").

representing sixty-one percent of the annual budget.[63] Appropriations committees have encroached on authorizing committees' domains as well, with substantive riders and legislative provisions regularly appearing in annual appropriations bills.[64] Over the twentieth century, appropriators have also vied with congressional and party leaders for control of the appropriations process, with leadership becoming dominant in the 1980s and 1990s.[65]

Today, the official contours of the budget and appropriations process remain largely those set by the 1974 Congressional Budget Act (CBA).[66] Under the CBA, the President submits an annual budget to Congress in early February, and the House and Senate Budget Committees are supposed to adopt a concurrent resolution specifying an overall budget amount by mid-April.[67] Then the Appropriations Committees divide the total amount listed for annual appropriations among their twelve subcommittees, and each subcommittee drafts an appropriations bill that allocates its amount among the different agencies and programs within its jurisdiction.[68] Although appropriations bills may provide set amounts for particular activities, more often that detailed allocation is provided in the committee report and the bill lists the amount of budget authority by budget account, with each account often spanning multiple activities.[69] The subcommittee bills then must pass the full Appropriations Committees, the House and Senate, and be signed by the President by the start of the fiscal year on the first of October.[70] This legislation constitutes the basic annual appropriations for the fiscal year, but it represents only part of the federal

63. See Schick, Federal Budget, supra note 44, at 209–12; The Federal Budget in 2019: An Infographic, CBO (Apr. 15, 2020), https://www.cbo.gov/publication/56324 [https://perma.cc/9PKS-AYW7] (noting that mandatory spending made up $2.7 trillion out of $4.4 trillion in federal outlays in FY2019).

64. Walter J. Oleszek, Mark J. Oleszek, Elizabeth Rybicki & Bill Heniff Jr., Congressional Procedures and the Policy Process 59–63 (11th ed. 2020); Schick, Federal Budget, supra note 44, at 268.

65. See Geoffrey W. Buhl, Scott A. Frisch & Sean Q. Kelly, Appropriations to the Extreme: Partisanship and the Power of the Purse, *in* Politics to the Extreme 3, 9–10 (Scott A. Frisch & Sean Q. Kelly eds., 2013); Schick, Federal Budget, supra note 44, at 219–23.

66. 2 U.S.C. §§ 631–645(a) (2018). Congress has occasionally adopted measures that impose budget caps or sequesters. See, e.g., Balanced Budget and Emergency Deficit Control (Gramm–Rudman–Hollings) Act of 1985, Pub. L. No. 99-177, § 251, 99 Stat. 1038, 1063–72 (codified as amended at 2 U.S.C. § 901 (2018)); Budget Control Act of 2011, Pub. L. No. 112-25, § 101, 125 Stat. 240, 241–45 (codified as amended at 2 U.S.C. § 901 (2018)).

67. 2 U.S.C. § 632.

68. Schick, Federal Budget, supra note 44, at 230, 234 tbl.9-6.

69. 2 U.S.C. § 632(d); U.S. Gov't Accountability Off., GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process app. I, at 107 (2005), https://www.gao.gov/assets/80/76911.pdf [https://perma.cc/9DHR-ECG6]; Schick, Federal Budget, supra note 44, at 263.

70. Schick, Federal Budget, supra note 44, at 234 tbl.9-6.

government's actual annual spending.[71] Substantial sums are also provided by permanent appropriations and supplemental appropriations, the latter intended for unexpected or unusual demands during the year.[72] The CBA also provides for a reconciliation process that was originally intended as a streamlined means for aligning the enacted budget with fiscal items such as revenue, direct spending, and the debt ceiling.[73] Increasingly, however, reconciliation has been used to enact controversial tax-related legislation that could not pass through ordinary procedures.[74]

On the executive branch side, the task of developing the President's budget and then executing appropriations acts falls to OMB, housed in the Executive Office of the President. Critically, agencies must obtain OMB's approval of their budget requests and comply with OMB's instructions regarding what activities and programs to include.[75] They are also prohibited from disclosing disagreement with the budget requests the President ultimately submits to Congress.[76] The Antideficiency Act requires that appropriations be apportioned over the year and among the different programs and activities that each budget account covers.[77] The executive branch is generally allowed to reapportion or reprogram funds to different uses within the account to which they were appropriated, but transfers between accounts require statutory authority.[78] Agencies propose initial allotments of appropriated funds, but the actual apportionment of funds that governs the agency is made by OMB. OMB's approval is also needed for any reprogramming or transfer of appropriated funds.[79]

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71. See id. at 215.

72. Kate P. McClanahan, James V. Saturno, Megan S. Lynch, Bill Heniff Jr. & Justin Murray, Cong. Rsch. Serv., R42647, Continuing Resolutions: Overview of Components and Practices 2–4 (2019); Schick, Federal Budget, supra note 44, at 256–63.

73. See Schick, Federal Budget, supra note 44, at 142.

74. Oleszek et al., supra note 64, at 72–77; see also Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress 127–30 (5th ed. 2017) (noting the use of reconciliation to enact controversial policies); Emily Cochrane, How Biden Could Use Reconciliation to Speed Through His Pandemic Aid Plan, N.Y. Times. (Jan. 27, 2021), https://www.nytimes.com/2021/01/27/us/politics/budget-reconciliation-coronavirus-stimulus.html (on file with the *Columbia Law Review*) (discussing the possibility that Democrats may use reconciliation to enact President Biden's pandemic relief bill in the face of Republican opposition and a divided Senate).

75. Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-11, Preparation, Submission, and Execution of the Budget § 10.5 (2020), https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf [https://perma.cc/F9AV-KRA5] [hereinafter Circular A-11].

76. Id. § 22.1; Pasachoff, The President's Budget, supra note 24, at 2213–27.

77. 31 U.S.C. § 1512(a)–(b) (2018).

78. Id. § 1532; GAO Red Book, GAO-16-464SP, supra note 53, ch. 2, at 38–43; Michelle D. Christensen, Cong. Rsch. Serv., R43098, Transfer and Reprogramming of Appropriations: An Overview of Authorities, Limitations, and Procedures 2–8 (2013).

79. Circular A-11, supra note 75, § 120; Pasachoff, The President's Budget, supra note 24, at 2231.

Congress has also tasked GAO with a number of responsibilities related to budget execution, such as auditing agencies' expenditure of funds as well as investigating and reporting on potential Antideficiency Act and ICA violations.[80]

### B. *Appropriations Today*

1. *Polarization, Appropriations, and Congress.* — This official tale of the budget and appropriations process—often called the "regular order" of appropriations[81]—has always been somewhat aspirational; after all, Congress has enacted appropriations bills on time only four times since 1977.[82] But the gap between the ideal and the real has grown much larger of late. For example, Congress enacted a budget resolution each year from 1975 to 1998 but has failed to do so seven times in the period FY2011–FY2020.[83] Appropriations bills are now regularly packaged together into omnibus or minibus legislation to increase their chances of enactment. In addition, they are often adopted well past the start of the new fiscal year, necessitating enactment of multiple continuing resolutions (CRs) in the interim.[84] Congress is also foregoing authorization legislation for appropriations. In FY2020, $332 billion—nearly a third of all discretionary spending—had an expired authorization, up from $121 billion in FY2000.[85]

The congressional move to "unorthodox" procedures is certainly not unique to appropriations and results from the same political forces undermining Congress's ability to function in other domains.[86] Historically,

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80. 2 U.S.C. §§ 686–687 (2018); U.S. Gov't Accountability Off., GAO-16-463SP, Principles of Federal Appropriations Law ch. 1, at 21–24 (4th ed. 2016) [hereinafter GAO Red Book, GAO-16-463SP].

81. Peter Hanson, Too Weak to Govern: Majority Party Power and Appropriations in the U.S. Senate 3, 17–18 (2014).

82. See, e.g., Drew Desilver, Congress Has Long Struggled to Pass Spending Bills on Time, Pew Rsch. Ctr. (Jan. 16, 2018), https://www.pewresearch.org/fact-tank/2018/01/16/congress-has-long-struggled-to-pass-spending-bills-on-time [https://perma.cc/DF8R-RZE9] (noting that Congress has enacted all of the budget and appropriations measures called for in the CBA on time only four times since the CBA's enactment in 1974).

83. Megan S. Lynch, Cong. Rsch. Serv., R44296, Deeming Resolutions: Budget Enforcement in the Absence of a Budget Resolution 5 tbl.1 (2019).

84. Hanson, supra note 81, at 19, 25–32; Molly E. Reynolds, The Senate Passed Another "Minibus" Funding Package. Now What?, Brookings (Aug. 2, 2018), https://www.brookings.edu/blog/fixgov/2018/08/02/minibus-funding-package-now-what [https://perma.cc/4GH7-XGWL].

85. CBO, Expired and Expiring Authorizations of Appropriations: Fiscal Year 2020, at 3 tbl.1 (2020), https://www.cbo.gov/system/files/2020-02/56082-CBO-EEAA.pdf [https://perma.cc/B9JX-VLNS]; CBO, Unauthorized Appropriations and Expiring Authorizations 4 tbl.1 (2000), https://www.cbo.gov/system/files/2019-04/12063-UAEA.pdf [https://perma.cc/TU7X-ZVY4]; Chuzi, supra note 59, at 1011–15 & tbl.1.

86. See Thomas E. Mann & Norman J. Ornstein, It's Even Worse than It Looks: How the American Constitutional System Collided with the New Politics of Extremism, at xiii–xiv

appropriations were an area of bipartisanship, but the intense partisan polarization that has dominated Congress since the 1990s has now also overtaken the appropriations process.[87] Sharp partisan differences on spending priorities, budget deficits, and the loss of earmarks also impede bipartisan compromise.[88] Meanwhile, the narrow margins of party control in each chamber of Congress operate to reinforce party loyalty, discourage interparty compromise, and increase the chances of divided government.[89] At the same time, these political factors increase the difficulty of enacting legislation generally, making it more likely that members of Congress will seek to attach substantive measures to appropriations bills to take advantage of appropriations' must-pass status and the greater ease of getting appropriations measures to the floor.[90]

This turn toward enacting substantive policy through the appropriations process is evident in increased reliance on appropriations riders, which are provisions in appropriations legislation that limit (or occasionally require) the use of funds for purposes or activities an agency is authorized to undertake.[91] Riders are plainly aimed at changing governmental policy: Their prime use is to forestall the executive branch from proceeding with or developing particular agency initiatives, and they frequently surface in prominent policy disputes when the President and Congress are at odds.[92] A 2010 study of riders found that approximately

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(2012) (identifying two main sources of political dysfunction in Congress); Sarah Binder, The Dysfunctional Congress, 18 Ann. Rev. Pol. Sci. 85, 94–98 (2015). See generally Sinclair, supra note 74 (describing the "unorthodox lawmaking" phenomenon).

87. See Buhl et al., supra note 65, at 4, 7–11; Schick, Federal Budget, supra note 44, at 219–22; see also Lee Drutman & Peter C. Hanson, Does Regular Order Produce a More Deliberative Congress?: Evidence from the Annual Appropriations Process, *in* Can America Govern Itself? 155, 178–79 (Frances E. Lee & Nolan McCarty eds., 2019) (identifying substantial bipartisanship still on appropriations but noting the dangers that polarization poses); Nolan McCarty, The Decline of Regular Order in Appropriations: Does it Matter, *in* Transformation of American Politics: Activist Government and the Rise of Conservatism 223, 224–32 (Paul Pierson & Theda Skocpol eds., 2007) (describing the impact of polarization on appropriations, but arguing that other factors appear in play as well).

88. Buhl et al., supra note 65, at 11–12 (earmarks); David Scott Louk & David Gamage, Preventing Government Shutdowns: Designing Default Rules for Budgets, 86 U. Colo. L. Rev. 181, 202–16 (2015) (spending priorities and deficits).

89. See Frances E. Lee, Insecure Majorities: Congress and the Perpetual Campaign 2–3 (2016).

90. Buhl et al., supra note 65, at 9–10; Richard J. Lazarus, Congressional Descent: The Demise of Deliberative Democracy in Environmental Law, 94 Geo. L.J. 619, 635–37 (2006).

91. Curtis W. Copeland, Cong. Rsch. Serv., RL34354, Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions 3–12 (2008) (providing examples of riders that limit or require rulemaking). Because appropriations riders usually limit or prohibit activities, they are often called "limitation riders." Jason A. MacDonald, Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions, 104 Am. Pol. Sci. Rev. 166, 166 (2010).

92. Lazarus, supra note 90, at 632–52 (describing riders in the 1990s and noting their decline with the Bush II presidency); Thomas O. McGarity, Deregulatory Riders Redux, 1

300 riders affecting policy were included every year in appropriations bills proposed by the House Appropriations Committee in the ten-year period FY1993–FY2003, with most riders prohibiting specific agency actions.[93] Although appropriations riders are a longstanding phenomenon, several commentators trace an uptick in the use of such riders to the 1990s, coinciding with the 1994 Republican takeover of the House and the onset of intensified partisan divides in Congress.[94]

The Affordable Care Act (ACA) represents one of the most prominent uses of appropriations to push through controversial policy. The ACA itself was initially passed through the reconciliation process to bypass the Senate filibuster.[95] More recently, appropriations riders substantially curtailed the money available to cover insurer costs under the ACA's now-expired risk corridor program, and Congress also has refused to appropriate funds to cover cost-sharing obligations that the ACA imposes on insurers.[96] A particularly striking feature of these moves is that despite Congress's refusal to appropriate the necessary amounts, the government remained statutorily obligated to cover insurers' costs under the ACA's risk corridor and cost-sharing programs.[97] According to Matthew Lawrence, these instances are part of a newly emerging phenomenon of "legislative failure to appropriate funds necessary to honor a government commitment."[98] To be sure, Congress regularly funds programs at less than their fullest authorized amount, and often at less than the amount needed for agencies to meet all their statutory responsibilities in a timely and effective fashion.[99] But in the past, these failures to fund tended to involve discretionary spending; Congress almost always honored mandatory spending

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Mich. J. Env't & Admin. L. 33, 53–56, 64–70 (2012) (detailing the environmental appropriations riders during Obama's second term); Price, supra note 33, at 371–78 (discussing riders affecting Guantánamo Bay transfers, diplomacy, and White House advisors).

93. MacDonald, supra note 91, at 767, 769–70.

94. See, e.g., McGarity, supra note 92, at 35–36, 39–40; see also Neal E. Devins, Regulation of Government Agencies Through Limitation Riders, 1987 Duke L.J. 456, 462–63, 472–73 (tracing the uses of riders back to the 1870s).

95. Abbe R. Gluck, Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking, 129 Harv. L. Rev. 62, 78–79 (2015) [hereinafter Gluck, Imperfect Statutes].

96. See supra text accompanying notes 9–10.

97. Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020); Cmty. Health Choice, Inc. v. United States, 141 Fed. Cl. 744, 757–62 (2019), aff'd in part, rev'd in part, remanded, 970 F.3d 1364 (Fed. Cir. 2020).

98. Lawrence, Disappropriation, supra note 30, at 25; see also id. at 27–44 (providing other examples).

99. See Oleszek et al., supra note 64, at 46; Rena Steinzor & Sidney Shapiro, The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment 4–5, 10, 12, 19, 24–25 (2010).

obligations in statutes, even as such commitments came to dominate annual expenditures.[100]

A second manifestation of growing partisanship in appropriations is the increased reliance on temporary funding and greater risk of government shutdowns. Shutdowns occur when there is a funding gap of more than trivial duration, with Congress failing to pass either appropriations legislation for the new fiscal year or a CR to keep the government funded in the interim.[101] But what transforms a funding gap into a shutdown is the Antideficiency Act's prohibition on receipt of voluntary services, which since 1981 has been read to necessitate furloughing most federal employees when there is a funding gap.[102] Otherwise, employees could continue to work with the expectation they would be paid once appropriations are made.[103] As shutdowns are tied to annual appropriations from Congress, programs that are funded by permanent appropriations or agency-generated funds such as user fees can continue to operate.[104]

Shutdowns are not a new phenomenon. The government has had twenty funding gaps since the CBA was enacted in 1974, and early on a number of these gaps lasted for ten days or more.[105] But over time the shutdown threat has become more constant, a result of growing polarization and stark partisan differences over the budget. Since 1981, ten funding gaps have lasted more than a day and involved significant costs and furloughs, and three shutdowns have occurred in the last ten years.[106] As significant, Congress is relying more often and for longer periods on temporary stopgap funding through CRs to keep the government

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100. Lawrence, Disappropriation, supra note 30, at 26–27.

101. Clinton T. Brass, Ida A. Brudnick, Natalie Keegan, Barry J. McMillion, John W. Rollins & Brian T. Yeh, Cong. Rsch. Serv., RL34680, Shutdown of the Federal Government: Causes, Processes, and Effects 1–2 (2018). A funding gap of a day or less, or one occurring over a weekend, may not lead to an actual government shutdown. Id. at 2.

102. See id. at 4–5; James V. Saturno, Cong. Rsch. Serv., RS20348, Federal Funding Gaps: A Brief Overview 4 (2019) (noting that prior to 1981, "the expectation was that agencies would not shut down during a funding gap").

103. This expectation was codified into law with an amendment to the Antideficiency Act in early 2019. Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat. 3 (to be codified at 31 U.S.C. § 1341).

104. See U.S. Gov't Accountability Off., GAO-19-289T, Government-Wide Inventory of Accounts with Spending Authority and Permanent Appropriations, Fiscal Years 1995 to 2015, at 5–6 (2018) (statement of Tranchau (Kris) T. Nguyen, Acting Dir., Strategic Issues & Julia C. Matta, Managing Assoc. Gen. Coins., Off. of the Gen. Couns.) https://www.gao.gov/assets/700/695894.pdf [https://perma.cc/3Q7A-5W4K]; DeMuth & Greve, supra note 32, at 561–63.

105. See Saturno, supra note 102, at 1–3 & tbl.1 (2019) (counting only those funding gaps for which there was at least one full day without budget authority).

106. Id. at 3 tbl.1; see also Josh Hicks, How Much Did the Shutdown Cost the Economy?, Wash. Post (Oct. 18, 2013), https://www.washingtonpost.com/news/federal-eye/wp/2013/10/18/how-much-did-the-shutdown-cost-the-economy (on file with the *Columbia Law Review*) (detailing the cost of the 2013 shutdown).

running.[107] Both shutdowns and temporary funding impose significant costs on agencies—disrupting activities and creating uncertainty that makes it difficult for agencies to plan effectively.[108]

2. *Presidential Administration and Appropriations.* — Eloise Pasachoff has described in detail the many ways in which the ordinary budget drafting and execution processes allow the President, through OMB, to wield significant power over agency policy and push presidential priorities.[109] Even so, multiple scholars and budget participants report that Presidents are now exercising more control over federal spending than at any point in the recent past.[110] This is part of a broader recent trend toward presidential administration and greater presidential control over administrative government.[111] Deepening partisan polarization is also an instigating factor here, making Presidents both less able to push their agendas through Congress and more committed on partisan grounds to advancing certain policies.[112]

President Trump's transfer of appropriated funds to build the southern border wall is exhibit A of such enhanced presidential control.[113]

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107. Continuing resolutions have been used every fiscal year since FY1998 and their period of use generally increased over the period FY1998–FY2020. McClanahan et al., supra note 72, at 12–13 tbl.3; see also id. at 10 (noting that no appropriation bills were enacted before the start of the fiscal year fifteen times in the period FY1978–FY2010, with ten of those instances happening since FY2001).

108. On the costs of shutdowns, see U.S. Senate, Perm. Subcomm. on Investigations, The True Cost of Shutdowns 31, 45, 172 (2019); Brass et al., supra note 101, at 13–19, 25–36. On the costs of temporary funding, see U.S. Gov't Accountability Off., GAO-18-368T, Continuing Resolutions and Other Budget Uncertainties Present Management Challenges 4–6 (2018) (statement of Heather Krause, Dir., Strategic Issues), https://www.gao.gov/assets/690/689914.pdf [https://perma.cc/5X8A-Q5ER]; U.S. Gov't Accountability Off., GAO-09-879, Continuing Resolutions: Uncertainty Limited Management Options and Increased Work Load in Selected Agencies 24–25 (2009), https://www.gao.gov/assets/300/295970.pdf [https://perma.cc/V84Y-TF5E]; Philip G. Joyce, IBM Ctr. for Bus. of Gov't, The Costs of Budget Uncertainty: Analyzing the Impact of Late Appropriations 20–29 (2012), http://www.businessofgovernment.org/sites/default/files/The%20Costs%20of%20Budget%20Uncertainty.pdf [https://perma.cc/SGB8-9UMX].

109. Pasachoff, The President's Budget, supra note 24, at 2186; see also Lewis, supra note 56, at 10–15 (discussing OMB efforts to influence agency spending and instances when presidential influence is likely to be strong).

110. Emily Cochrane, As Trump Seizes Wall Money, Congress's Spending Power Weakens, N.Y. Times (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/us/politics/congress-spending-trump-wall.html (on file with the *Columbia Law Review*).

111. See Jerry L. Mashaw & David Berke, Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience, 35 Yale J. on Regul. 549, 605–07 (2018); Kathryn A. Watts, Controlling Presidential Control, 114 Mich. L. Rev. 683, 692–706 (2016).

112. See Mashaw & Berke, supra note 111, at 561–62; Gillian E. Metzger, Agencies, Polarization, and the States, 115 Colum. L. Rev. 1739, 1752–57 (2015).

113. See supra text accompanying notes 4–8.

The FY2019 appropriations bill that ended the 2018–2019 shutdown provided $1.375 billion for "construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector," whereas Trump had requested $5.7 billion for a steel wall along the full border.[114] After signing the bill, Trump immediately declared a national emergency and claimed authority to redirect up to $8.1 billion that had been appropriated for other purposes to constructing the wall, with the DOD being the main source of the additional funds.[115] Among the statutes that the Administration cited for this authority, Section 8005 of the FY2019 DOD Appropriations Act empowered the Secretary of Defense, upon determining "that such action is necessary in the national interest," to transfer up to $4 billion among DOD's appropriations accounts, provided certain conditions were met.[116] Under longstanding norms, agencies obtain approval from their appropriations subcommittees before going ahead with a transfer, but here DOD went ahead in the face of disapproval from both the House Appropriations and Armed Services Committees. A joint resolution terminating the emergency declaration passed both houses of Congress twice, but both times it was vetoed by the President.[117] DOD initially transferred $1.8 billion to be used for border wall construction and subsequently committed additional amounts, invoking other transfer and reprogramming authority.[118] In one of his first executive actions upon assuming office, President Biden issued an executive order terminating the national emergency and calling for a pause in wall construction, a review of the wall's funding, and a plan for redirecting funds.[119]

Presidents use their control over budget execution to advance their policy interests in other ways than reprogramming appropriated funds.

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114. Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 230(a)(1), 133 Stat. 13, 28; Marianne Levine & Quint Forgey, White House Asks Congress for $5.7 Billion for 'Steel Barrier', Politico (Jan. 6, 2019), https://www.politico.com/story/2019/01/06/trump-emergency-border-wall-government-shutdown-1082712 [https://perma.cc/FQ7A-5NLR].

115. Proclamation No. 9844, 84 Fed. Reg. 4949, 4949–50 (Feb. 15, 2019); President Donald J. Trump's Border Security Victory, White House (Feb. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-border-security-victory [https://perma.cc/N6R2-JF5Y].

116. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 (CAA), Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).

117. California v. Trump, 963 F.3d 926, 932 n.3 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618 (2020); GAO Red Book, GAO-16-464SP, supra note 53, ch. 2, at 46–47; see also Letter from Peter J. Visclosky, Rep., Ind., to David L. Norquist, Under Sec'y of Def., Comptroller, Dep't of Def. (Mar. 26, 2019) (denying DOD's request to reprogram funds for the border wall).

118. *California v. Trump*, 963 F.3d at 947 (noting the invocation of 10 U.S.C. § 2808 (2018)); Eloise Pasachoff, The President's Budget Powers in the Trump Era, *in* Executive Policymaking: The Role of the OMB in the Presidency 69, 80–82 (Meena Bose & Andrew Rudalevige eds., 2020) [hereinafter Pasachoff, Trump Era Budget Powers].

119. See Proclamation No. 10142, 86 Fed. Reg. 7225, 7225–26 (Jan. 20, 2021).

During the 2018–2019 shutdown, the Trump Administration took a broad view of the extent to which nonessential personnel paid through annual appropriations could work to process payments funded through permanent appropriations without violating the Antideficiency Act.[120] Meanwhile, the Obama Administration implemented its deferred action initiative for parents of legal permanent residents and dreamers (DAPA) through the Customs and Immigration Service, which is funded almost entirely through fees. The effect was to immunize the initiative against congressional Republican efforts to stop it through an appropriations rider.[121] Congress sometimes responds in kind, providing independent funding streams that exempt agencies from presidential budgetary oversight, albeit also from congressional appropriations control. A prominent recent example is the Consumer Financial Protection Bureau (CFPB), created in 2010, which by statute is entitled to the amount of funding from the Federal Reserve's earnings that the CFPB Director deems reasonably necessary to carry out its responsibilities, up to a maximum percentage of the Federal Reserve's own expenses.[122]

Grant awards and conditions on federal spending are another key mechanism for presidential influence.[123] Prominent uses of federal grants to push presidential policy occurred during the Obama Administration, a prime example being the Race to the Top Competitive Grant Program at the Department of Education.[124] Although the American Reinvestment and Recovery Act provided $5 billion for competitive grants and innovations awards in education, it left the specifics of how these funds were to be allotted largely to the Secretary of Education's discretion.[125] The resultant Race to the Top Program put a premium on grant applicants that adopted educational policy measures the Obama Administration favored and was effective in getting states and localities to adopt even controversial

120. See Nat'l Treasury Emps. Union v. United States, Nos. 19-50 (RJL), 19-51 (RJL), 19-62 (RJL), 2019 WL 266381, at *1 (D.D.C. Jan. 18, 2019); see also Am. Fed'n of Gov't Emps. v. Rivlin, No. 95-2115 (EGS), 1995 WL 697236, at *1 (D.D.C. Nov. 17, 1995) (challenging a requirement that employees work without pay during the 1995–1996 shutdowns).

121. DeMuth & Greve, supra note 32, at 562–63.

122. 12 U.S.C. § 5497(a) (2018).

123. See Hudak, supra note 28, at 3, 6–7, 55–60, 62 (emphasizing the importance of grants and arguing that funding allocations reflect presidential electoral interests and the strategic importance of swing states); Christopher R. Berry, Barry C. Burden & William G. Howell, The President and the Distribution of Federal Spending, 104 Am. Pol. Sci. Rev. 783, 797 (2010) (arguing that "members of the president's party receive systematically more federal outlays").

124. Timothy J. Conlan, Federalism and Policy Instability: Centralization and Decentralization in Contemporary American Federalism, 64 Revue française de science politique (English ed.) 27, 38–39 (2014).

125. The American Recovery and Reinvestment Act of 2009: Saving and Creating Jobs and Reforming Education, U.S. Dep't of Educ. (Mar. 7, 2009), https://www2.ed.gov/policy/gen/leg/recovery/implementation.html [https://perma.cc/CBE8-9EMZ].

policies, such as common state standards and expanding the number of charter schools.[126] Loan programs can provide similar opportunities for exercise of executive branch control. The Obama Administration significantly expanded access to student loan forgiveness by taking advantage of a permanent appropriation for student loans.[127]

The Trump Administration also sought to advance its policies through grant conditions, most notably by attaching new conditions on grants under the DOJ's Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program, the main source of federal criminal justice funding to states and localities.[128] The new conditions were meant to assist the federal government in immigration law enforcement and curtail immigration sanctuary policies.[129] Trump also suggested that any federal funds to help states and localities with the fiscal impact of COVID-19 might be conditioned on revoking sanctuary policies.[130] And the Trump Administration imposed new conditions on grants under the competitive grant Teen Pregnancy Prevention Program (TPPP).[131]

On the flip side, Presidents also exert control by refusing to spend appropriated funds at odds with presidential policies. Although prior Presidents had occasionally "impounded" funds in this fashion, President Nixon developed the practice into a high art, impounding tens of billions of appropriated funds and triggering enactment of the ICA.[132] Both President George W. Bush and President Obama proposed few deferrals and no rescissions, but President Trump was more active. In 2018, he proposed $15 billion in rescissions targeting foreign aid, which Congress rejected on a bipartisan basis, and in the last week of his presidency he proposed an additional $27.4 billion in rescissions that President Biden

126. Gillian E. Metzger, Federalism Under Obama, 53 Wm. & Mary L. Rev. 567, 590–92 (2011); Grover J. "Russ" Whitehurst, Did Congress Authorize Race to the Top?, Brookings (Apr. 27, 2010), https://www.brookings.edu/opinions/did-congress-authorize-race-to-the-top [https://perma.cc/YH4X-Z5Z9].

127. See Sohoni, supra note 32, at 1699–700.

128. City of Chicago v. Barr, 961 F.3d 882, 886–87 (7th Cir. 2020).

129. Press Release, Dep't of Just., Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial [https://perma.cc/8PRA-KMT4] (last updated Nov. 8, 2017); see also City of Philadelphia v. Att'y Gen., 916 F.3d 276, 280 (3d Cir. 2019) (describing the conditions).

130. Justin Wise, Trump Suggests Coronavirus Funding for States Could Be Tied to Sanctuary City Policies, Hill (Apr. 28, 2020), https://thehill.com/homenews/administration/495170-trump-suggests-coronavirus-funding-for-states-could-be-tied-to [https://perma.cc/2RMX-SFG9].

131. Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs., 946 F.3d 1100, 1106 (9th Cir. 2020).

132. Abner J. Mikva, Congress: The Purse, the Purpose, and the Power, 21 Ga. L. Rev. 1, 11 (1986).

quickly reversed.[133] Far more high profile was the Trump Administration's delay in releasing hundreds of millions of dollars Congress appropriated in military aid for Ukraine.[134] The Trump Administration also withheld funds appropriated to assist Puerto Rico and the WHO.[135]

3. *Appropriations Litigation.* — Appropriations matters are often thought of primarily in terms of the political branches. But they are increasingly showing up in court, with many of the developments detailed above prompting litigation.

As mentioned, both the ACA risk corridor appropriations rider and President Trump's border wall funds transfer have surfaced at the Supreme Court and also triggered substantial litigation in lower courts.[136]

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133. Off. of Mgmt. & Budget, Exec. Off. of the President, Proposed Rescission of Budget Authority (2018), https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/05/POTUS-Rescission-Transmittal-Package-5.8.2018.pdf [https://perma.cc/BB8L-FR9L]; Updated Rescission Stat., Fiscal Years 1974–2017, B-330091, 2018 WL 4679596, at *2 (Comp. Gen. Sept. 27, 2018); U.S. Gov't Accountability Off., GAO-10-320T, Impoundment Control Act: Use and Impact of Rescission Procedures 4–5 (2009) (statement of Susan A. Poling, Managing Assoc. Gen. Couns., Off. of Gen. Couns.), https://www.gao.gov/assets/130/123935.pdf [https://perma.cc/9X72-NAPF] (noting that Bush proposed no rescissions but undertook "cancellations" that GAO found to violate the ICA); Pasachoff, Trump Era Budget Powers, supra note 118, at 7–9; Justine Coleman, Biden Reverses Trump Last-Minute Attempt to Freeze $27.4 Billion in Programs, Hill (Jan. 31, 2021), https://thehill.com/homenews/administration/536704-biden-reverses-trump-last-minute-attempt-to-freeze-274-billion-of [https://perma.cc/7JZA-QMAY].

134. See Letter from Mark R. Paoletta, Gen. Couns., Off. of Mgmt. & Budget, to Tom Armstrong, Gen. Couns., U.S. Gov't Accountability Off. 1–2 (Dec. 11, 2019), https://www.justsecurity.org/wp-content/uploads/2019/12/ukraine-clearinghouse-letter_from_omb_gc_paoletta_to_gao_gc_armstrong-2019.12.11.pdf [https://perma.cc/G4FA-XSQG]; Aaron Blake, Philip Bump & Irfan Uraizee, The Full Trump-Ukraine Impeachment Timeline, Wash. Post, https://www.washingtonpost.com/graphics/2019/politics/trump-impeachment-timeline/ (on file with the *Columbia Law Review*) (last updated Jan. 27, 2020). In addition to the $214 million, the appropriated funds put on hold included up to $168 million in foreign military financing through the State Department. See Off. of Mgmt. & Budget—Withholding of Ukr. Sec. Assistance, B-331564, 2020 WL 241373, at *6 (Comp. Gen. Jan. 16, 2020).

135. Katy O'Donnell, Trump to Lift Hold on $8.2B in Puerto Rico Disaster Aid, Politico (Jan. 15, 2020), https://www.politico.com/news/2020/01/15/trump-to-lift-hold-on-82b-in-puerto-rico-disaster-aid-099139 [https://perma.cc/NB4A-4WN8]; Erica Werner, Congressional Democrats Allege Trump's Move to Defund World Health Organization Is Illegal, Wash. Post (Apr. 15, 2020), https://www.washingtonpost.com/us-policy/2020/04/15/trump-who-democrats (on file with the *Columbia Law Review*).

136. See supra notes 6–8 and accompanying text. A number of lower courts have ruled the funds transfer unlawful. See, e.g., Washington v. Trump, 441 F. Supp. 3d 1101, 1115–23 (W.D. Wash. 2020) (finding that the funding plan violates the CAA and 10 U.S.C. § 2808 (2018)); El Paso County v. Trump, 408 F. Supp. 3d 840, 856–60 (W.D. Tex. 2019) (concluding that the funding plan violates the CAA), aff'd in part, rev'd on other grounds, 982 F.3d 332 (5th Cir. 2020); see also Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 46–51 (D.D.C. 2020) (holding that environmental groups' suit could proceed on ultra vires and appropriations act claims); Alvarez v. Trump, No. 19-cv-404 (TNM), 2019 WL 1771148 (D.D.C. Apr. 22, 2019) (indicating that the landowners voluntarily dismissed the

After the Obama Administration's effort to fund cost-sharing through a permanent appropriation was enjoined, numerous insurers sued successfully in the Court of Claims to recover the unpaid cost-sharing payments.[137] A number of federal defendants charged with marijuana crimes have also succeeded in enjoining their prosecutions after Congress enacted an appropriations rider prohibiting expenditure of appropriated DOJ funds in a way that would prevent states from implementing their medical marijuana laws.[138]

Many lawsuits were also filed by states and localities challenging the new Byrne JAG conditions. Most district and appellate courts held that the Trump Administration lacked statutory authorization for the new conditions, concluding that the conditions were at odds with the plain meaning of the underlying statute and with the Byrne JAG's status as a formula grant program rather than one where awards are left to agency discretion.[139] However, the Second Circuit upheld the conditions, creating a circuit split.[140] Several courts have similarly invalidated the Trump Administration's new conditions on TPPP grants, unanimously concluding that at least some of the new conditions violate the plain meaning of the program's authorizing statute.[141]

Shutdowns and temporary funding measures, on the other hand, have provoked relatively little litigation.[142] During the lengthy 2018–2019 shutdown, government employees required to work without pay sued, claiming inter alia that the government was violating the Antideficiency

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case); U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 10 (D.D.C. 2019), aff'd in part, vacated in part, remanded, 976 F.3d 1 (D.C. Cir. 2020) (finding no standing).

137. See Cmty. Health Choice, Inc. v. United States, 141 Fed. Cl. 744, 751, 753–54 (2019), aff'd in part, rev'd in part, remanded, 970 F.3d 1364 (Fed. Cir. 2020); supra text accompanying note 9.

138. See, e.g., United States v. Pisarki, 965 F.3d 738, 740–43 (9th Cir. 2020); see also United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016) (holding that a rider prohibited the DOJ from spending appropriated funds "for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws").

139. See, e.g., City of Chicago v. Barr, 961 F.3d 882, 887–88 (7th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 32–34, 37–38, 42–43 (1st Cir. 2020); City of Los Angeles v. Barr, 941 F.3d 931, 934 (9th Cir. 2019); City of Philadelphia v. Att'y Gen., 916 F.3d 276, 279, 287–88, 290 (3d Cir. 2019).

140. New York v. U.S. Dep't of Just., 951 F.3d 84, 103–04, 123–24 (2d Cir. 2020), rehearing en banc denied, 2020 WL 3956260 (2d Cir. July 13, 2020).

141. See, e.g., Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs., 946 F.3d 1100, 1113–14 (9th Cir. 2020); Multnomah County v. Azar, 340 F. Supp. 3d 1046, 1068–69 (D. Or. 2018); Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Hum. Servs., 337 F. Supp. 3d 308, 320–24 (S.D.N.Y. 2018).

142. One reason is no doubt that the frequently short duration of shutdowns sometimes leads suits that are filed to be declared moot once the shutdown ends. See, e.g., Atlas Brew Works, LLC v. Barr, 391 F. Supp. 3d 6, 9 (D.D.C. 2019), aff'd, 820 F. App'x 4, 5 (D.C. Cir. 2020).

Act by reading its emergency exception too broadly.[143] That claim might well have legs on the merits; GAO subsequently held that some of the Trump Administration's excepted employee determinations violated the Act.[144] Not surprisingly, however, the district court was unwilling to second guess agency determinations about which employees were needed on an emergency basis to protect human safety and property.[145] On the other hand, the Court of Federal Claims held that employees forced to work without pay during the 2013 shutdown were owed damages under the Fair Labor Standards Act, notwithstanding that the Antideficiency Act precluded the government from paying their wages.[146] Contractors have also brought administrative claims to recoup costs imposed by shutdowns, with their success often turning on the nature of their contracts and the presence of particular clauses.[147] Still, despite these occasional suits for compensation, shutdowns and reliance on temporary spending remain predominantly political events.

This lack of litigation is also true of impoundments. Agency efforts to withhold appropriated funds occasionally lead to suits but not violations of the ICA.[148] Instead, administrations have generally released the funds at issue in the face of congressional outcry or a GAO finding of an ICA violation.[149] In January 2020, GAO determined that the hold on Ukraine's

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143. See supra note 120 and accompanying text.

144. Nat'l Archives & Recs. Admin.—Publ'n of Fed. Reg. During the Fiscal Year 2019 Lapse in Appropriations, B-331091, 2020 WL 4013489, at *1 (Comp. Gen. July 16, 2020) (concluding that publications in the Federal Register violated the Act); see also U.S. Dep't of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations, B-331093, 2019 WL 5390179, at *1 (Comp. Gen. Oct. 22, 2019) (finding that using annually funded employees to process tax returns violated the Act).

145. Nat'l Treasury Emps. Union v. United States, Nos. 19-50 (RJL), 19-51 (RJL), 19-62 (RJL), 2019 WL 266381, at *2 (D.D.C. Jan. 18, 2019); see also Am. Fed'n of Gov't Emps. v. Rivlin, No. 95-2115 (EGS), 1995 WL 697236, at *4 (D.D.C. Nov. 17, 1995) (denying plaintiffs' motion for a temporary restraining order during the 1995–1996 shutdowns because it was still unclear "how much deference, if any, . . . the court [should] afford to the Executive Branch's construction and interpretation of the relevant statutes and regulations").

146. Martin v. United States, 130 Fed. Cl. 578, 584–85 (2017).

147. Compare Cleveland Telecomms. Corp. v. United States, 39 Fed. Cl. 649, 650 (1997) (holding that the contractor "should bear the risk of the unforeseen furlough" under a firm fixed-price contract), with Raytheon STX Corp. v. Dep't of Com., GSBCA No. 14296-COM, 00-1 BCA P 30632 (1999) (determining that "cost-reimbursement contracts obligate the Government to bear the increased costs attributable to the shutdown"). See generally Darrell Curren, Note, Government Contracting in the Shadow of the October 2013 Shutdown, 44 Pub. Cont. L.J. 349 (2015) (reviewing "the use of risk allocation clauses in the different types of contracts used between the government and contractors").

148. E.g., In re Aiken County, 725 F.3d 255, 259–60 (D.C. Cir. 2013); see infra notes 258–261.

149. See, e.g., Impoundment of the Advanced Research Projects Agency–Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018, B-329092, 2017 WL 6335684, at *1 (Comp. Gen. Dec. 12, 2017); U.S. Gov't

funds violated the ICA, rejecting OMB's claim that it was simply an acceptable programmatic delay.[150] According to GAO, the hold was undertaken to advance President Trump's policy goals, not because of some external factor, and as a result represented a prohibited policy deferral.[151]

## II. THE MARGINALIZATION OF APPROPRIATIONS IN PUBLIC LAW DOCTRINE

Viewed cumulatively, these phenomena demonstrate the contemporary prominence of appropriations as a tool of government control, as well as the extent to which current appropriations and budget practices are deviating from the past regular order. These examples also show how appropriations issues are spilling over into court. It is increasingly apparent that appropriations are playing a starring role in the contemporary administrative state that lawyers cannot ignore.

Yet despite their importance, appropriations are marginalized in public law doctrine. This is particularly true of constitutional and administrative law doctrines and litigation, where appropriations are often ignored or given little weight. Appropriations arise more frequently in statutory interpretation case law but still are often downplayed in their import. And while public law in the political branches engages with appropriations extensively, marginalization is arguably evident here too, as political polarization and legislative–executive disputes increasingly push established appropriations measures to the sidelines.

The term marginalization often carries a negative connotation, and the discussion here identifies several analytic flaws underlying the lack of attention to appropriations in public law doctrine. But as Parts III and IV make clear, whether appropriations' doctrinal marginalization is problematic is a hard question that cannot be determined in gross. The focus in this Part is simply on demonstrating the many ways in which such doctrinal exclusion of appropriations occurs.

### A. *The How of Marginalization*

Literally conveying being pushed to the margins or sidelines, to be marginalized means to be "relegate[d] . . . to an unimportant or powerless

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Accountability Off., Impoundment Control Act: Use and Impact of Rescission Procedures 2 (1999) (statement of Gary L. Kepplinger, Assoc. Gen. Couns., Off. of Gen. Couns.), https://www.gao.gov/assets/110/108076.pdf [https://perma.cc/5LVS-4CW8] (noting funds generally released and that GAO had filed suit only once).

150. Off. of Mgmt. & Budget—Withholding of Ukr. Sec. Assistance, B-331564, 2020 WL 241373, at *7 (Comp. Gen. Jan. 16, 2020) (concluding that the hold was undertaken to advance President Trump's policy goals, not because of some external factor, and as a result represented a prohibited policy deferral); Letter from Mark R. Paoletta to Tom Armstrong, supra note 134, at 9.

151. *Withholding of Ukr. Sec. Assistance*, 2020 WL 241373, at *7.

position."[152] Several distinct mechanisms of appropriations marginalization repeat across the doctrines discussed below. As a result, an initial taxonomy of the different forms that appropriations marginalization takes is in order. Such a taxonomy helps not only to identify the shared marginalization dynamic linking these varying doctrines but also to underscore that marginalization in doctrine and marginalization in practice are distinct phenomena. Sometimes these two phenomena overlap, but sometimes the effect of appropriations' doctrinal marginalization is actually to expand their real-world import.

1. *Exceptionalism, Silence, Assimilation, and Jurisdictional Exclusion.* — A first form of marginalization is what we might call appropriations exceptionalism, or the application of legal rules that are specific to appropriations. Examples span the areas of doctrine detailed below, from the singling out of appropriations for different constitutional and procedural requirements that apply to regulation, to the frequent barriers to judicial review of appropriations actions, to the imposition of special canons for interpreting appropriations measures. Although appropriations are thereby pushed to the edges of standard public law doctrines, whether they are marginalized in the sense of being rendered unimportant depends on the specific substantive rules to which they are then subject.

A second approach, appropriations silence, is diametrically opposite. Rather than fashioning new legal requirements because of appropriations' distinct features, this technique stands out for not taking heed of appropriations. Sometimes courts ignore appropriations altogether, while other times courts assimilate appropriations to existing legal doctrines without considering whether those rules fit the appropriations context. It is worth noting, however, that not all appropriations assimilation takes the form of appropriations silence. In some instances, courts explain why they are subjecting appropriations measures to standard legal rules. The distinctive trait of appropriations silence, by contrast, is that courts fail to engage with appropriations or to discuss whether the fact that appropriations are involved should affect the legal analysis. This distinction matters because such express appropriations assimilation is not necessarily a manifestation of appropriations marginalization; appropriations are neither pushed to the sidelines nor ignored but instead engaged with by courts and treated as part of standard public law. Instead, like appropriations exceptionalism, whether express appropriations assimilation ends up marginalizing appropriations will turn on the reasons the court gives for assimilating appropriations and the impact of such assimilation in practice.

The final approach is jurisdictional exclusion. A striking array of jurisdictional obstacles either preclude bringing appropriations claims in court or at least allow such claims to be excluded. Such jurisdictional exclusion sometimes takes the form of appropriations exceptionalism,

152. Marginalize, Merriam-Webster, https://www.merriam-webster.com/dictionary/marginalize [https://perma.cc/7L54-KSSX] (last visited Jan. 15, 2021).

with efforts to challenge appropriations measures or actions facing unique barriers to judicial review. Sometimes, however, jurisdictional exclusion results from appropriations silence and assimilation. For example, given the frequent generalized aspect of appropriations and the fact that appropriations statutes are primarily geared to funding agencies, application of standard standing or zone of interests requirements may serve to exclude appropriations challenges from courts.[153]

2. *Marginalization in Doctrine Versus Marginalization in Practice.* — As this description of the different methods of marginalization highlights, the focus in what follows is primarily on appropriations' marginalization in doctrine. Sometimes doctrinal marginalization also serves to limit the impact an appropriations measure has in practice, but that is not always the case. On the contrary, some forms of doctrinal marginalization can operate to enhance the potency of appropriations as a governance tool. This variation between doctrine and practical effect results in large part because doctrinal marginalization can allow appropriations to operate with fewer judicially enforceable legal constraints. Hence, not surprisingly it is doctrinal marginalization of the jurisdictional exclusion variety that is most likely to expand the practical import of an appropriations measure. Other forms of marginalization are less clearly identified with particular practical outcomes—at times enhancing the power of an appropriations measure and at times undermining it.

But generalizations here are easily misleading. In particular, it would be a mistake to conclude that freeing appropriations from judicially enforceable constraints enhances the potency of appropriations across the board. Although jurisdictional exclusion makes appropriations a particularly powerful tool for the President and the executive branch, the effect on Congress is mixed. Congress similarly benefits from preserving flexibility in appropriations and from being able to wield its political influence without risk of judicial interference, but jurisdictional obstacles also limit Congress's ability to rely on courts to enforce statutory appropriations requirements on a recalcitrant executive branch. These variations—between doctrine and practice, and in the positions of the two political branches—make it necessary to consider appropriations' status in political branch public law as well as in public law doctrine. This Part undertakes both.

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153. See infra text accompanying notes 175–183; see also Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599–607, 609–10 (2007) (rejecting taxpayer standing to challenge an executive branch funding decision for violating the Establishment Clause and distinguishing precedent allowing taxpayer standing to challenge appropriations statutes on this ground); see also id. at 618 (Scalia, J., concurring in the judgment) (arguing that precedent should be repudiated and no taxpayer standing be allowed).

### B. *Appropriations and Constitutional Law*

As the contemporary disputes noted above underscore, appropriations are central to the separation of powers in practice, and courts frequently invoke the appropriations power as a tool Congress can use to control the President.[154] Nonetheless, much separation of powers case law ignores appropriations altogether or pushes appropriations matters out of the courts' purview.

1. *Delegation.* — A good place to start is with delegation. Challenges to congressional delegations as unconstitutional grants of legislative authority to the executive branch are the "Energizer Bunny" of the separation of powers; notwithstanding longstanding precedent repeatedly knocking down such challenges, they continue to be made.[155] Indeed, delegation challenges appear to be gaining traction. In *Gundy v. United States*, Justice Gorsuch criticized the Court's current approach to delegation, under which a delegation is constitutional provided Congress provides an "intelligible principle," very loosely defined, to guide executive decisionmaking.[156] At issue in *Gundy* was a provision of the Sex Offender Registration and Notification Act (SORNA) that authorized the Attorney General "to specify the applicability" of the Act's sex offender registration requirements to individuals convicted before SORNA was adopted and "prescribe rules for [their] registration."[157] Writing for himself, Chief Justice Roberts, and Justice Thomas, Gorsuch argued that this provision was an unconstitutional delegation because it allowed the Attorney General to make "unbounded policy choices" about whether and how SORNA would apply to pre-Act offenders.[158] Although a plurality of the Court upheld the provision under the intelligible principle test in an opinion written by Justice Kagan,[159] Justice Alito separately voiced his willingness to reconsider the nondelegation doctrine, as did Justice Kavanaugh after he joined the Court.[160]

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154. For a recent example, see Comm. on the Judiciary v. McGahn, 951 F.3d 510, 528–29 (D.C. Cir. 2020), vacated en banc, 968 F.3d 755 (D.C. Cir. 2020).

155. Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 330 (2002); see also Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (Kagan, J.) (reviewing precedent).

156. *Gundy*, 139 S. Ct. at 2138–40 (Gorsuch, J., dissenting).

157. 34 U.S.C. § 20913 (2018). SORNA was part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 34 U.S.C. § 20911 (2018)).

158. *Gundy*, 139 S. Ct. at 2132–33 (Gorsuch, J., dissenting).

159. See id. at 2129 (plurality opinion) (Kagan, J.).

160. See id. at 2131 (Alito, J., concurring in the judgment) (signaling support for reconsidering "the approach we have taken [to nondelegation] for the past 84 years"); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement on the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine . . . may warrant further consideration in future cases.").

Interestingly, in concluding that the delegation at issue in *Gundy* was unconstitutionally broad, Justice Gorsuch considered only the text of SORNA itself.[161] Justice Kagan similarly focused only on SORNA, among other things describing detailed statements in SORNA's legislative history indicating that members of Congress were particularly concerned with registering 100,000 past offenders who had not complied with existing registration requirements.[162] In so doing, both Gorsuch and Kagan were in good company; the Court's prior delegation precedents similarly look only at the organic or substantive statute authorizing the agency action in question.[163] More specifically, these cases are prime examples of appropriations silence—they do not look to see if Congress has appropriated funds or authorized appropriations for the action the agency took. Yet if congressional determination of policy is the concern, then action taken by Congress to fund or authorize funding for the agency's policy should be relevant.[164]

In the case of SORNA, Congress has not specifically addressed the registration of pre-Act offenders in its appropriations legislation or subsequent authorization of appropriations. But since 2007, it has regularly appropriated substantial sums for SORNA implementation, including up to $20 million annually for sex offender management assistance and up to $50 million for the U.S. Marshals Service to assist in enforcing registration requirements.[165] The Attorney General's final guidelines on registration by pre-Act offenders were issued in 2009. Hearings and reports held in 2008 and 2009 make clear that Congress was monitoring sex offender registration efforts and aware that the registration requirements were being

161. See *Gundy*, 139 S. Ct. at 2131–32 (Gorsuch, J., dissenting).

162. Id. at 2126–29 (plurality opinion) (Kagan, J.).

163. E.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473–76 (2001).

164. See Jonathan H. Adler & Christopher J. Walker, Delegation and Time, 105 Iowa L. Rev. 1931, 1956–57, 1966, 1979–80 (2020) (identifying periodic enactment of legislation authorizing appropriations as a means of addressing concerns raised by delegation, although arguing that limitations of the appropriations process mean that enactment of appropriations measures alone is not enough to address delegation concerns).

165. E.g., Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. B, tit. II, 131 Stat. 135, 204 (appropriating $20 million for state and local sex-offender-management assistance and $1 million for a national registry); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. B, tit. II, 121 Stat. 1844, 1911 (2007) (appropriating roughly $4.2 million for sex offender management); William J. Krouse, Celinda Franco & Nathan James, Cong. Rsch. Serv., RL34530, Department of Justice (DOJ) Appropriations for FY2008 and FY2009, at 14, 27 (Aug. 1, 2008) (noting the allocation of $50 million in funding for U.S. Marshals to enforce the Adam Walsh Act and other sex offender enforcement funding); Garrine P. Laney, Cong. Rsch. Serv., RL32800, Sex Offender Registration and Community Notification Law: Recent Legislation and Issues 1–3, 30–32 (June 3, 2008) (describing proposed and enacted legislation on sex offenders and noting funding amounts).

applied retroactively.[166] Despite being aware of the Attorney General's application of SORNA and enacting legislation annually to fund SORNA registration and enforcement, Congress never precluded the Attorney General from using appropriated funds to register pre-Act offenders. To the contrary, language in appropriations subcommittee reports from FY2009 to FY2011 repeatedly voiced disappointment that the Obama Administration did not request additional funds so that the U.S. Marshals Service could address the "estimated caseload of 100,000 noncompliant sex offenders."[167] These were the same 100,000 past offenders that Justice Kagan flagged as of particular concern to Congress in enacting SORNA and that would only be subject to SORNA's requirements if the Attorney General applied SORNA retroactively. In addition, the conference reports—reflecting the views of both houses—signaled that Congress intended the Administration to be, if anything, more aggressive in enforcing SORNA with respect to these individuals, specifically recommending that additional funds of $20 million and more be spent to reduce the caseload of noncompliant offenders.[168]

In short, Congress not only appropriated significant funds to support federal enforcement of SORNA well aware that the Attorney General had

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166. See Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 1–3, 51, 57–58, 158 (2009); Commerce, Justice, Science, and Related Agencies Appropriations for Fiscal Year 2008: Hearing on H.R. 3093 and S. 1745 Before the Subcomm. on Comm., Just., Sci. & Related Agencies of S. Comm. on Appropriations, 110th Cong. 290 (2007) (statement of Sen. Richard Shelby) ("As many as 100,000 [sex offenders] are not in compliance with their registry requirements . . . . How long would it take the [U.S. Marshals] Service to fully enforce this law, and what kind of resources would be required?").

167. H.R. Rep. No. 110-919, at 49–50 (2008) ("The Committee is disappointed that the Administration did not request funds for the Marshals to execute their responsibilities under the Adam Walsh . . . Act. Although this legislation was passed in 2006, the Marshals still have no significant resources dedicated to addressing an estimated caseload of 100,000 noncompliant sex offenders."); see also S. Rep. No. 111-34, at 61 (2009) (noting the same concern that the U.S. Marshals Service would need substantially greater resources to "fulfill its Adam Walsh Act responsibilities" but not invoking the 100,000 number); H.R. Rep. No. 111-149, at 60–61 (2009) ("If the Marshals are going to make a significant impact on the estimated caseload of 100,000 non-compliant sex offenders, a concerted, multiyear effort to dedicate additional resources to the program is necessary."); S. Rep. No. 110-397, at 51 (2008) ("The Committee is deeply concerned that the administration has failed to request resources to carry out this act."). In FY2011, the relevant Senate subcommittee raised its estimate of noncompliant offenders to 135,000. S. Rep. No. 111-229, at 57 (2010).

168. See H.R. Rep. No. 111-366, at 665 (2009) (Conf. Rep.) ("The conference agreement includes an increase of $27,500,000 over the budget request to expand Adam Walsh Act enforcement activities in districts across the country."); see also S. Rep. No. 111-34, at 61 (recommending an increase of $35 million); H.R. Rep. No. 111-149, at 61 ("[T]he Committee's recommendation includes $20,000,000 to expand Adam Walsh Act enforcement . . . .").

applied registration requirements retroactively, it repeatedly recommended allocating more money specifically to expand enforcement of SORNA against past offenders. True, these actions do not take the form of an express statutory endorsement of the Attorney General's approach. But they surely call into question any suggestion that the Attorney General applied SORNA to pre-Act offenders without congressional sanction. Nonetheless, the opinions in *Gundy*—and the briefs—all ignored these appropriations actions entirely. Moreover, in a rare recent instance when claims were made that Congress had sanctioned agency action through appropriations—involving the actions of the Federal Housing Finance Authority (FHFA) with respect to the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) during the last financial crisis—the Fifth Circuit en banc was highly resistant to the suggestion of such appropriations ratification.[169]

2. *Article III.* — When it comes to Article III, the marginalization of appropriations is baked into the doctrine. This is particularly true with respect to challenges arguing that Article III is violated by adjudication occurring outside of federal courts. Traditionally, Article III adjudication was not required for matters of public right, which centrally included disputes over public funds. *Murray's Lessee v. Hoboken Land & Improvement Co.*, the paradigmatic case in which Article III adjudication was held to be not required on public right grounds, involved a federal customs collector found to owe the government over $1.3 million after an administrative audit.[170] Over the course of the twentieth century, the Supreme Court moved away from giving the presence of a public right such talismanic importance, but more recent jurisprudence has returned to drawing a strict doctrinal divide between public and private rights in determining whether Article III adjudication is required.[171] In a similar vein, sovereign immunity doctrine operates to bar suits for money from the federal government without its consent. As Congress has tied its consent to being sued to certain venues, those seeking wrongfully withheld funds are often forced to sue in the Court of Federal Claims rather than ordinary district courts.[172]

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169. Collins v. Mnuchin, 938 F.3d 553, 572–73 (5th Cir. 2019) (en banc), cert. granted, 141 S. Ct. 193 (2020).

170. 59 U.S. (18 How.) 272, 275 (1856).

171. Compare Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) ("When determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between 'public rights' and 'private rights.'"), with Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853–54 (1986) ("[T]his Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights . . . .").

172. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 89–90 (7th ed. 2015) [hereinafter Hart & Wechsler].

This exemption from Article III is a form of appropriations exceptionalism, with the Court expressly invoking the fact that government funds are involved as a reason why Article III adjudication is not required and may even be precluded.[173] On the other hand, the public rights doctrine is not limited to instances of appropriations but applies more broadly to civil adjudication in which the government is a party or the right at issue "is integrally related to particular Federal Government action."[174] In that sense, the exemption of public funds disputes from the mandatory scope of Article III can also be viewed as simply the assimilation of appropriations matters into a broader category for which Article III adjudication is optional, rather than as an instance of appropriations-specific exceptionalism. Either way, the net result is to push some adjudication of appropriations disputes to the Article III sidelines.

A further sign of appropriations marginalization under Article III comes from case law on standing. Courts regularly find that entities and individuals who claim a right to funds under a statute, or even a right to compete for funds, have standing to challenge executive branch actions that operate to deny them those funds.[175] But establishing standing to challenge government uses of funds or grants to third parties, without also claiming a right to the funds in question, is more difficult.[176] Courts can be skeptical of plaintiffs' claims of particularized injury and causality in such appropriations contexts.[177] Litigants sometimes resort to asserting their interests as taxpayers, but the Court has repeatedly held that "[a]s a general matter, the interest of a federal taxpayer in seeing that Treasury

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173. See *Murray's Lessee*, 59 U.S. (18 How.) at 281–84; Haines v. Fed. Motor Carrier Safety Admin., 814 F.3d 417, 425–26 (6th Cir. 2016) (explaining that federal sovereign immunity bars suit for money damages in federal district court).

174. Stern v. Marshall, 564 U.S. 462, 489–91 (2011).

175. See, e.g., Clinton v. City of New York, 524 U.S. 417, 429–36 (1998); Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs., 946 F.3d 1100, 1109 (9th Cir. 2020). This ability of individuals to sue for money they were entitled to by law was established implicitly in Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 623–26 (1838), which affirmed a writ of mandamus ordering the postmaster general to pay out money owed to the plaintiffs.

176. See Sohoni, supra note 32, at 1706–07.

177. See, e.g., Allen v. Wright, 468 U.S. 737, 740 (1984) (rejecting standing to challenge the IRS's grant of tax-exempt status to racially discriminatory schools on the ground that the plaintiffs did not show that this grant of financial benefits had harmed their children's access to desegregated schools and that the injury of funding racially discriminatory schools was too generalized); El Paso County v. Trump, 982 F.3d 332, 339–42 (5th Cir. 2020) (concluding that standing was lacking to challenge diverted appropriations because the alleged injury was too general, causation insufficiently direct, and redressability unclear). But see California v. Trump, 963 F.3d 926, 935–40 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618 (2020) (concluding that states met the tripartite standing requirements because the government's use of funds to build the border wall harmed their environmental interests).

funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing."[178]

To be sure, establishing standing based on claims of injury from the impact of government actions on third parties can be difficult outside the appropriations context as well.[179] But these generalized injury and causation problems are especially predictable when it comes to appropriations, given appropriations' programmatic aspect and the optional character of financial incentives. Yet courts silently assimilate appropriations to standard standing analysis, without addressing how well that analysis fits the appropriations realities.

The appropriations context is also home to many disputes over congressional standing. In *Raines v. Byrd*, the Supreme Court held that individual members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, which authorized the President to cancel statutory provisions granting discretionary budget authority, direct spending, or limited tax relief within five days of enactment.[180] *Raines* is striking in its refusal to take account of Congress's constitutional role in appropriations, instead insisting that the case should be governed by the same standing rules that apply to private suits against governmental action.[181] Recently, the en banc D.C. Circuit concluded that neither *Raines* nor subsequent Supreme Court case law addressing state legislative standing precluded the House of Representatives from suing to challenge the Trump Administration's transfer of funds appropriated for other purposes to build the border wall.[182] According to the D.C. Circuit, the House met the conventional requirements of standing because the transfer caused it a distinct institutional injury, in the form of the loss of its constitutionally protected power to prevent expenditures, that it could seek to redress in court.[183]

3. *Congressional and Presidential Powers.* — Appropriations play a surprisingly tangential role in cases addressing the scope of congressional and presidential powers, given how central the congressional–presidential

178. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599–600 (2007); see also United States v. Richardson, 418 U.S. 166, 174–75 (1974) (rejecting a taxpayer's effort to enforce the Appropriations Clause's statement-and-account requirement to obtain a statement of the CIA's expenditures).

179. See, e.g., Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992).

180. 521 U.S. 811, 829–30 (1997) (discussing 2 U.S.C. § 691(a) (1996)).

181. Id. at 820–21 ("[A]ppellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete."). But see id. at 841–42 (Breyer, J., dissenting) (finding that the "systematic nature of the harm" to the validity of the laws, including "all appropriations laws," presented a stronger claim for justiciability than the majority observed).

182. See U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 6–13 (D.C. Cir. 2020).

183. See id. at 8–9, rev'ing 379 F. Supp. 3d 8, 14–16, 18–19 (D.D.C. 2019) (holding in the district court that the House lacked standing to challenge President Trump's transfer and reprogramming of military funds to build the border wall, relying heavily on *Raines*).

rivalry over spending is in practice to the balance of power between the branches. One of the rare instances of appropriations factoring into such assessments involves invocation of military appropriations as signaling congressional sanction for presidentially initiated military activities. Although courts rarely review the constitutionality of presidential uses of force, several decisions emphasized congressional appropriations in rejecting legal challenges to the Vietnam War.[184] Congress subsequently stated in the War Powers Resolution that congressional authorization for the use of force shall not be inferred from "any provision of law . . . including any provision contained in any appropriation Act," unless the provision specifically so states.[185] Yet appropriations continue to factor into executive branch justifications for use of force and are occasionally identified by courts as reasons why challenges to military actions are nonjusticiable political questions.[186]

Several leading separation of powers decisions have emerged from the appropriations and budget context. Strikingly, however, the Court engaged in appropriations silence and ignored the appropriations dimension of these cases, other than to note how appropriations provided the factual background of the dispute at hand. *Clinton v. City of New York* is a prime example.[187] The Line Item Veto Act at issue there was inextricably tied to the appropriations process; not only did the Act authorize presidential vetoing of revenue and spending measures, but the Act emerged from concerns over Congress's lack of budget discipline and prior battles over presidential impoundments of appropriated funds.[188] Yet in holding the Act unconstitutional, the majority focused on the

184. See, e.g., Orlando v. Laird, 443 F.2d 1039, 1042 & n.2 (2d Cir. 1971) ("Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia . . . ."); see also Banks & Raven-Hansen, supra note 37, at 119 (characterizing the Vietnam War appropriations as "legitimating," from which "the executive infers authority for national security actions"). But see Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) ("This court cannot be unmindful of what every schoolboy knows . . . . A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations . . . because he was unwilling to abandon without support men already fighting.").

185. 50 U.S.C. § 1547(a)(1) (2018).

186. Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000) (noting that Congress could end the United States' involvement in Yugoslavia by "cut[ting] off funds for the American role in the conflict"); Authorization for Continuing Hostilities in Kos., 24 Op. O.L.C. 327, 346–65 (2000) (discussing in detail whether appropriations have authorized the use of force and concluding that emergency supplemental appropriations for military operations in Kosovo had such an effect, even though a bill authorizing the action failed in Congress).

187. 524 U.S. 417 (1998).

188. See H.R. Rep. No. 104-491, at 15 (1996) (Conf. Rep.) ("This legislation . . . moves to meet [the demand for greater fiscal accountability] by enhancing the President's ability to eliminate wasteful federal spending and to cancel special tax breaks."); see also *Clinton*, 524 U.S. at 449, 451 (Kennedy, J., concurring) (noting the relationship to excessive spending).

Constitution's general bicameralism and presentment requirements for enacting legislation and did not address whether the appropriations context might affect how—or whether—those requirements apply.[189]

*Bowsher v. Synar* similarly involved a budget measure, the Balanced Budget and Emergency Deficit Control Act of 1985, known as the Gramm–Rudman–Hollings Act.[190] It set maximum deficit amounts that declined over five years until reaching zero and directed the Comptroller General—the head of GAO who was removable by a joint resolution by Congress—to specify required spending reductions by program if the annual federal deficit exceeded the allowed amount, after reviewing reductions proposed by OMB and CBO.[191] The arrangement was challenged as an unconstitutional exercise of congressional control over law execution.[192] Writing in dissent to uphold the measure, Justice White suggested that the fact appropriations were involved mattered to the analysis:

> Determining the level of spending by the Federal Government is not by nature a function central either to the exercise of the President's enumerated powers or to his general duty to ensure execution of the laws; rather, appropriating funds is a peculiarly legislative function, and one expressly committed to Congress by Art. I, § 9 . . . . Delegating the execution of this legislation . . . to an officer independent of the President's will does not deprive the President of any power that he would otherwise have or that is essential to the performance of the duties of his office.[193]

But Justice White was a lone voice. A majority of the Court concluded that this scheme entailed Congress retaining control of an executive officer in violation of the separation of powers,[194] while two concurring Justices held it was an instance of part of the legislative branch acting outside of the Constitution's requirement of bicameralism and presentment.[195] Neither opinion gave any attention to the fact that the appropriations power was involved.

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189. *Clinton*, 524 U.S. at 438–40; see also id. at 440–41, 446–47 (briefly rejecting the relevance of the executive branch's historical discretion over expenditures and the statute's lockbox aspect). The dissenters gave more play to the appropriations background, arguing that the President's discretion under the Act was "no broader than the discretion traditionally granted the President in his execution of spending laws." Id. at 466–69 (Scalia, J., dissenting); id. at 470–71, 483 (Breyer, J., dissenting).

190. 478 U.S. 714, 717–18 (1986).

191. Id.

192. Id. at 719–21.

193. Id. at 763 (White, J., dissenting).

194. Id. at 733–34 (majority opinion).

195. Id. at 737 (Stevens, J., concurring).

Finally, appropriations largely have not factored into analysis of whether agencies are too insulated from presidential control. To begin with, unitary executive claims that the Constitution grants the President full control over all executive branch officers and decisionmaking rarely engage with the fact that Congress's power of the purse allows it to impose quite detailed instructions on the executive branch.[196] In addition, courts have given little consideration to whether an agency has access to independent funding and what the impact of that budgetary independence might mean. Indeed, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court went beyond appropriations silence to expressly dismissing the significance of appropriations.[197] There, Chief Justice Roberts's majority opinion dismissed the fact that the budget of the Public Company Accounting Oversight Board (PCAOB) was entirely controlled by the Securities and Exchange Commission (SEC), deeming questions of "who controls the agency's budget requests and funding" to be "bureaucratic minutiae" not relevant to the separation of powers challenge at hand.[198]

There are signs that this exclusion of appropriations from jurisprudence on presidential power may be changing. Some courts invalidating the Trump Administration's conditions on Byrne JAG grants held that the conditions violated the separation of powers,[199] and the Ninth Circuit also raised separation of powers concerns in the border wall litigation.[200] Even

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196. See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1183 n.149 (1992) ("Neither the unitary executive debate nor the jurisdiction-stripping debate has yet turned on the scope of Congress's ability to use the appropriations power to undermine the separation of powers."). For a rare discussion of the President's spending dependence as a sign of limits on presidential control of the executive branch, see Saikrishna B. Prakash, Fragmented Features of the Constitution's Unitary Executive, 45 Willamette L. Rev. 701, 702, 711–12 (2009).

197. 561 U.S. 477 (2010).

198. Id. at 499–500, 504; see also id. at 524 (Breyer, J., dissenting) (noting that "who controls the agency's budget requests and funding . . . [is] more likely to affect the President's power to get something done" than a power of at-will removal but otherwise not mentioning appropriations); Morrison v. Olson, 487 U.S. 654, 660–63 (1988) (upholding the constitutionality of the independent counsel without discussing that the DOJ had to pay the counsel's costs but could not control them, nor referencing the multiple provisions in the independent counsel statute specifying costs the counsel could incur); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 96 (D.C. Cir. 2018) (en banc) ("The CFPB's independent funding source has no constitutionally salient effect on the President's power."), abrogated by Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

199. See City & County of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018); City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 639 (E.D. Pa. 2017); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 943 (N.D. Ill. 2017).

200. California v. Trump, 963 F.3d 926, 943 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618 (2020); Sierra Club v. Trump, 963 F.3d 874, 887 (9th Cir. 2020), cert. granted, 141 S. Ct. 618 (2020); Sierra Club v. Trump, 929 F.3d 670, 686–87, 689, 701–04 (9th Cir. 2019).

more significant is *Seila Law LLC v. Consumer Financial Protection Bureau* from last Term, in which the Court held that removal protection for the Director of the Consumer Financial Protection Bureau violated the President's constitutional powers.[201] In reaching this result, Chief Justice Roberts noted the CFPB's independent budget authority, arguing that the "CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control" by denying the President's ability to influence the agency's actions through "budgetary controls."[202] Appropriations may also factor in the latest removal power challenge involving the FHFA, pending before the Court when this Article went to press.[203] Not only does the FHFA also enjoy budgetary autonomy, the action challenged in the case arose out of the government's provision of hundreds of billions of dollars to Fannie Mae and Freddie Mac—two government-sponsored enterprises—during the last recession.[204]

Yet so far, these references to appropriations in presidential power disputes have been fleeting and undeveloped. Even in *Seila*, appropriations were treated as a sideshow, with the Court focusing predominantly on the CFPB's single-director structure and removal protection. Remarkably, moreover, in *Seila* the Court only mentioned the impact of the CFPB's budgetary independence on the President. It never considered whether making the CFPB Director removable at will—and thus giving the President broad control over an agency that operates independent of Congress's budgetary constraints—would raise separation of powers concerns of its own.

At the same time that appropriations are excluded from jurisprudence on presidential power, questions about presidential power are often ignored in cases that focus on appropriations.[205] Courts generally approach challenges alleging that administrative actions violate statutes appropriating funds or providing grants solely as questions of statutory interpretation. As a result, they avoid the issue of whether the President enjoys any inherent constitutional power to spend without congressional authorization or to refuse to spend in the face of congressional direction. This avoidance is evident in numerous cases addressing President Nixon's impoundment of funds. Although Nixon claimed a right to refuse to

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201. 140 S. Ct. 2183, 2192 (2020).

202. Id. at 2204.

203. Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2019) (en banc), cert. granted, 141 S. Ct. 193 (2020).

204. See id. at 564–65, 567–68.

205. An exception is Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). There, the Court emphasized that "[i]f agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." Id. at 428.

spend with constitutional overtones,[206] the government defended the challenged impoundments in statutory terms, and the courts overwhelmingly rejected impoundments on a similar statutory basis.[207] The effect was to deny any presidential impoundment power not provided by statute, but courts let that implication go almost entirely unacknowledged.[208] According to Keith Whittington, the courts' limited intervention also made clear that "[c]ontrolling the constitutional budgeting process required institution building more than it required judicial pronouncements."[209] This recognition underlay enactment of the major 1974 budget reforms, both the CBA and the ICA, and Congress's assumption of a more active role in the budget process.[210]

4. *The Spending Power.* — It is hard to view spending power jurisprudence as an instance of doctrinal marginalization of appropriations. To be sure, these cases fall squarely in the camp of appropriations exceptionalism, with courts creating a body of doctrine specifically to govern the use of federal funds. But far from being pushed to the sidelines, questions about the constitutional significance of federal funds take center stage here. In the past, spending power cases have largely focused on claims that statutory spending conditions violate federalism or individual rights, but, as noted above, separation of powers has risen to the fore in many recent sanctuary cities decisions. These cases arose out of a Trump executive order directing that jurisdictions that willfully refuse to allow their agencies and employees to share immigration information with federal immigration authorities "are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes."[211] Concluding that this

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206. See 119 Cong. Rec. 4143 (1973) (statement of Rep. Pickle) ("The constitutional right for the President of the United States to impound funds . . . is absolutely clear." (internal quotation marks omitted) (quoting The Impoundment Battle, Wash. Post, Feb. 6, 1973 (quoting President Nixon))).

207. See Train v. City of New York, 420 U.S. 35, 43–44 (1975) (concluding that $5 billion to $7 billion appropriated for grants in FY1973–FY1975 to help cover the cost of municipal sewers and sewage treatment works were statutorily required to be allotted, rejecting President Nixon's instruction that no more than $2–3 billion be allotted); see also Brief for the Petitioner at 46 n.17, *Train*, 420 U.S. 35 (Nos. 73-1377, 73-1378), 1974 WL 187558 ("The question whether Congress's use of mandatory language can subsequently prevent the President from spending less than the total amount appropriated . . . presents difficult and complex constitutional issues involving the allocation of powers [that the Court need not reach].").

208. The Eighth Circuit noted in passing that "[i]t should require no citation of authority to reaffirm the proposition that the Secretary's authority is limited to carrying out the law according to its terms." State Highway Comm'n v. Volpe, 479 F.2d 1099, 1111 (8th Cir. 1973).

209. Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 168 (1999).

210. Id. at 168–73.

211. Exec. Order 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (referencing the requirement of 8 U.S.C. § 1373 (2012) that "a Federal, State, or local government entity or

condition on federal grants was not authorized by Congress, the Ninth Circuit and several other courts held that the executive order "violate[d] the constitutional principle of the Separation of Powers" because the Administration had "claimed for itself Congress's exclusive spending power . . . [and] also attempted to coopt Congress's power to legislate."[212]

Yet there is one way in which spending power doctrine could be said to marginalize appropriations: by leaving the spending of federal funds relatively free from judicially enforceable constitutional limits.[213] Although the Court has invalidated some spending measures as unconstitutional and imposed significant clear statement requirements,[214] the spending power remains less constrained than other major congressional authorities.[215] The textual requirement that spending must advance the "general Welfare" is left for political determination, and the courts are also highly deferential to the political branches on whether a spending condition is related to the federal interest in the program under which a grant is made.[216] Further, the Court has often rejected individual rights challenges to spending conditions, emphasizing the government's ability to use public funds to advance its preferred message and insisting that "[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds."[217]

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official may not prohibit . . . any government entity or official from sending to, or receiving from, . . . [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual").

212. City & County of San Francisco v. Trump, 897 F.3d 1225, 1234–35 (9th Cir. 2018); see also City of Chicago v. Barr, 961 F.3d 882, 887 (7th Cir. 2020) ("The executive branch has significant powers over immigration matters; the power of the purse is not one of them. This tendency to overlook the formalities of the separation of powers to address the issue-of-the-day has been seen many times by the courts, and it is no more persuasive now . . . ."). But see New York v. U.S. Dep't of Just., 951 F.3d 84, 111 (2d Cir. 2020) ("The Attorney General was authorized to impose the challenged Certification Condition and did not violate the . . . separation of powers by doing so.").

213. *NFIB*, 567 U.S. 519, 537 (2012); South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).

214. See Agency for Int'l Dev. v. Open Soc'y (*USAID*), 570 U.S. 205, 217 (2013) (ruling that a funding condition violated the First Amendment); *NFIB*, 567 U.S. at 580–82 (striking down a condition on Medicaid funds as coercive); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (implementing a clear statement requirement); United States v. Lovett, 328 U.S. 303, 315–17 (1946) (invalidating an appropriations measure as an unconstitutional bill of attainder).

215. *NFIB*, 567 U.S. at 537; see also Nat'l Endowment for the Arts v. Finley (*NEA*), 524 U.S. 569, 587–88 (1998) ("Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.").

216. *Dole*, 483 U.S. at 207–09; see also Samuel R. Bagenstos, Spending Clause Litigation in the Roberts Court, 58 Duke L.J. 345, 367–69 (2008).

217. *USAID*, 570 U.S. at 214; see also *NEA*, 524 U.S. at 572, 587–88 (upholding the requirement that NEA "tak[e] into consideration general standards of decency" in making grant awards); Rust v. Sullivan, 500 U.S. 173, 193–95 (1991) (upholding a prohibition on doctors in a government-funded program from discussing abortion with their patients).

Of course, even if this lack of constitutional limits is seen as marginalizing spending in constitutional doctrine, it has the opposite effect in practice. The federal government's ability to employ federal funds in ways that it cannot regulate enhances appropriations' usefulness as a policymaking tool. Indeed, the same is true of some other forms of appropriations' marginalization in constitutional law. The ability to adjudicate appropriations disputes in non–Article III contexts, or limitations on standing to challenge appropriations decisions, also serve to enhance appropriations' potency as mechanisms of action for the government.

### C. *Appropriations and Administrative Law*

For all that appropriations are sidelined in constitutional jurisprudence, their marginalization in administrative law is even more pronounced. Across a number of central domains in administrative law—administrative procedure, access to judicial review, and judicial review of administrative decisionmaking—appropriations are pulled out of the usual analytic frameworks. And often litigation over appropriations takes place in venues and under statutes quite different than those that dominate standard administrative law.

1. *Administrative Procedure.* — On the procedural front, the marginalization of appropriations stems not from administrative law doctrine but instead from the text of the Administrative Procedure Act (APA). Section 553 of the APA requires notice and an opportunity for comment, as well as publication and a statement of basis and purpose, for most agency rulemaking.[218] But it excepts rulemakings "to the extent that there is involved . . . a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."[219] A number of substantive statutes impose rulemaking requirements on benefit programs,[220] and many grantmaking agencies have waived this exemption in keeping with recommendations from the Administrative Conference of the United States.[221] But the exemption means that the use of standard rulemaking procedures may be optional for government actions involving loans,

218. 5 U.S.C. § 553 (2018).

219. Id. § 553(a)(2). Appropriations programs do not enjoy a similar categorical exemption from adjudication procedures, but the procedures mandated by the APA are likely to be limited because the applicability of formal adjudication requirements and the substance of the requirements themselves are often read narrowly. See Michael Asimow, ACUS Sourcebook on Federal Administrative Adjudication Outside the Administrative Procedure Act 15–18 (2019).

220. See, e.g., 42 U.S.C. § 1395hh(a)–(c) (2018) (imposing a notice, comment, and publication requirement for regulations promulgated under the Medicare Act).

221. ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8 (1992) (repealed 1995); see also, e.g., 29 C.F.R. § 2.7 (1981) (DOL); 36 Fed. Reg. 2532 (Jan. 28, 1971) (Department of Health, Education and Welfare).

grants, benefits, and contracts, all of which are closely tied to appropriations.[222] The impetus behind the APA exemption was the same idea that underlies the public rights doctrine that puts appropriations outside of Article III's strictures: Use of public property or receipt of public benefits and contracts was considered voluntary and a matter of privilege rather than of right, in contrast to instances when individuals had no choice but to adhere to governing regulations of their private conduct.[223] That traditional right–privilege distinction no longer governs procedural due process analysis but lives on in the APA's rulemaking exemption.[224]

A similar lack of statutorily mandated procedure surrounds other administrative decisions on appropriations, such as OMB and agency apportionment, reprogramming, and transfer decisions. Statutes often require agencies to notify the relevant appropriations subcommittees and subject-matter committees and wait a set period before transferring or reprogramming. In practice, the norm is for agencies to obtain committee approval, given that angering their appropriations overseers risks triggering a pullback in funding and transfer authority in the future.[225] But few other significant procedures are generally imposed; the government is not even currently required to provide public disclosure of its reprogramming and transfer decisions.[226] Reprogramming decisions, which occur within a single budget account, are especially hard for external observers to identify and police if agencies fail to disclose them.[227] And the Antideficiency

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222. Some agencies, such as the USDA, have rescinded their earlier waivers of the § 553(a)(2) exemption. See Public Participation in Rule Making, 36 Fed. Reg. 13,804 (July 24, 1971) (exempting rulemakings related to "public property, loans, grants, benefits, or contracts" from the notice and comment requirements); see also Revocation of Statement of Policy on Public Participation in Rulemaking, 78 Fed. Reg. 64,194 (Oct. 28, 2013) (rescinding the 1971 waiver of a § 553(a)(2) exemption).

223. See Arthur Earl Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts, 118 U. Pa. L. Rev. 540, 571–73 (1970).

224. As a result, individual determinations under benefit programs funded through appropriations may be subject to procedural due process requirements. E.g., Kapps v. Wing, 404 F.3d 105, 108 (2d Cir. 2005).

225. Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 Law & Contemp. Probs. 273, 288–91 (1993) [hereinafter Fisher, Legislative Veto]; see also GAO Red Book, GAO-16-464SP, supra note 53, ch. 2, at 46–47 (describing agency norms); cf. Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("[O]f course, we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences.").

226. Legislation that would require such disclosure was recently introduced in the House of Representatives. See Congressional Power of the Purse Act, H.R. 6628, 116th Cong., §§ 101–105, 201–214 (2020). But the bill ultimately did not receive a vote and was not enacted into law. H.R.6628—Congressional Power of the Purse Act, Congress.gov, https://www.congress.gov/bill/116th-congress/house-bill/6628/all-actions [https://perma.cc/K9WV-X2FD] (last visited Jan. 26, 2021).

227. Lewis, supra note 56, at 7; see also Pasachoff, The President's Budget, supra note 24, at 2251–62 (raising concerns about secrecy in budgeting generally, especially OMB's

Act simply requires apportionment and stipulates which official shall apportion without imposing any other procedures on how apportionment is done.[228] The APA's rulemaking exemption plays a role here too: Given that decisions setting requirements on future uses of government funds have been held to be rules, some reprogramming and apportionment decisions might trigger notice and comment requirements were it not for the exemption.[229]

2. *Access to Judicial Review.* — Perhaps no area demonstrates appropriations' marginalization in administrative law more than doctrines governing access to judicial review. To begin with, the sovereign immunity waiver in the APA is limited to those "seeking relief other than money damages."[230] The Supreme Court has read this language to allow an equitable action seeking specific relief, even if the effect of the relief would be to require an agency to pay funds.[231] But lower courts have held that in order to avoid being barred by sovereign immunity, a suit under the APA can seek only additional funds from the same appropriation under which the funds were mistakenly withheld.[232] Often, however, those appropriations are exhausted by the time suit is brought, leading to suits being dismissed as moot.[233]

Even when amounts remain available in an appropriation, the Supreme Court has rejected suits challenging agency allocation decisions under lump-sum appropriations on the grounds that such decisions are "committed to agency discretion under law" and not reviewable under Section 701(a)(2) of the APA.[234] In *Lincoln v. Vigil*, the Indian Health Service decided to discontinue the provision of clinical services to handi-

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role); Michelle Mrdeza & Kenneth Gold, Reprogramming Funds: Understanding the Appropriators' Perspective, Gov't Affs. Inst. at Georgetown Univ., http://gai.georgetown.edu/reprogramming-funds-understanding [https://perma.cc/8XG9-7L7Q] ("At some level, all agencies routinely move funds around within accounts as needs shift, and as a matter of sound budgeting. Much of this takes place without the knowledge of appropriators, or even high level agency officials.") (last visited Jan. 15, 2021).

228. 31 U.S.C. §§ 1512–1513 (2018).

229. See Sugar Cane Growers Co-op of Fla. v. Veneman, 289 F.3d 89, 95–97 (D.C. Cir. 2002); see also *Lincoln*, 508 U.S. at 196–98 & n.5 (stating that even if the decision by the Indian Health Service to discontinue using lump-sum appropriations to provide clinical services was a rule, it was exempt from notice and comment requirements as a general statement of policy, noting that the agency had waived its § 553(a)(2) exemption).

230. 5 U.S.C. § 702 (2018).

231. Bowen v. Massachusetts, 487 U.S. 879, 893–94 (1988).

232. See Modoc Lassen Indian Hous. Auth. v. Dep't of Hous. & Urb. Dev., 881 F.3d 1181, 1195–98 (10th Cir. 2017); County of Suffolk v. Sebelius, 605 F.3d 135, 140–44 (2d Cir. 2010); City of Houston v. Dep't of Hous. & Urb. Dev., 24 F.3d 1421, 1428 (D.C. Cir. 1994).

233. See, e.g., *County of Suffolk*, 605 F.3d at 137–38.

234. 5 U.S.C. § 701(a)(2).

capped Native American children in the southwest, opting instead to reallocate resources to support nationwide programs.[235] A group of children eligible for services challenged this decision—announced in a memorandum that sought "public input" but not through notice and comment procedures—under the APA.[236] Noting that Congress had never expressly authorized funds for the program and the Service previously paid for the program using annual lump-sum appropriations, the Court identified "a fundamental principle of appropriations law" as being that when "'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.'"[237] As a result, the Court concluded that "the allocation of funds from a lump-sum appropriation is . . . [an] administrative decision traditionally regarded as committed to agency discretion."[238] This lack of judicial review for lump-sum appropriations underlies agencies' broad powers to reprogram funds within a single budget account.

The nonreviewability of lump-sum appropriations is a prime example of appropriations exceptionalism. With respect to substantive statutes, the fact that an agency enjoys broad discretion to set policy does not preclude judicial review.[239] Moreover, the treatment of lump-sum appropriations actions stands out even compared to other agency actions pulled out from judicial review as committed to agency discretion. Agency nonenforcement decisions are another category of agency action that is often nonreviewable on this basis—in part on a similar rationale that nonenforcement decisions turn on assessments about how to most effectively utilize agency resources that are particularly within agency expertise.[240] Yet nonenforcement decisions are only presumptively nonreviewable,[241] whereas *Lincoln* imposed no such qualification.

*Lincoln* does not preclude judicial review of appropriations decisions when Congress does allocate funds for specific programs or imposes specific prohibitions.[242] But here a separate obstacle to suit under the APA

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235. 508 U.S. 182, 182 (1993).

236. Id. at 188–89.

237. Id. at 192 (quoting LTV Aerospace Corp., B-183851, 1975 WL 11581, at *11 (Comp. Gen. Oct. 1, 1975)).

238. Id.

239. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370–72 (2018).

240. Heckler v. Chaney, 470 U.S. 821, 831–34 (1985).

241. Id.

242. Cf. *Lincoln*, 508 U.S. at 193; see also Shawnee Tribe v. Mnuchin, 984 F.3d 94, 100 (D.C. Cir. 2021) (rejecting the Secretary's argument that the Coronavirus Aid, Relief, and Economic Security (CARES) Act appropriation, which provided funds for "necessary expenditures incurred due to the public health emergency with respect to" COVID-19 and directed the Secretary to "ensure that all amounts available" be "distributed to Tribal governments," was a lump-sum appropriation (internal quotation marks omitted) (quoting 42 U.S.C. § 801(c)(7), (d)(1) (2018))). The court further held that the CARES Act

can arise, namely the requirement that to sue under the APA's right of action a challenger must be within the zone of interests protected by the statute at issue.[243] Ordinarily, the APA's zone of interests test is easily met.[244] All that is required is that the interest asserted by the plaintiff be "'arguably within the zone of interests to be protected . . . by the statute,'" with suit foreclosed "only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute.'"[245] However, the zone of interests test can prove more challenging to meet in the appropriations context, because the interests asserted by parties injured by uses of appropriated funds may be pretty marginal to the appropriations statutes at issue. Hence, here appropriations assimilation in the form of applying the usual zone of interests test can operate to exclude appropriations from judicial review.

Consider the Ninth Circuit border wall litigation, where a number of states and environmental organizations challenged the Trump Administration's transfer of appropriated funds as unlawful and violating Section 8005 of the FY2019 DOD Appropriations Act. All based their claims of injury largely on the environmental effects of the border wall and its impact on wildlife in the region.[246] The Ninth Circuit held that the states satisfied the APA's zone of interests requirement with respect to Section 8005, emphasizing that their interests "are congruent with those of Congress" and the challenge they were raising "actively furthers Congress's intent to 'tighten congressional control of the reprogramming process'" and "congressional power over appropriations."[247] The appellate court also emphasized that in the past Section 8005 had been used to transfer funds to rebuild military bases in states hit by natural disasters, arguing that showed states were

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appropriation provided a judicially manageable standard by which to judge the Secretary's action. Id. at 100. Courts have sometimes found specific appropriations committed to agency discretion as well, however. See, e.g., Milk Train, Inc. v. Veneman, 310 F.3d 747, 751–52 (D.C. Cir. 2002).

243. 5 U.S.C. § 702 (2018) ("A person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 488 (1998).

244. See Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014) ("We have said, in the APA context, that the test is not 'especially demanding.'" (internal quotation marks omitted) (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012))).

245. *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225 (first quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); then quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

246. California v. Trump, 963 F.3d 926, 936–40 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618 (2020) (asserting additionally the states' sovereign interests in enforcing their environmental laws); see also Sierra Club v. Trump, 963 F.3d 874, 883–84 (9th Cir. 2020), cert. granted, 141 S. Ct. 618 (2020) (asserting "recreational, professional, scientific, educational, and aesthetic benefits" from their activities in the U.S.–Mexico border area and the wildlife in those areas).

247. *California v. Trump*, 963 F.3d at 942 (quoting H.R. Rep. No. 93-662, at 16 (1973)).

predictable challengers under Section 8005.[248] But these arguments mistakenly focus on the nature of the states' claim—that the reprogramming was unlawful—rather than the environmental and wildlife interests the states were asserting, which are marginal at best to Congress's interests in controlling the federal fisc.[249] It also claimed that the states have unique sovereign interests in enforcing their laws, but that argument would be more on point if Section 8005 itself displaced state law, which it does not.[250]

The Ninth Circuit's more interesting arguments sounded in a constitutional register. Perhaps recognizing that its zone of interests arguments were tenuous, it insisted that "[t]he field of suitable challengers must be construed broadly in this context because . . . restrictions on congressional standing make it difficult for Congress to enforce [Section 8005's] obligations itself."[251] The appellate court deserves credit for emphasizing the separation of powers harm that would result if no one could enforce statutory appropriations limits on the executive branch. But the Supreme Court has long rejected the argument that "otherwise no one could sue" as reason to allow a suit to go forward.[252] More precedent supports the Ninth Circuit's argument that no statutory cause of action was required because an implied equitable action exists to challenge allegedly unconstitutional or ultra vires actions. Here, the constitutional claim was that the unauthorized transfers violated the Appropriations Clause.[253] Yet the Supreme Court has pulled back on this line of case law allowing equitable actions.[254] And the Court signaled skepticism about this basis for suit here when it stated that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain

248. See id. at 943.

249. See id. at 960–62 (Collins, J., dissenting); see also Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 883 (1990) ("[T]he plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.").

250. *California v. Trump*, 963 F.3d at 938–40; id. at 954, 960 (Collins, J., dissenting). The appellate court also contended that states had benefited from past Section 8005 transfers and therefore were predictable challengers. But that amounts to the claim that "once within the zone, always within the zone," regardless of interests asserted, which seems a dubious proposition.

251. Id. at 942.

252. Thole v. U.S. Bank, 140 S. Ct. 1615, 1621 (2020).

253. Sierra Club v. Trump, 963 F.3d 874, 887–93 (9th Cir. 2020), cert. granted, 141 S. Ct. 618 (2020); see also Nat'l Lab. Rels. Bd. v. Noel Canning, 573 U.S. 513, 556–57 (2014) (implying a cause of action based on the Recess Appointments Clause).

254. See Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 325–27 (2015). The APA has been held to not displace the traditional equitable cause of action, however. See Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988).

review of . . . compliance with § 8005" in granting the stay that the Ninth Circuit denied.[255]

Cause of action obstacles also arise with respect to other appropriations statutes.[256] For instance, courts have read the Antideficiency Act's provisions for administrative reporting and penalties as precluding a private right of action to enforce the Act.[257] The ICA authorizes the Comptroller General to sue if funds that the Comptroller General concludes were unlawfully withheld are not released, a remedial provision that some courts have read as indicating no private right of action exists to enforce the ICA.[258] On the other hand, the ICA also provides that nothing in it "shall be construed as . . . affecting in any way the claims or defenses of any party to litigation concerning any impoundment."[259] President Nixon's impoundments prompted a number of lawsuits under the substantive statutes at issue,[260] and given the ICA's caveat, such statutory suits should still be available as a means to challenge impoundments.[261]

3. *Judicial Review of Administrative Decisionmaking*. — In short, judicial review of agency decisionmaking on appropriations can be hard to come by and may confront obstacles that are not a significant impediment for other challenges to administrative action. Appropriations disputes also look different when judicial review does occur. Most notably, courts rarely defer to agency interpretations of appropriations statutes.[262] Many reasons are given for this lack of deference. In denying a stay of preliminary relief in the border wall litigation, the Ninth Circuit held that *Chevron* deference

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255. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).

256. In the federal grant context, the Court has pulled back significantly on implying causes of actions in governing statutes, and the extent to which third-party beneficiaries can enforce contractual requirements that underlie federal government grants is unclear. See Alexander v. Sandoval, 532 U.S. 275, 279, 284, 293 (2001) (concluding that a private right of action exists to enforce the prohibition on intentional racial discrimination contained in Title VI of the Civil Rights Act but not governmental regulations enforcing that prohibition); Fahey, supra note 35, at 2382–87 (describing the evolution of case law on third-party beneficiary enforcement).

257. See, e.g., Feldman v. Bowser, 315 F. Supp. 3d 299, 305 (D.D.C. 2018) (quoting Thurston v. United States, 696 F. Supp. 680, 683 (D.D.C. 1988)).

258. See, e.g., Rogers v. United States, 14 Cl. Ct. 39, 50 (1987), aff'd, 861 F.2d 729 (Fed. Cir. 1988); Pub. Citizen v. Stockman, 528 F. Supp. 824, 827 (D.D.C. 1981).

259. 2 U.S.C. § 681 (2018).

260. See, e.g., Train v. City of New York, 420 U.S. 35, 40 (1975).

261. See U.S. Gov't Accountability Off., OGC-82-9, President's Eighth Special Message for Fiscal Year 1982, at 4–24 (1982) (discussing in detail the continuing vitality of pre-ICA impoundment case law and concluding it is still valid); see also Maine v. Goldschmidt, 494 F. Supp. 93, 98–99 (D. Me. 1980) (holding that a mandatory spending obligation in a statute allows suit).

262. Matthew B. Lawrence, Congress's Domain: Appropriations, Time, and *Chevron*, 70 Duke L.J. 1057, 1082–90 (2021) [hereinafter Lawrence, Congress's Domain] (noting that "[j]udicial decisions regarding the applicability of *Chevron* to appropriations are relatively rare" and describing a range of approaches largely denying deference).

would be inappropriate for DOD's interpretation of Section 8005 because the DOD had not issued its interpretation through rulemaking and did not have rulemaking power under its appropriations statutes.[263] It further rejected even weaker *Skidmore* deference on the ground that DOD's statement was "entirely conclusory."[264] At other times, courts have rejected deference after concluding that the agency lacked any special expertise with respect to the appropriation statute at issue or that the meaning of the statute was clear so deference was inapplicable.[265] Often, courts review agency interpretations de novo without even addressing the question of *Chevron* deference.[266]

To be sure, on occasion courts do find deference applicable to appropriations,[267] and more importantly grounds exist for denying deference that are not unique to the appropriations context. For example, *Chevron* deference is only applicable when Congress has given an agency distinct responsibility to implement a statute,[268] and Congress has charged multiple actors—agencies, the President and OMB, and GAO—with responsibility for implementing appropriations.[269] Moreover, as Lawrence has

263. Sierra Club v. Trump, 929 F.3d 670, 692–93 (9th Cir. 2019).

264. Id. at 693.

265. Oregon v. Trump, 406 F. Supp. 3d 940, 961–62 (D. Or. 2019) (concluding that the DOJ's interpretation of grant conditions applicable under the Byrne JAG program was not entitled to *Chevron* deference because the statute at issue was clear and the interpretation did not carry the force of law); Multnomah County v. Azar, 340 F. Supp. 3d 1046, 1063 (D. Or. 2018) (determining *Chevron* to be inapplicable when the statute is clear); see also U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 188 (D.D.C. 2016), vacated in part sub nom. U.S. House of Representatives v. Azar, No. 14-1967 (RMC), 2018 WL 8576647 (D.D.C. May 18, 2018) (refusing to grant *Chevron* deference to agencies' interpretation of a tax refund provision because agencies were not delegated authority to fill gaps and the provision's meaning was clear).

266. See, e.g., California v. Trump, 963 F.3d 926, 944–49 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618 (2020) (concluding that Section 8005 clearly prohibited DOD's transfers without referencing deference doctrines or GAO's contrary view); Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs., 946 F.3d 1100, 1112–14 (9th Cir. 2020) (concluding that the meaning of a statute providing grants for TPPP was clear and at odds in part with agency interpretation, with only a passing citation to *Chevron*); Moda Health Plan, Inc. v. United States, 892 F.3d 1311, 1320–22 (Fed. Cir. 2018), rev'd and remanded sub nom. Me. Cmty. Health Options v. United States, 140 S. Ct. 1308 (2020) (determining the meaning of an appropriations rider de novo without discussing deference); see also United States v. McIntosh, 833 F.3d 1163, 1174–79 (9th Cir. 2016) (interpreting independently an appropriations rider limiting the DOJ's ability to prosecute without considering the applicability of *Chevron*, but in a criminal context where *Chevron* does not usually apply).

267. See California ex rel. Becerra v. Azar, 950 F.3d 1067, 1084–88 (9th Cir. 2020); WildEarth Guardians v. U.S. Forest Serv., 668 F. Supp. 2d 1314, 1329–31 (D.N.M. 2009).

268. See Pro. Reactor Operator Soc'y v. U.S. Nuclear Regul. Comm'n, 939 F.2d 1047, 1051 (D.C. Cir. 1991) ("[C]ourts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer.").

269. See, e.g., 31 U.S.C. §§ 1513–1514 (2018).

noted, annual appropriations measures often are not on the books long enough for agencies to interpret them through notice and comment rulemaking, which would increase the chances of deference.[270] Hence, the frequent lack of deference to agency interpretations of appropriations statutes can be the result of applying the standard *Chevron* framework to appropriations—an instance of appropriations assimilation more than appropriations exceptionalism. Yet the rarity of deference stands out and suggests that courts do not intuitively view appropriations as a proper instance for deference to agency views. Indeed, sometimes courts say so expressly.[271]

Instead of deference to agencies, courts regularly invoke general appropriations principles, often as stated by GAO.[272] Indeed, although they do not put their reliance on GAO in these terms, courts give GAO's approach to interpreting appropriations statutes a weight akin to *Skidmore* deference.[273] In its recent decision on the risk corridor rider, for example, the Supreme Court primarily relied on appropriations principles enunciated in past case law and by GAO, only noting in passing how the implementing agencies had interpreted the rider.[274] This interpretive reliance on GAO is unusual given GAO's ties to the legislative branch, but reflects the expertise GAO has developed through its appropriations enforcement and oversight roles.[275] One effect, however, is to downplay the area-specific

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270. Lawrence, Congress's Domain, supra note 262, at 1062; see also U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 188 (D.D.C. 2016), vacated in part sub nom. U.S. House of Representatives v. Azar, No. 14-1967 (RMC), 2018 WL 8576647 (D.D.C. May 18, 2018) (arguing that whether a permanent appropriations provision extended to cover insurers' cost-sharing payments under the Affordable Care Act is a major question for which deference is inappropriate).

271. See California v. Trump, 267 F. Supp. 3d 1119, 1132 (N.D. Cal. 2017) (invoking separation of powers as a reason to not read appropriations statutes broadly); *Burwell*, 185 F. Supp. 3d at 174 (arguing that the statute governing appropriations interpretation imposes a clear statement requirement).

272. See Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 187–88 (2012) (failing to mention deference and instead invoking GAO appropriations principles to determine that the government owed tribes the full cost of provided services).

273. See U.S. Dep't of the Navy v. Fed. Lab. Rels. Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (stating that the court gives weight but does not defer to GAO, ultimately exercising independent judgment in interpreting appropriations statutes).

274. Compare Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1319–21 (2020) (relying on GAO principles to determine that the ACA created a government obligation to pay insurers), with id. at 1324–25 (committing one paragraph to the relevant agency's "response to the riders").

275. See *Dep't of the Navy*, 665 F.3d at 1349 (noting GAO's legislative connection); Nevada v. Dep't of Energy, 400 F.3d 9, 16 (D.C. Cir. 2005) ("[W]e give special weight to [GAO's] opinions due to its accumulated experience and expertise in the field of government appropriations." (internal quotation marks omitted) (quoting Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984))).

policy aspects of appropriations measures by framing appropriations disputes in terms of broader government contracting and fiscal principles. This may result in interpretations of appropriations measures that poorly fit the policy contexts in which they are operative, even as it produces a more coherent body of overall appropriations law.

### D. *Appropriations and Statutory Interpretation*

As this discussion of deference suggests, statutory interpretation is a public law area where appropriations do receive judicial attention. Appropriations exceptionalism is common, with courts developing a body of doctrinal rules specific to the appropriations context. For instance, the making of an appropriation must be expressly stated, an interpretive rule that is statutorily codified.[276] Similarly, although later-passed appropriations legislation can trump earlier substantive legislation, the Supreme Court has held that the usual presumption against repeals by implication is especially strong in the appropriations context.[277] There is also "a very strong presumption that if an appropriations act changes substantive law, it does so only for the fiscal year for which the bill was passed."[278] As a result, if Congress wants to change substantive legislation through an appropriation it must do so clearly,[279] and if it wishes to change substantive law going forward it must include language of "futurity" such as the word "hereafter."[280] Courts also construe appropriations measures narrowly when they arguably conflict with authorizing statutes.[281] These rules draw on GAO's statements of appropriations principles and in turn are codified

276. 31 U.S.C. § 1301(d) (2018); Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990).

277. *Me. Cmty. Health Options*, 140 S. Ct. at 1323; Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992); GAO Red Book, GAO-16-464SP, supra note 53, ch. 2, at 57–58, 76–78.

278. Tin Cup, LLC v. U.S. Army Corps of Eng'rs, 904 F.3d 1068, 1073 (9th Cir. 2018) (internal quotation marks omitted) (quoting Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269, 273 (D.C. Cir. 1992)); see also Minis v. United States, 40 U.S. 423, 445 (1841) (stating that a temporary appropriations act ought not be read as imposing a provision on "all future appropriations . . . unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.").

279. Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs, 619 F.3d 1289, 1296–300 (11th Cir. 2010) ("Congress has the power to effect a repeal through an appropriations bill—Congress just needs to be clear it is doing so." (citing United States v. Will, 449 U.S. 200, 222 (1980))).

280. *Tin Cup*, 904 F.3d at 1073 (internal quotation marks omitted) (quoting Nat'l Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 806 n.19 (9th Cir. 2005)); see also United States v. Vulte, 233 U.S. 509, 524 (1914) (emphasizing the need for "words of prospective extension").

281. See, e.g., Calloway v. District of Columbia, 216 F.3d 1, 9 (D.C. Cir. 2000) ("When Congress wants to use an appropriations act to limit court authority, it knows precisely how to do so.").

in those statements and applied in GAO's own decisions.[282] The Supreme Court also has invoked features of the appropriations process to justify these rules, arguing that members of Congress expect appropriations legislation to be short-term and therefore are less likely to be focused on changes to substantive law when voting on appropriations.[283]

Despite such attention to appropriations, marginalization occurs here as well. Most of these appropriations-specific rules downplay the substantive import of appropriations, making it difficult for Congress to use appropriations to change governing law. Even general interpretive doctrines are applied to limit appropriations' impact.[284] Perhaps the prime example of this is *Tennessee Valley Authority v. Hill*.[285] There, Congress repeatedly had appropriated funds to finish building a dam whose operation would violate the Endangered Species Act, and statements in the Appropriations Committee reports made clear that this violation should not prevent the dam from being completed.[286] Nonetheless, the Court enjoined construction of the dam, arguing that giving weight to the reports would allow the Appropriations Committee to invade the authorizing committee's domain and push its policy onto an unsuspecting Congress.[287] Occasionally, courts put more substantive weight on appropriations measures, as the Federal Circuit recently did in concluding that the risk corridor rider suspended the government's obligation in the ACA to make risk corridor payments.[288] But the Supreme Court promptly reversed, holding nearly unanimously that the appropriations measure did no such thing.[289]

Indeed, the Court's concern to limit the substantive impact of appropriations helps explain seeming inconsistencies in its recent approaches to appropriations measures. In a 2012 decision, *Salazar v. Ramah Navajo Chapter*, the Court dismissed the fact that the substantive statute made provision of funds under the Act "subject to the availability of appropriations"

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282. See, e.g., *Me. Cmty. Health Options*, 140 S. Ct. at 1319–21.

283. See Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190–91 (1978); *Tin Cup*, 904 F.3d at 1073.

284. See, e.g., Nevada v. Dep't of Energy, 400 F.3d 9, 16 (D.C. Cir. 2005) (applying to appropriations legislation "the 'general principle of statutory construction,' that 'a more specific statute will be given precedence over a more general one'" (quoting Busic v. United States, 446 U.S. 398, 406 (1980))).

285. 437 U.S. 153 (1978).

286. Id. at 163–71.

287. Id. at 191–92; see also Mathew D. McCubbins & Daniel B. Rodriguez, Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon, 14 J. Contemp. Legal Issues 669, 676–84 (2005) (sourcing the origin of the appropriations canon in *Tennessee Valley Authority v. Hill*).

288. See Moda Health Plan, Inc. v. United States, 892 F.3d 1311, 1325–27 (Fed. Cir. 2018), rev'd and remanded sub nom. *Me. Cmty. Health Options*, 140 S. Ct. 1308.

289. See *Me. Cmty. Health Options*, 140 S. Ct. at 1323–26; see also id. at 1332–34 (Alito, J., dissenting) (failing to address whether the rider changed the government's statutory obligation to pay).

in concluding that the government's obligation to pay tribes for their full costs was not affected by an insufficient appropriation.[290] Just eight years later, however, the Court emphasized that the risk corridor provision did not contain language conditioning payments on provision of funding, such as the "subject to the availability of appropriations" language, in holding that the appropriations rider did not alter the government's obligation to pay. The Court never acknowledged this inconsistency and cited *Salazar* approvingly.[291] Yet despite this contrary reasoning, the bottom-line result in the two cases was the same: The Court refused to read an appropriations measure as limiting a payment promise contained in an authorization statute, in contexts where services were already provided in reliance on the payment promises. It is hard not to see a desire to protect expectations and enforce statutory obligations as driving both decisions, despite their inconsistency.

Moreover, in developing these appropriations statutory interpretation doctrines, courts for the most part have not paid close attention to important aspects of the appropriations process. For example, courts do not distinguish between annual and permanent appropriations measures, but the two differ in important ways that appear relevant to how they should be interpreted.[292] Similarly, empirical studies of congressional drafting practices reveal that members of Congress give particular weight to appropriations committee reports in understanding appropriations legislation and also give substantial weight to CBO's estimates of the budgetary impact of legislation. Yet courts treat appropriations reports no differently than other committee reports and do not look to CBO interpretations of statutory meaning as particularly instructive.[293]

### E. *Appropriations and Political Branch Public Law*

There is one public law arena where appropriations play a starring role: political branch public law. Historically, it was the political branches that set out the constitutional contours of appropriations, with nineteenth-century politics marked by constitutional debates over using federal funds

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290. 567 U.S. 182, 190–91, 197, 199–200 (2012).

291. *Me. Cmty. Health Options*, 140 S. Ct. at 1319, 1322–23.

292. See Lawrence, Congress's Domain, supra note 262, at 1090–91 (arguing that because Congress is better able to push back on agency implementation and interpretation of appropriations measures through annual appropriations than permanent appropriations, agency views of annual measures deserve deference, but their views of permanent measures do not).

293. See Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 980–82 (2013); Abbe R. Gluck, Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do, 84 U. Chi. L. Rev. 177, 180–81 (2017).

for internal improvements and presidential impoundments.[294] In addition to the key statutes governing the budget and appropriations process, a number of other statutes extensively regulate the Treasury, management of public funds, agency financial personnel and accounting, and much more.[295] In response to the Trump Administration's border wall reprogramming, legislation in the House tightened the ICA and required greater transparency over apportionment, transfer, and reprogramming of appropriated funds, among other measures.[296] A vast array of administrative issuances further govern appropriations and implement these statutes, such as OMB memos and circulars, GAO decisions and statements of appropriations principles, and legal interpretations from the Office of Legal Counsel (OLC) at the DOJ.[297] On top of this are norms and practices long adhered to across the legislative and executive branches.[298] Many of these measures are largely limited to the political branches and as noted above may not be enforceable in courts.[299]

Yet the separation between political and judicial public law on appropriations is easy to exaggerate. Frequently, political branch actors invoke court decisions in addressing appropriations questions. In particular, GAO regularly cites and relies on judicial decisions in its compilation of principles of appropriations law known as the Red Book.[300] As a result, many of the judicial doctrines that marginalize appropriations have the same effect in the political realm. This is especially true of doctrines limiting the extent to which appropriations measures are read as changing substantive enactments, which are echoed in GAO interpretations.[301]

Moreover, some of this political branch public law of appropriations is fraying in the face of deep partisan divides. This fraying is evident not only in the number of recent appropriations disputes appearing in court, but also in increased deviations from longstanding norms and divisions between legislative and executive interpretations of appropriations measures. The Trump Administration's "position ha[d] become one of

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294. See Alison L. LaCroix, The Interbellum Constitution: Federalism in the Long Founding Moment, 67 Stan. L. Rev. 397, 409–44 (2015).

295. See 31 U.S.C. §§ 101–3907 (2018); supra text accompanying notes 49–56, 66–74.

296. Congressional Power of the Purse Act, H.R. 6628, 116th Cong. §§ 101–105, 201–214 (2020). Congress also enacted additional budget accountability and transparency measures. See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong., 2d Sess. § 9601 (2020) (enacted).

297. See supra text accompanying notes 75–80; infra text accompanying note 351.

298. See supra text accompanying notes 42–44, 69, 117.

299. See supra text accompanying notes 257–261.

300. See, e.g., GAO Red Book, GAO-16-463SP, supra note 80, ch. 1, at 2 (noting that GAO would update the Red Book annually "to incorporate new Comptroller General case law as well as discussions of particularly prominent decisions from the courts").

301. See, e.g., id., ch. 2, at 76–79.

open defiance" of requirements of congressional consultation and approval.[302] In addition to agencies proceeding with transfers and reprogramming of funds notwithstanding appropriations committee opposition, OMB expanded its understanding of Antideficiency Act exceptions and in other ways pushed at the limits of accepted appropriations practices.[303] It also asserted its power over what constitutes an Antideficiency Act violation that must be reported to GAO.[304] OMB did so in the face of conflicting GAO views, instructing agencies and officials that GAO determinations are not binding on the executive branch and that agencies should not report Antideficiency Act violations unless the agencies, consulting with OMB, agreed that a violation occurred.[305] In short, the substance of political branch appropriations law appears increasingly undermined by the same broader forces of political polarization and expansive assertions of executive power. Whether this trend continues under the Biden Administration, particularly now that Democrats control both Congress and the White House, remains to be seen.

## III. IS THE MARGINALIZATION OF APPROPRIATIONS A PROBLEM?

This account of how appropriations are marginalized in public law doctrine raises two pressing questions: First, why have appropriations been pushed to the sidelines of so many public law doctrines? And second, is this marginalization a problem? These two questions are closely linked, in

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302. Molly E. Reynolds & Philip A. Wallach, Am. Enter. Inst., Does the Executive Branch Control the Power of the Purse? 5 (2020), https://www.aei.org/wp-content/uploads/2020/10/Does-the-executive-branch-control-the-power-of-the-purse.pdf?x88519 (on file with the *Columbia Law Review*).

303. See Department of the Interior—Activities at National Parks During the Fiscal Year 2019 Lapse in Appropriations, B-330776, 2019 WL 4200991, at *1, *11–12 (Comp. Gen. Sept. 5, 2019) (concluding that the Department of the Interior violated the Antideficiency Act during the partial shutdown by using resources to pay for expenses that ordinarily would be covered by National Park Service appropriations); supra text accompanying note 120; see also Louise Radnosfsky, Much of Federal Government Expected to Keep Running in Shutdown, Wall St. J. (Jan. 19, 2018), https://www.wsj.com/articles/much-of-the-federal-government-wouldnt-shut-down-in-a-government-shutdown-1516357801 (on file with the *Columbia Law Review*) (contrasting Obama's and Trump's approaches to the Antideficiency Act).

304. See Circular A-11, supra note 75, § 145.8 (instructing agencies to report such violations only if "the agency, in consultation with OMB, agrees with GAO that a violation has occurred").

305. See Off. of Mgmt. & Budget, Exec. Off. of the President, Memorandum for Agency General Counsels 1–2 (2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/11/Memo-to-Agencies-on-A-11.pdf [https://perma.cc/QL4L-S9DK] ("When an agency of the Legislative Branch interprets a law differently than the Executive Branch, the Executive Branch is not bound by its views . . . . [A]n Executive Branch agency is under no obligation to report an action it has determined does not constitute an [Antideficiency Act] violation."); supra text accompanying notes 120–144; see also Agency Reporting of GAO Determinations of Antideficiency Act Violations, B-331295, 2019 WL 4594337, at *1 (Comp. Gen. Sept. 23, 2019) (disagreeing with OMB's position).

that whether the marginalization of appropriations is problematic turns largely on whether the rationales for marginalization are justified. This part identifies three overarching rationales—a view of appropriations as closely tied to sovereignty; the belief that therefore appropriations should be left to the purview of the political branches; and a normative prioritization of substantive legislation—and argues that none justify the current marginalization of appropriations. To the contrary, the minimizing of appropriations in public law doctrine departs from the importance of appropriations in the Constitution, undercuts key constitutional values, and creates a de facto presidential spending authority fundamentally at odds with the separation of powers.

### A. *The Why of Appropriations Marginalization*

The numerous examples detailed above highlight the shared theme of appropriations being pushed to the doctrinal sidelines, but they also highlight that appropriations' doctrinal marginalization is not monolithic. Not only do these examples fall into different methodological camps—appropriations exceptionalism, silence, assimilation, or jurisdictional exclusion—but they have significantly different impacts in practice. Some instances operate to limit the practical import of appropriations, such as appropriations-exceptionalist rules of statutory interpretation that make it difficult for appropriations measures to change substantive legislation. A similar result follows from the courts' general failure to engage with appropriations in separation of powers analysis. Other doctrinally limiting moves, however, actually make appropriations a more powerful means of governmental action. The nonreviewability of agency decisions involving lump-sum appropriations is a case in point; the effect of this exclusion of appropriations is to give the executive branch freedom to reallocate funds (usually with congressional approval) without the risk of litigation.

These examples also reveal different underlying rationales for appropriations' marginalization in doctrine. Three rationales repeatedly arise: a perception of appropriations as primarily an issue for the political branches; an identification of government funds as especially tied to sovereignty; and a normative prioritization of substantive legislation. Indeed, the practical impact of an instance of appropriations marginalization often reflects its underlying rationale. Forms of doctrinal marginalization that operate to enhance appropriations' practical impact tend to be based on a perception of appropriations as primarily an issue for the political branches or an identification of government funds as especially tied to sovereignty. By contrast, the underlying driver when marginalization limits the practical impact of appropriations is often a normative prioritization of substantive legislation.

The first two of these rationales—the political nature and sovereignty ties of appropriations—are closely related. Appropriations are seen as a political prerogative and not for the courts in part because control of the

federal fisc is closely tied to sovereignty. Thus, in justifying the adjudication of government funds disputes outside of Article III, the Court has connected the public rights doctrine "to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued" and "draws upon a historical understanding that certain prerogatives were reserved to the political Branches of Government."[306] Early on, the Appropriations Clause was identified as an express constitutional basis for the federal government's sovereign immunity in damages actions.[307] Granted, sovereign immunity is not limited to suits for money and embodies a broader principle that forcing the government to be subject to suits by private parties is an affront to its "sovereign dignity."[308] But the Court has insisted that the link between sovereign immunity and a state's control of its treasury is particularly tight, both historically and as a matter of democratic principle: Financial independence is essential for the states' "ability to govern in accordance with the will of their citizens. Today, as at the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process."[309]

Yet the idea that the allocation of government funds represents a core prerogative of the political branches surfaces outside the context of sovereign immunity as well. In *Lincoln*, it took the form of a pragmatic assessment of institutional competency. In holding lump-sum allocation decisions nonreviewable, the Court there emphasized that such decisions involved complicated balancing of factors and priorities that were peculiarly within an agency's expertise and not a court's.[310] This same emphasis on political prerogatives is also evident in some spending power cases that reach the merits, with the Court underscoring the government's

306. N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 67 (1982) (plurality opinion) (Brennan, J.); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1855); see also Stern v. Marshall, 564 U.S. 462, 489 (2011) (emphasizing the sovereign immunity roots of *Murray's Lessee* while acknowledging that the category of public right has expanded to include instances in which the government is not a party but the suit is between two private parties over a right that is "integrally related to particular Federal Government action").

307. Paul F. Figley & Jay Tidmarsh, The Appropriations Power and Sovereign Immunity, 107 Mich. L. Rev. 1207, 1261–64 (2009) ("Early commentaries on the Constitution . . . drew an explicit connection between the Appropriations Clause and the sovereign immunity of the federal government in damage actions."); see also Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 Geo. Wash. Int'l L. Rev. 521, 541–52 (2003) [hereinafter Jackson, Suing the Federal Government] (identifying several sources for federal sovereign immunity, including not just the Appropriations Clause but also Congress's control of federal court jurisdiction and English common law).

308. Alden v. Maine, 527 U.S. 706, 715 (1999).

309. Id. at 751.

310. Lincoln v. Vigil, 508 U.S. 182, 193 (1993) (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

broad freedom to impose conditions on government funds when using those funds to advance government policies.[311]

This discussion highlights that the marginalization of appropriations in public law doctrine is closely linked to the centrality of appropriations in the political branches. Both reflect the identification of appropriations as inherently political and an arena where courts should play a limited role. Moreover, despite invoking the political branches generically and on occasion focusing on executive branch discretion, appropriations jurisprudence makes clear that control over government funds falls fundamentally to Congress.[312] Indeed, the link between political prerogatives and sovereign immunity reinforces Congress's centrality, as the power to waive sovereign immunity lies with Congress and not with the executive branch.[313]

Still, political prerogatives and sovereignty alone do not explain appropriations' doctrinal marginalization. After all, governments also set policy and exercise their sovereignty through substantive legislation and administrative regulations. But unlike appropriations, these types of measures lie at the core of public law doctrines, with courts regularly engaged in policing the legality of such governmental actions. What also animates the marginalization of appropriations is a view of legislation and public law that puts primacy on substantive enactments that formally bind private parties.

This ideal of lawmaking keyed to substantive legislation that coerces private individuals is particularly evident in separation of powers cases.[314] Perhaps most clearly, in *Gundy*, Justice Gorsuch defined the legislative power as "the power to adopt generally applicable rules of conduct governing future actions by private persons."[315] That description fails to account for appropriations measures, which aim at funding the government rather than regulating private actors. As John Harrison has

311. See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229, 235 (2000) (stating that "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy," but requiring viewpoint neutrality when the government seeks to create a forum for speech).

312. Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 427–28 (1990); see also *Lincoln*, 508 U.S. at 193 (emphasizing that Congress can limit executive discretion over funding allocations through line-item appropriations).

313. Wagstaff v. Dep't of Educ., 509 F.3d 661, 664 (5th Cir. 2007).

314. See United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (tying deference to Congress's grant to an agency of the power to issue rules with legal force and effect, as well as the agency's exercise of that power); Clinton v. City of New York, 524 U.S. 417, 446–47 (1998) (putting primacy on changes to formally enacted text and dismissing the President's past ability to achieve much the same result in practice using standard appropriations controls).

315. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

remarked, Gorsuch's definition excludes matters involving the government's use of public resources, even though such use similarly requires legislative authorization.[316] And the public rights doctrine is premised on the claim that ordinary separation of powers constraints only apply to governmental actions that regulate private individuals and property.[317]

In like vein, the Court has "repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract,'" precisely because it becomes operative only upon recipients' voluntary and knowing acceptance of funding conditions and not through compulsion alone.[318] Relatedly, in *National Federation of Independent Business v. Sebelius* the Court made clear that spending conditions qua spending conditions are unconstitutional if they cross the line from voluntary to coercive.[319] Much spending power litigation involves state and local governments and thus lacks the emphasis on binding private parties evident in the separation of powers context. Yet these cases reveal a shared belief that coercion is the focus of constitutional concern and add an understanding of federal funds as generally noncoercive.

Judicial accounts of the legislative process also display an emphasis on general substantive enactments.[320] The Court paints the national legislative process as structured to make lawmaking deliberate and difficult; "legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."[321] Appropriations also go

316. John C. Harrison, Executive Discretion in Administering the Government's Rights and the Delegation Problem 1–2, 4, 10 (Sept. 3, 2020), https://ssrn.com/abstract=3686204 (on file with the *Columbia Law Review*) (unpublished manuscript) (noting that Congress's legislative power under Article I is not limited to the ability to "adopt general and prospective rules" but also includes its postal and general spending powers).

317. See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 569–70 (2007) (explaining that, traditionally, only actions against private individuals or property necessitated the involvement of courts).

318. *NFIB*, 567 U.S. 519, 578 (2012) (emphasis omitted) (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

319. Id. at 578–79; see also Samuel R. Bagenstos, The Anti-Leveraging Principle and the Spending Clause after *NFIB*, 101 Geo. L.J. 861, 864, 871–73 (2013) (noting that, notwithstanding *NFIB*'s willingness to find coercion based on practical financial pressure, courts generally take a more formalist approach to what counts as binding).

320. See, e.g., Mariano-Florentino Cuéllar, Earmarking Earmarking, 49 Harv. J. on Legis. 249, 250 (2012) (emphasizing that, when determining whether earmarks constitute desirable legislative activity, judicial "interpretations . . . often pivot on normative presumptions about the lawmaking process—including in some instances the idea that general authorizing legislation is preferable to targeted appropriations as a means of shaping substantive policy outcomes").

321. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 949 (1983); see also Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (arguing that the Framers "[r]estrict[ed] the task of legislating to one branch characterized by difficult and deliberative processes" to "promote fair notice and the rule of law" as well as protect liberty and minority rights).

through the bicameralism and presentment process, but in the case of appropriations the emphasis is instead on the need to enact legislation to avoid funding gaps rather than on the dangers of too-frequent enactments. Indeed, concern not to burden the appropriations process with substantive disputes contributed to the early separation of substantive measures and appropriations legislation through House and Senate rules.[322] In *Hill*, the Court expressly invoked these process contrasts to defend a higher threshold before appropriations measures are found to alter substantive legislation, arguing that "[w]hen voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful . . . . Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation . . . ."[323] As Matthew McCubbins and Daniel Rodriguez have argued, *Hill* also took a decidedly dim view of using the appropriations process to set policy.[324] According to the Court, the "Appropriations Committees had no jurisdiction over the subject of endangered species, much less did they conduct the type of extensive hearings which preceded passage of the . . . substantive legislation" that would be amended; "there is no indication that Congress as a whole was aware" of the issue.[325] Therefore, the repeated explicit statements in the Committee's reports that the dam should be built represented nothing more than the "personal views" of Committee members.[326]

### B. *Evaluating the Marginalization of Appropriations*

The marginalization of appropriations in public law creates a substantial disconnect between governance reality and public law. Such a disconnect is hardly unique to appropriations. A number of scholars have detailed how existing statutes and public law doctrines ill-fit actual practices in Congress and the executive branch. Dan Farber and Anne Joseph O'Connell have gone so far as to identify a "lost world of administrative law" that rests on assumptions no longer true of how the administrative state primarily functions.[327] Abbe Gluck has made a similar

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322. Chuzi, supra note 59, at 999–1000.

323. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978); see also Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) ("[A]lthough repeals by implication are especially disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly." (citation omitted)).

324. McCubbins & Rodriguez, supra note 287, at 683, 687–90.

325. *Hill*, 437 U.S. at 191–92.

326. Id. at 193.

327. Daniel A. Farber & Anne Joseph O'Connell, The Lost World of Administrative Law, 92 Tex. L. Rev. 1137, 1140 (2014); see also Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, Unorthodox Lawmaking, Unorthodox Rulemaking, 115 Colum. L. Rev. 1789, 1792, 1852–54 (2015) (explaining the mismatch between modern reliance on unorthodox

claim about Congress and statutory interpretation, and the point is also true of actual congressional–presidential relationships and constitutional law.[328] A variety of explanations are offered for these divides, ranging from the effects of political polarization and congressional inaction, to the need for greater operational efficiency, to the fact that current doctrines emerged in an era in which different practices and concerns dominated.[329] Whatever the causal explanation, the repeated theme is one of deep disconnect between public law and the way government institutions actually function today.[330] Public law on the books is increasingly not public law in practice.

Whether such disconnects justify revising public law is a harder question.[331] In particular, to the extent the Constitution puts primacy on substantive enactments, or leaves appropriations to the political branches and minimizes the courts' role, then the disconnect between doctrine and reality in appropriations may be proper. The current marginalization of appropriations might also be thought normatively preferable, by increasing political accountability and public deliberation over policy and also enhancing the rule of law.

In fact, however, the current doctrinal marginalization of appropriations is at odds with constitutional structure, disempowers Congress, and undermines political accountability as well as the rule of law. While legislative and regulatory reforms are unquestionably essential in addressing appropriations abuses, the courts are also a necessary element of the

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rulemaking and the now-outdated views of regulation that underpin administrative law); Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 Geo. Mason L. Rev. 501, 504 (2015) (examining "agency 'rewrites' of statutes, . . . procedural shell games and manipulation; and . . . broad regulatory waivers").

328. See Gluck, Imperfect Statutes, supra note 95, at 87–103 (describing how presumptions used in statutory interpretation contain outdated assumptions about Congress and the drafting process); Gluck et al., supra note 327, at 1850–52 (describing how, despite the Court's claims otherwise, presumptions in statutory interpretation are not well tailored to unorthodox lawmaking); see also Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2349–68 (2006) (describing how separation of powers is grounded in an understanding of the branches as "the locus of democratic competition," in contrast to the reality, where parties are that locus).

329. See Farber & O'Connell, supra note 327, at 1155–67 (discussing reasons); Greve & Parrish, supra note 327, at 502–03 (discussing congressional inaction and hyperlegislation); Levinson & Pildes, supra note 328, at 2314–15 (discussing the rise of political parties); Michael A. Livermore & Daniel Richardson, Administrative Law in an Era of Partisan Volatility, 69 Emory L.J. 1, 3–6 (2019) (emphasizing the out-of-date historical and political context in which current doctrines emerged).

330. Richard Pildes has argued that such a disconnect is endemic to public law doctrine. See Richard H. Pildes, Institutional Formalism and Realism in Constitutional and Public Law, 2013 Sup. Ct. Rev. 1, 2–5.

331. See Gluck et al., supra note 327, at 1850–64 (suggesting that the answer turns on whether the goal of doctrine should be to "reflect how policymaking actually happens," or to "advance [values such as] accountability or the rule of law").

solution. Recognition of these points supports greater incorporation of appropriations into public law doctrine and greater legal acceptance of appropriations' policy-setting role.

1. *The Constitutional Importance of Congress's Appropriations Power.* — A good place to begin assessing the doctrinal marginalization of appropriations is with the Constitution. Constitutional text, structure, and history all make clear that the appropriations power is one of Congress's central authorities and particularly essential in ensuring the power of Congress vis-à-vis the executive branch.

The fiscal provisions of the Constitution were critical to its adoption. Under the Articles of Confederation, Congress lacked a power to tax and was dependent on requisitioning the states for revenue—requisitions that frequently went unpaid.[332] The need for a consistent source of revenue and means by which the federal government could pay its debts "drove the constitutional Revolution of 1787."[333] Congress's powers to tax and appropriate are not simply economically intertwined but also textually conjoined at the outset of the list of Congress's enumerated powers. Both powers are presented in terms that appear very broad and have been so read by the Supreme Court.[334] Congress is given power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare," with taxes subject to a few additional limitations.[335]

The Constitution then goes further, specifying in the Appropriations Clause that such spending requires an appropriation "by Law."[336] The reinforcement provided by the Appropriations Clause is textually unnecessary. Simply vesting the spending power in Congress would be sufficient to give Congress control over appropriations, and the requirement that Congress act by law is a necessary concomitant of the Bicameralism and Presentment Clauses, which mandate passage by both houses and consent from the President (or overriding the President's veto by a supermajority of both

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332. Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 15–21 (2016).

333. Roger H. Brown, Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution 3 (1993); Bruce Ackerman, Taxation and the Constitution, 99 Colum. L. Rev. 1, 6–7 (1999) ("The Federalists . . . would never have launched their campaign against . . . the Articles of Confederation[] had it not been for its failure to provide adequate fiscal powers for the national government.").

334. See supra text accompanying notes 213–217 (discussing the spending power). Some scholars insist that these terms are far more confining than longstanding doctrine admits. See, e.g., David E. Engdahl, The Spending Power, 44 Duke L.J. 1, 49–53 (1994) (arguing that "one can be very easily seduced into thinking that any 'general Welfare' objective is an enumerated one").

335. U.S. Const. art. I, § 8. The additional limitations are a requirement that taxes be uniform, id.; a requirement that direct taxes be apportioned, id. § 2; and a prohibition on taxing exports from a state, id. § 9.

336. Id. § 9, cl. 7.

houses) for all legislative action.[337] This textual reinforcement of Congress's role—something the Constitution omits for other congressional powers—shows the importance that the Framers assigned to popular legislative control over government funds.[338] The requirement that appropriations be made by law also puts the onus on the executive branch to identify affirmative congressional authorization before obligating funds; congressional silence or the lack of a congressional prohibition does not suffice. Justice Story acknowledged this point early on, stating that "[i]f it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure."[339]

The real significance of the Appropriations Clause is thus what it signals about the Constitution's structure: The Appropriations Clause imposes congressional control of government funds as a critical check on the executive branch.[340] Indeed, this function is built into the Clause.

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337. Id. § 7; Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983); see also Stith, supra note 34, at 1349–50 ("If the Constitution thus strictly forbids 'executive appropriation' of public funds, the exercise by Congress of its power of the purse is a structural imperative." (footnotes omitted)).

338. Gregory Sidak rejects the argument that the Appropriations Clause's requirement of appropriations by law reinforces congressional control, emphasizing that "'[l]aw' can consist of the Constitution, legislation, treaties, the common law, and contract" and that "one could argue that the appropriations clause establishes the general rule that when any one of the three branches (not just Congress) spends public funds, it must have a legal authorization for doing so." Sidak, supra note 34, at 1168, 1170–71. But Sidak's argument ignores the fact that Article I, § 8 expressly grants Congress the power to spend, a power not given to any other branch. Against this backdrop, the reference to law in the Appropriations Clause logically means legislation, as that is the means by which Congress acts. This reading of "law" as "legislation" is further reinforced by the Clause's surfacing in Article I, which up through Section 9 (where the Clause is found) addresses only the legislative branch. See U.S. Const. art. 1, §§ 1–9. And all the other references to "law" in Article I refer to legislation. See, e.g., U.S. Const. art. I, § 2 (providing that representation shall be apportioned based on an "actual Enumeration" undertaken "in such Manner" as "the Congress of the United States . . . shall by Law direct"); id. § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."); id. § 7 (discussing the various ways that a bill can "become a Law").

339. 3 Joseph Story, Commentaries on the Constitution § 1342, at 213–14 (Boston, Hillard, Gray & Co. 1833). Story praised this assignment of appropriations control to Congress:

> "As all the taxes raised from the people, as well as the revenues arising from other source, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes."

Id. at 213.

340. See Edward S. Corwin, The Constitution and What It Means Today 134 (14th ed. 1978) (describing Congress's appropriations power as "the most important single curb" on the President); see also Stith, supra note 34, at 1349 (arguing that "a primary significance

Unlike Congress's regulatory authorities, which directly target private action and impose duties on government to implement substantive legislative regimes, the Appropriations Clause is focused first and foremost on the government itself. This is not to suggest that Congress does not use appropriations to affect private action—of course it does. But the central aim of appropriations is providing the government with the funds needed to operate. Moreover, particularly when combined with the practice of annual or time-limited appropriations, the Clause ensures that the executive branch must continuously secure congressional support for its chosen courses of action.[341] As Josh Chafetz has emphasized, the result is to give Congress critical leverage over government policy.[342]

The history of the Appropriations Clause also shows the importance of legislative appropriations control and the Clause's role as a check on the executive. Along with the Origination Clause, which requires revenue-raising bills to originate in the House, the Appropriations Clause was added as part of the great compromise that combined popular representation in the House with equal state representation in the Senate.[343] Debates from the Constitutional Convention make clear that the Framers agreed that control of the public fisc must lie with the legislature and was a preeminent power.[344] Such agreement on the need for legislative control of the purse is not surprising in light of Parliament's historical use of appropriations to rein in the British monarchy, as well as the practice in early state constitutions of granting the state legislature broad control over state finances and state treasurers.[345] James Madison put the point plainly in Federalist No. 58, where he wrote that the "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which

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of the appropriations clause . . . lies in what it takes away from Congress: the option *not* to require legislative appropriations prior to expenditure."). For the contrary view that Congress lacks any broad power of the purse with which to check the President and that the Appropriations Clause was simply intended to ensure fiscal responsibility, see Sidak, supra note 34, at 1164–83.

341. See Chafetz, Congress's Constitution, supra note 37, at 62; Price, supra note 33, at 367–69.

342. Chafetz, Congress's Constitution, supra note 37, at 66–73; see also Josh Chafetz, Opinion, Don't Be Fooled, Trump Is a Winner in the Supreme Court Tax Case, N.Y. Times (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/trump-taxes-supreme-court-.html (on file with the *Columbia Law Review*) (explaining how Congress could have used its "power of the purse" to compel President Trump to release his tax information).

343. Figley & Tidmarsh, supra note 307, at 1248–52 (describing the legislative history of the Appropriations Clause at the Constitutional Convention).

344. Id. at 1248–55; see also Banks & Raven-Hansen, supra note 37, at 27–32 (describing discussion of appropriations in the Convention and during ratification); Michael W. McConnell, The President Who Would Not Be King: Executive Power Under the Constitution 101 (2020) ("It was undisputed the executive would have no prerogative power to tax, spend, or borrow.").

345. Chafetz, Congress's Constitution, supra note 37, at 45–55; Casper, supra note 47, at 3–8.

any constitution can arm the immediate representatives of the people . . . ."[346] And members of Congress were quick to try to use this weapon of influence, with efforts to assert congressional appropriations control through itemized appropriations beginning in the last years of the Washington Administration.[347]

Although few dispute Congress's primacy in appropriations, more controversy exists over whether the Constitution's assignment of appropriations to Congress precludes the President from exercising any independent spending power. Notwithstanding the Appropriations Clause, Presidents have made unauthorized expenditures since the Founding—sometimes seeking subsequent congressional approval.[348] They have also long challenged some legislative limits on appropriated funds as intruding on constitutionally granted presidential powers.[349] In his famous 1981 opinion on the Antideficiency Act, Attorney General Benjamin Civiletti stated—without further elaboration—that "[m]anifestly, Congress could not deprive the President of [a constitutional] power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect."[350] Interestingly, however, the executive branch has on occasion rejected broad claims of presidential power over governmental funds. A prime example is William Rehnquist's opinion, when head of OLC, disclaiming presidential impoundment authority in the face of a congressional directive to spend, despite presidential impoundment practices dating back to the eighteenth century.[351]

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346. The Federalist No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1st ed. 1961).

347. See Wilmerding, supra note 36, at 20–49.

348. Id. at 4–19.

349. Price, supra note 33, at 373–78; see also Legis. Prohibiting Spending for Delegations to U.N. Agencies Chaired by Countries that Support Int'l Terrorism, 33 Op. O.L.C. 221, 221 (2009) (concluding that a limit in an appropriations act prohibiting spending funds for U.S. delegation to certain United Nations bodies unconstitutionality infringed on the President's constitutional power to conduct foreign relations and may be disregarded); Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468–69 (1860) (stating, in the course of interpreting an appropriations provision, that Congress could not interfere with the President's constitutional power to determine "what officer shall perform any particular duty").

350. Auth. for the Continuance of Gov't Functions During a Temp. Lapse in Appropriations, 43 Op. Att'y Gen. 293, 297, 299 (1981); see also Memorandum from Walter Dellinger, Assistant Att'y Gen., Off. of Legal Couns. to the Dir., Off. of Mgmt. & Budget, Gov't Operations in the Event of a Lapse in Appropriations 4–5 (Aug. 16, 1995), https://www.justice.gov/opinion/file/844116/download [https://perma.cc/9DDP-WWPT] (agreeing with the 1981 opinion's exception to the Antideficiency Act for presidential powers).

351. Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools, 1 Op. O.L.C. Supp. 303, 309–11 (1969); see also Memorandum from Homer S. Cummings to the President, Presidential Authority to Direct Departments and Agencies to Withhold Expenditures from Appropriations Made 16 (May 27, 1937),

Courts have not ruled on whether any such presidential spending authority exists.[352] This is perhaps another sign of appropriations' doctrinal marginalization but also reflects the fact that the political branches usually have avoided head-on disputes over appropriations.[353] Constitutional scholarship on the question is divided. In response to Iran–Contra, Kate Stith concluded that the President and executive officials could never spend without legislative authorization,[354] while Gregory Sidak argued that Presidents can spend the minimum amount they deem necessary in order to wield presidential prerogatives or satisfy presidential duties, even if Congress has denied funds or provided a lesser amount.[355] More often, claims for presidential spending authority fall somewhere in between these extremes. Recently, for example, Zachary Price has argued that the President can spend without congressional authorization only with respect to what Price terms "resource-independent" powers that the President can exercise personally and that serve to check the legislative branch or assert presidential control over the executive.[356] Yet even moderate efforts run into difficulties, given the lack of a textual basis for the lines they draw and the presence of conflicting structural imperatives.[357]

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https://www.justice.gov/file/19191/download [https://perma.cc/6DAF-98CU] ("Opinions of the Attorney General indicate that presidential power over appropriations must find its source in legislation.").

352. Price, supra note 33, at 379. One decision that arguably comes close is *United States v. Klein*, which invalidated a provision in an appropriations bill stripping jurisdiction over some claims on the grounds, among others, that the provision "impair[ed]" the effect of a presidential pardon. 80 U.S. (13 Wall.) 128, 147–48 (1871). But *Klein* is a notoriously opaque decision more focused on congressional power to strip court jurisdiction, and it discusses appropriations only in passing. See id. at 144, 146–47. A more express rejection of the proposition of independent presidential spending authority came from Justice McReynolds dissenting in *Myers v. United States*. See 272 U.S. 52, 187 (1926) (McReynolds, J., dissenting) ("He must utilize the force which Congress gives. He cannot, without permission, appoint the humblest clerk or expend a dollar of the public funds.").

353. For instance, despite questioning the constitutionality of an appropriations provision prohibiting the use of funds to transfer Guantánamo Bay detainees, President Obama generally complied with its terms. Price, supra note 33, at 374–75.

354. Stith, supra note 34, at 1345, 1348–51, 1356–61; see also Prakash, supra note 196, at 704 ("The President may wish to have funds to defray the projected expenses of the executive branch, but he has no constitutional right to them.").

355. Sidak, supra note 34, at 1166–73, 1185–94.

356. Price, supra note 33, at 361–63. Price further contends that Congress cannot use its appropriations power to manipulate how the President wields her constitutional powers. Id. at 404–13; see also Banks & Raven-Hansen, supra note 37, at 160–63, 166–68 (denying that the President has inherent spending authority and assessing the constitutionality of spending limits by balancing the extent of intrusion on presidential constitutional functions against congressional need).

357. As a case in point, Price's intriguing account runs into the difficulty that no presidential powers are truly and distinctively resource independent. Meaningful exercise of the veto, pardon, and appointment powers, for example, entails resources and staff. Price acknowledges as much and focuses instead on the formal exercise of these powers, which he argues a President could do alone. Price, supra note 33, at 390–91, 406–07. But it is also

The claim that Presidents enjoy broad independent authority to spend as they deem necessary is impossible to square with the Appropriations Clause's text and history. Contrary to the Civiletti Memorandum's assertion, even a more limited presidential authority to obligate the minimal level of funds objectively necessary to wield express presidential powers is far from "manifest[]."[358] To be sure, allowing Congress carte blanche to prevent the President from exercising expressly granted powers through funding denials is also constitutionally troubling, with its theoretical potential to undermine the ability of Presidents to perform their constitutional functions.[359] But the best way to accommodate these dueling constitutional imperatives may well be to conclude that Congress is constitutionally obliged to provide the funds needed for the President to function effectively, not that the President can claim constitutional authority to spend unauthorized funds when Congress fails to act. In her seminal work on the appropriations power, Stith made a structural argument for such a nonjudicially enforceable duty, contending that "Congress is obliged to provide public funds for constitutionally mandated activities—both obligations imposed on the government generally and independent constitutional activities of the President."[360]

Even accepting that some independent presidential spending authority exists, however, it is operative at the margins. Hence, this debate should not obscure the fundamental thrust of the Appropriations Clause as a central mechanism of congressional empowerment. Correspondingly, the rationales for appropriations marginalization in public law doctrine should be assessed, at least in part, on the extent to which they accord with this congressional empowering function.

2. *The Illegitimacy of Prioritizing Substantive Statutes.* — This constitutional backdrop undercuts those forms of appropriations marginalization

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possible to imagine the President formally undertaking direct law enforcement, albeit poorly, or—to name two early functions of the early American state—providing customs guidance or deciding on applications for land grants. See Jerry L. Mashaw, Creating the Administration Constitution: The Lost One Hundred Years of American Administrative Law 34 (2012). More persuasive is Price's emphasis on whether a presidential power operates as a check on Congress and whether Congress is seeking to manipulate the exercise of presidential powers. Price, supra note 33, at 395, 405–06. But one could argue that these factors resolve to the familiar if amorphous inquiry into "the extent to which [a legislative restriction] prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

358. Auth. for the Continuance of Gov't Functions During a Temp. Lapse in Appropriations, 43 Op. Att'y Gen. 293, 299 (1981). Constitutional scholar Charles Black famously stated that "Congress could . . . reduce the president's staff to one secretary for answering social correspondence." Charles L. Black, Jr., The Working Balance of the American Political Departments, 1 Hastings Const. L.Q. 13, 15 (1974).

359. See Morrison v. Olson, 487 U.S. 654, 691 (1988) ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty.").

360. Stith, supra note 34, at 1348–52.

that are based on prioritizing substantive statutes over appropriations measures. Provision of Congress's new substantive authorities, especially the power to regulate foreign and interstate commerce, was also a central concern of the Framers.[361] But acknowledging appropriations' constitutional importance does not entail subordinating Congress's other authorities. The claim is instead simply that the policy choices Congress makes using its appropriations power deserve equal stature. Indeed, despite rivalries between authorization and appropriations committees, the relationship between Congress's substantive and appropriations powers is more supportive when viewed from the perspective of Congress as a whole.[362] In particular, appropriations can serve to reinforce Congress's substantive authorities by providing ongoing avenues for congressional control of policy in between enactment of substantive measures. In a world marked by broad delegations of substantive authority to the executive branch, the need to secure annual appropriations "preserve[s] congressional influence over the executive's implementation of permanent programs."[363] Appropriations also may allow for discrete policy adjustments without opening up the broader policy for revision.[364]

This suggests a broader flaw in the prioritization of substantive statutes over appropriations. Underlying this prioritization is a misguided understanding of lawmaking that puts primacy on initial enactments. But in fact, lawmaking is a far more iterative and ongoing process, with Congress responding to executive branch implementation and policies and the executive branch in turn responding to Congress. Appropriations measures are a critical part of that ongoing process—along with oversight, informal legislative–executive interactions, appropriations authorizations, and statutory amendments. Taking appropriations seriously thus allows for a fuller and more accurate understanding of our constitutional system for making law.

a. *Political Accountability.* — Those prioritizing Congress's substantive authorities often justify doing so on political accountability grounds. A familiar critique of policy-based appropriations riders is that they are adopted by appropriations committees whose members and staff have less expertise in the substantive area in question.[365] In addition, the time restrictions of the appropriations process offer little opportunity to

361. See Klarman, supra note 332, at 21–25, 129.

362. Cf. Black, supra note 358, at 15 ("And underlying all the powers of Congress is the appropriations power . . . .").

363. Lawrence, Disappropriation, supra note 30, at 54, 58–60; see also Chafetz, Congress's Constitution, supra note 37, at 61–66 ("[I]ncreased budgetary capacity gives Congress more power to affect non-fiscal policy."); Beermann, supra note 30, at 85–90 (discussing Congress's use of appropriations riders to supervise the execution of federal laws).

364. See McCubbins & Rodriguez, supra note 287, at 705–06.

365. See, e.g., Lazarus, supra note 90, at 653–56.

ventilate issues or explore alternatives, and members often vote on vast omnibus appropriations bills without knowing what they contain.[366] Moreover, sometimes the appropriations process can seem like crass politics at its worst, filled with leadership backroom deals and logrolling to get members of Congress on board.[367] By contrast, authorizing legislation—whether in the form of organic statutes or periodic appropriations authorizations—originates with the legislative committee that has substantive responsibility for the relevant subject area. Not only do its members and staff have greater knowledge of the field, they are more connected to the relevant stakeholders and programmatic agency staff, and the slower process of enactment for authorization measures allows more opportunity for investigation and consideration.[368] The greater deliberation and debate connected to substantive enactments are also said to ensure that members of Congress are aware of the policy being enacted and allow broader popular engagement.[369] These arguments connect to the Constitution's concern with ensuring deliberation in lawmaking, so as "to protect the whole people from improvident laws" by ensuring "that the legislative power would be exercised only after opportunity for full study and debate in separate settings."[370]

It's worth noting, however, that other scholars have questioned these characterizations, arguing that in fact the Appropriations Committees are more representative of Congress, appropriations bills are more bipartisan, and the appropriations process is in some ways more transparent and open than are authorizing committees and legislation.[371] Recent experience with earmarks provides a good illustration of this point. For many, earmarks—specific allocations of funds at the behest of a member of Congress as the price of the member's support for appropriations bills—are the epitome of corrupt politics and wasteful spending. Yet some scholars argue that singling out earmarks for condemnation of this score

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366. See, e.g., Luke Broadwater, Jesse Drucker & Rebecca R. Ruiz, Buried in Pandemic Aid Bill: Billions to Soothe the Richest, N.Y. Times (Dec. 22, 2020), https://www.nytimes.com/2020/12/22/us/politics/whats-in-the-covid-relief-bill.html (on file with the *Columbia Law Review*) (describing a rushed COVID-19 stimulus bill that lawmakers could not read in advance).

367. See Sinclair, supra note 74, at 111–14, 117–20; Lazarus, supra note 90, at 650; Price, supra note 33, at 368–69.

368. See Lazarus, supra note 90, at 653–61; see also Adler & Walker, supra note 164, at 1956; Devins, supra note 94, at 457–58; Chuzi, supra note 59, at 1005–07.

369. See Tenn. Valley Auth. v. Hill, 437 U.S 153, 190–91 (1978); see also Elizabeth Garrett, Rethinking the Structures of Decisionmaking in the Federal Budget Process, 35 Harv. J. on Legis. 387, 425–26 (1998) ("[T]he formulation of the federal budget . . . is a complex process in which important decisions can be hidden in omnibus bills or through the use of dense, technical language . . . . In short, the complexity and immensity of budgeting undermine the value of political accountability.").

370. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

371. See, e.g., McCubbins & Rodriguez, supra note 287, at 695–706.

is unjustified; corruption in the form of undue influence and lobbying by regulated interests is often at play in substantive legislation as well, if less transparent and acknowledged.[372] Moreover, while enactment of an earmark ban in 2011 did not remove corruption from politics, it did serve to make enacting legislation more difficult, by denying legislators a central tool for obtaining buy-in from lawmakers.[373]

Even if the claimed political accountability advantages of authorization statutes are real, such differences do not justify courts prioritizing substantive enactments as a constitutional matter. The constitutional concern with deliberation is not free-floating but instead derives from the bicameralism and presentment process for legislation.[374] That process applies to both substantive and appropriations measures. As important, the Constitution leaves the choice of procedures for enacting legislation beyond bicameralism and presentment entirely up to Congress.[375] This means that Congress gets to decide whether to set policy through substantive enactments or appropriations and also could provide for greater deliberation of policy measures attached to appropriations if it so chose. If Congress hasn't done so, no constitutional basis exists for courts to second-guess Congress's choices.

A potentially stronger argument for prioritizing substantive enactments is that the House and Senate, exercising their procedural authority, have long had rules barring legislating through appropriations.[376] But these rules contain many exceptions and are frequently waived, and if thereby inapplicable should not get interpretive weight.[377] Furthermore, if Congress is now choosing to set policy through appropriations, then respecting Congress's exercise of its constitutional prerogatives prohibits courts from enforcing congressional rules to which Congress itself no longer adheres.

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372. Cuéllar, supra note 320, at 277; see also Russell W. Mills & Nicole Kalaf-Hughes, Exit Earmarks, Enter Lettermarks, R Street Policy Study, Jan. 2017, at 2–5 ("Despite the ban on earmarks, political scientists would argue that lawmakers still face electoral pressure to secure federal funding for their districts.").

373. See Mills & Kalaf-Hughes, supra note 372, at 2–3; Cuéllar, supra note 320, at 254–55. But see Andrew H. Sidman, Pork Barrel Politics: How Government Spending Determines Elections in a Polarized Era 131 (2019) (questioning the extent to which lawmakers will trade votes for earmarks under polarization).

374. See *Chadha*, 462 U.S. at 950–51; John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1982–83 (2011) ("By carving up the lawmaking power . . . [bicameralism and presentment] appears to promote several overlapping interests: . . . [I]t restrains momentary passions by promoting caution and deliberation . . . ." (footnote omitted)).

375. See U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."); Marshall Field & Co. v. Clark, 143 U.S. 649, 671 (1892).

376. See supra note 61 and accompanying text.

377. See Chuzi, supra note 59, at 1003–04.

Equally important, comparative assessment of political accountability cannot be made in a theoretical vacuum. The argument for prioritizing substantive measures based on their functional advantages fails to account for contemporary governance realities of deep partisan polarization and divisiveness in Congress.[378] Setting policy by substantive legislation may well be the preferred course, and Congress still enacts many substantive measures.[379] Realistically, however, substantive legislative enactments are very difficult now for many contentious policy areas.[380] If in practice appropriations measures are a central mechanism by which Congress is able to act today, then appropriations are a better policymaking tool for Congress than substantive enactments alone. Under these circumstances, prioritizing substantive enactments over more contemporaneous policy choices contained in appropriations measures serves to disempower the current Congress compared to its predecessors. Moreover, if appropriations are the terrain on which policy is actually determined, then public law's focus on authorization statutes and processes obscures power realities and misdirects public attention. Public law doctrine would better serve accountability goals by acknowledging reality and potentially spurring changes to improve the policy-setting capacity of the appropriations process.[381]

b. *The Rule of Law.* — A separate argument for prioritizing substantive enactments is that doing so advances the rule of law by protecting reliance and helping ensure the government lives up to its funding commitments. This rule of law concern underlies the Court's special resistance to implied repeal by appropriations statutes, especially when parties provided services based on statutory promises of payment. But the same concern can exist when a program promises permanent benefits yet is funded on an annual basis and Congress fails to provide adequate funding.[382] Indeed, arguably a similar concern exists when Congress imposes substantive responsibilities on agencies and then massively underfunds them. Even when the national government is not unfairly profiting from services it has not paid for, a wide array of actors may end up relying on the government to perform promised tasks to their detriment.

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378. See supra text accompanying notes 86–90.

379. See Adler & Walker, supra note 164, at 1957; Chuzi, supra note 59, at 1019–24; Sean Farhang, Legislative Capacity and Administrative Power Under Divided Polarization 8–13 (Oct. 15, 2020), https://ssrn.com/abstract=3712521 (on file with the *Columbia Law Review*) (unpublished manuscript).

380. See McCarty, supra note 87, at 223–24, 233–36; Jody Freeman & David B. Spence, Old Statutes, New Problems, 163 U. Pa. L. Rev. 1, 2, 4, 14–16 (2014); see also Craig Volden & Alan E. Wiseman, Legislative Effectiveness in the United States Congress: The Lawmakers 123–55 (2014) (emphasizing that while Congress is able to overcome partisanship on some issues, other issues remain intractable).

381. Cf. Pasachoff, The President's Budget, supra note 24, at 2251–61 (emphasizing the need for greater transparency from the entities that execute appropriations).

382. Lawrence, Disappropriation, supra note 30, at 47–51.

Although these reliance and fairness concerns are quite real, it is hard to justify appropriations marginalization on rule of law grounds. To begin with, there is a tension between these reliance and fairness concerns on the one hand and political accountability on the other. In essence, the concern is that it is too easy for Congress to change policy through appropriations, but that very ability to change policy with relative ease enhances political accountability.[383] Lawrence has sought to reconcile this tension by emphasizing the political accountability costs of courts mistakenly concluding that an appropriations statute denied funding for a statutory obligation when that was not what Congress and the President intended. He argues that to avoid thereby frustrating "the will of . . . Congress as expressed in a clear underlying permanent legislative commitment[,] . . . courts should presume when interpreting ambiguous appropriations that Congress always pays its debts."[384] Yet such a presumption would simply trade one political accountability hit for another, namely the risk that courts then would downplay congressional efforts to change substantive law through appropriations. An approach more likely to approximate congressional intent on the whole would be for courts to interpret the appropriations measure at issue without presumptions either way.

More broadly, privileging substantive enactments over appropriations can undermine the rule of law by increasing the risk of legal system inconsistency. The ACA risk corridor program provides a case in point. There, Congress both imposed funding obligations on the government and clearly prohibited the government from meeting that obligation through the risk corridor rider. Reading a later-in-time appropriations measure as altering a payment promise may actually advance rule of law concerns by removing such contradictions. Indeed, the Federal Circuit appears to have made a move along these lines, arguing that Congress would not intend the risk corridor funding obligation to exist in "fiscal limbo."[385] Of course, that leaves the substantial inequity of plans incurring the substantial financial costs of participating in the ACA exchanges only to have the government renege on its promise to pay after the fact. But unless the government's action amounted to a regulatory taking or due process violation, this inequity is one for Congress to remedy or avoid causing in the first place.

Appropriations marginalization undermines the rule of law in other ways as well. In the form of jurisdictional exclusion, appropriations marginalization can put appropriations challenges outside the orbit of

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383. See generally Daryl Levinson & Benjamin I. Sachs, Political Entrenchment and Public Law, 125 Yale L.J. 400 (2015) (discussing how prioritizing substantive enactments may entrench policy at the cost of democratic legitimacy).

384. Lawrence, Disappropriation, supra note 30, at 79.

385. Moda Health Plan, Inc. v. United States, 892 F.3d 1311, 1325–27 (Fed. Cir. 2018), rev'd and remanded sub nom. Me. Cmty. Health Options v. United States, 140 S. Ct. 1308 (2020).

judicial scrutiny, thereby limiting the extent to which courts are available to ensure that the government operates within its lawful authority—a policing role that contributes to the legitimacy of the national administrative state.[386] The rule of law is similarly at odds with the sovereignty claims that underlie appropriations marginalization; whereas the former demands that the government operate in accordance with the law, the latter excuses the government from being legally forced to meet its obligations or pay for its legal transgressions.[387] Given Congress's enactment of numerous statutes consenting to suit against the government, one could question the extent to which sovereignty can justify appropriations marginalization today, at least independent from concerns with protecting the prerogatives of the political branches.[388] At a minimum, however, relying simultaneously on the rule of law and sovereignty to justify appropriations marginalization seems incongruous.

c. *The Duty to Fund.* — I have elsewhere suggested that while Congress can alter the government's substantive responsibilities, it may violate a nonjusticiable constitutional duty to fund if it leaves statutory responsibilities in place but sabotages the government's ability to meet them by providing grossly inadequate funding.[389] Although early suggestions of such a duty can be found in congressional debates, these suggestions did not bear fruit and today "the great weight of historical practice contradicts it."[390] But a duty to fund can be based on a structural constitutional principle of a duty to supervise delegated power.[391] Arguably, it could also be rooted in constitutional concerns to secure effective government—concerns that animated the Framers to grant Congress direct revenue-raising capacity.[392] Albeit different in scope, such a duty bears similarities to Stith's claim that the grant to the President of certain constitutional powers entails the minimum resources necessary to wield them.[393] She also argued that "Congress has not only the power but also the duty to exercise

386. On the historical importance of the availability of judicial review to the legitimacy of administrative government, see generally Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940 (2014) (discussing the rise of judicial review of administrative procedure and agency fact-finding).

387. The tension between sovereign immunity and the rule of law is well known. See, e.g., United States v. Lee, 106 U.S. 196, 220 (1882) (rejecting the federal government's claim to sovereign immunity and proclaiming that "[n]o man in this country is so high that he is above the law"); Jackson, Suing the Federal Government, supra note 307, at 523.

388. See Hart & Wechsler, supra note 172, at 896–904 (describing relevant statutes).

389. Gillian E. Metzger, The Constitutional Duty to Supervise, 124 Yale L.J. 1836, 1931–32 (2015) [hereinafter Metzger, Duty to Supervise].

390. Price, supra note 33, at 382–86 (describing the surfacing of the duty to fund idea in the Jay Treaty and Reconstruction debates).

391. Metzger, Duty to Supervise, supra note 389, at 1931–32.

392. See supra text accompanying notes 332–333.

393. See supra text accompanying note 354.

legislative control over federal expenditures."[394] Where specific statutory obligations and commitments are involved, due process and fundamental fairness concerns also come into play in justifying a duty to fund.[395]

Such a duty to fund is somewhat in tension with my argument here, insofar as the duty prioritizes substantive legislation over appropriations measures as the means by which Congress sets policy. Moreover, given its constitutional basis, a duty to fund should trump countervailing policy concerns. The judicial nonenforceability of the duty mitigates this tension to some extent, but does not fully remove it. Congress is independently obligated to adhere to constitutional requirements, whether or not those are judicially enforced.

One factor helping to alleviate this tension is that such a general duty to fund is largely operative at the extremes of funding denial for an agency and thus likely would not come into play in the mine run of congressional appropriations decisions. Even more important, the duty to fund is compatible with a robust view of Congress's appropriations power when both are understood as part of an overall obligation by Congress to supervise delegated authority. Whether providing adequate funding or refusing to fund on policy grounds, Congress is playing that supervisory role. The two are also aligned in both offering ways of targeting systemic legal inconsistency, albeit from opposite angles—one urging Congress to provide funding to meet statutory obligations and the other arguing that Congress's failure to fund should be recognized as sometimes changing the underlying law.

3. *Appropriations Marginalization and the Separation of Powers.* — Prioritizing substantive enactments thus fails to justify appropriations marginalization. But the rationale of preserving political branch prerogatives, especially of Congress, appears to have a stronger basis. Limiting the appearance of appropriations disputes in court allows Congress broad room to wield its appropriations power without fear of judicial intrusion. In practice, knowing that Congress can enact detailed appropriations that would restrict agencies' flexibility has incentivized agencies to be attentive to their congressional funders' informal instructions on how funds should be used.[396] Moreover, current doctrine gives Congress some say over when judicial review is available, in that Congress can increase court access by providing for specific mandatory appropriations. At the same time, leaving

394. Stith, supra note 34, at 1345.

395. The extent to which due process creates a judicially enforceable right to funds is a matter of dispute. Compare, e.g., Reich v. Collins, 513 U.S. 106, 110–11 (1994) (holding that due process requires a "clear and certain" remedy for unlawfully collected taxes but that remedy can be pre-deprivation, post-deprivation, or a hybrid approach), with Alden v. Maine, 527 U.S. 706, 740 (1999) (suggesting that due process under *Reich* simply "requires the state to provide the remedy it has promised").

396. See Chafetz, Congress's Constitution, supra note 37, at 71–72; supra text accompanying note 225.

appropriations to the political branches has kept the scope of presidential spending authority an open question for political negotiation rather than judicial resolution.

The suggestion that separation of powers considerations militate against judicial involvement in setting the metes and bounds of appropriations powers is an unusual one for the Supreme Court. Although in the past the Court was often willing to leave separation of powers to political determination, its course over many decades has been markedly different.[397] Today, the Justices portray judicial enforcement of the separation of powers as essential to the preservation of individual liberty, a task the Court is duty-bound to perform.[398] A number of scholars question this turn to the courts to resolve separation of powers disputes between the political branches. They argue variously that the current judicialization of such disputes is a historical anomaly,[399] that courts are unlikely to resolve these disputes well,[400] and that the net result is just another separation of powers problem in the form of aggrandizement of the courts.[401] From this perspective, the marginalization of appropriations in public law doctrine is a welcome and rare instance of courts adhering to their proper historical role.

Yet this focus on judicial aggrandizement obscures that there is a real separation of powers cost to the doctrinal marginalization of appropria-

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397. Nikolas Bowie & Daphna Renan, The Separation-of-Powers Counterrevolution 43–46 (on file with the *Columbia Law Review*) (unpublished manuscript) (tracing the change to the Supreme Court's decision in Myers v. United States, 272 U.S. 52 (1926)).

398. See, e.g., United States v. Gundy, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) ("[W]hen a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way . . . . [T]he framers afforded us independence from the political branches in large part to encourage exactly this kind of 'fortitude . . . to do [our] duty as faithful guardians of the Constitution.'" (alteration in original) (quoting The Federalist No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1st ed. 1961))); Nat'l Lab. Rels. Bd. v. SW Gen., Inc., 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring) ("The Judicial Branch must be most vigilant in guarding the separation between the political powers precisely when those powers collude to avoid the structural constraints of our Constitution.").

399. Bowie & Renan, supra note 397, at 22–40 (identifying a pattern of political development and enforcement of the separation of powers until the 1870s and tying the turn to a juriscentric and rigid separation of powers to post-Reconstruction, white supremacist revisionism).

400. Aziz Z. Huq, The Negotiated Structural Constitution, 114 Colum. L. Rev. 1595, 1674-83 (2014).

401. Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chi. L. Rev. 1083, 1085–86, 1149–51 (2009) [hereinafter Chafetz, Executive Branch Contempt] (allowing separation of powers suits between the branches aggrandizes the courts at the political branches' expense); Tara Leigh Grove, Government Standing and the Fallacy of Institutional Injury, 167 U. Pa. L. Rev. 611, 615–16 (2019) (allowing governmental standing for institutional injuries aggrandizes the courts and government institutions at the public's expense).

tions. Increasingly, it operates to expand presidential power over government funds at Congress's expense. As the border wall and Ukraine episodes demonstrate, presidential control over budget execution provides significant opportunity to reprogram, transfer, and delay obligation of funds.[402] And appropriations marginalization means that the executive branch can often do so in ways that deviate from governing statutes with limited fear of legal reprisal. Standing and justiciability doctrines create substantial barriers to some suits seeking to enforce appropriation statutes. Even private entities denied funding may lack a judicial remedy if the appropriation was expended or is discretionary, assuming no independent legal violation.[403] Seeds of judicial shift are evident in the lower courts, with the Ninth Circuit's decision allowing states and environmental organizations to bring an APA challenge to Trump's border wall reprogramming and the D.C. Circuit's decision allowing the House of Representatives to challenge the legality of this action.[404] The Supreme Court has yet to bless these decisions, however.[405]

Granted, Trump's assertions of appropriations power were extreme and perhaps should not be the basis for broader doctrinal rethinking. But to view these appropriations actions as simply phenomena isolated to the Trump presidency is to ignore the broader background of deep political polarization of which they are part. In an era in which a political tribalism led well over a hundred members of Congress to challenge President Biden's victory in court and at the electoral college count,[406] it is hard to imagine that such political manipulation of appropriations will suddenly disappear. All the more because Trump's actions were part of a trend toward greater presidential efforts to manipulate appropriations for policy gain that also surfaced under Obama.[407] In addition, the impact of this de facto presidential control over funding needs to be assessed against the

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402. See Pasachoff, Trump Era Budget Powers, supra note 118, at 4–18 (discussing how the Trump Administration used apportionment, rescissions and deferrals, transfers and reprogramming, and management of government shutdowns to shape policy priorities); supra section II.B.2.

403. See supra text accompanying notes 232–233; see also supra note 214 (noting that some appropriations may violate constitutional prohibitions).

404. See supra text accompanying notes 182–183, 246–255.

405. See Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (staying the district court injunction); see also Trump v. Sierra Club, 141 S. Ct. 618, 618 (granting certiorari).

406. See Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of U.S. Representative Mike Johnson and 125 Other Members of the U.S. House of Representatives in Support of Plaintiff's Motion for Leave to File a Bill of Complaint and Motion for a Preliminary Injunction at 2, Texas v. Pennsylvania, No. 155 (U.S. Dec. 10, 2020); Barbara Sprunt, Here Are the Republicans Who Objected to the Electoral College Count, NPR (Jan. 7, 2021), https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count [https://perma.cc/B59G-EPCR].

407. See, e.g., supra text accompanying notes 9–10.

background of significantly expanded presidential assertions of administrative power generally.[408] One of Congress's main tools to push back at such presidential unilateralism is its control of the purse. As a result, the inability to enforce appropriations constraints on the executive branch can have a far-reaching effect on the legislative–executive balance of power.

Of course, Congress has the ability to punish the executive branch for appropriations transgressions without resorting to the courts, by overturning executive branch repurposing of funds, enacting new constraints, or cutting agency funding. But leaving aside the question of how these new constraints then get enforced on a recalcitrant executive branch, the same partisan divisions that lead to appropriations exploitation will prove an obstacle to congressional response. Of particular note, it is much harder for Congress to enact legislation overturning presidential uses of already appropriated funds than to deny the funds in the first place. Overturning legislation will inevitably face a presidential veto and lacks the must-pass status of the initial appropriations bill. Meanwhile, retaliation in the next appropriations bill may come too late, and in some contexts Congress may not be willing to dramatically cut back funding. An equally critical factor is the partisan politics that characterize Congress today. For Congress to succeed in rebuffing presidential spending adventurism, both houses need to be committed to asserting their institutional prerogatives over appropriations. But as Daryl Levinson and Richard Pildes have underscored, partisan rather than institutional ties drive Congress.[409]

Other important nonjudicial checks against presidential abuse of spending authority exist, such as oversight from GAO and inspectors general (IGs), executive branch lawyers, and agency officials who may fear personal Antideficiency Act liability.[410] Such internal governmental checks

408. See Mashaw & Berke, supra note 111, at 605–07 (concluding that presidential administration has expanded under Presidents Obama and Trump, especially during periods of unified government); Terry M. Moe & William G. Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132, 136–38 (1999) (noting a trend of legacy-conscious Presidents exploiting constitutional ambiguity of agencies to accomplish agendas); see also Charles M. Cameron, Studying the Polarized Presidency, 32 Presidential Stud. Q. 647, 647–48 (2002) (arguing that polarization has a "pervasive" impact on presidency).

409. Levinson & Pildes, supra note 328, at 2324–25.

410. See Lawrence, Disappropriation, supra note 30, at 82–83 (describing how civil servants play an important role in enforcing legal limits on executive spending and commitments to spend); see also Dino P. Christenson & Douglas L. Kriner, Political Constraints on Unilateral Executive Action, 65 Case W. Rsrv. L. Rev. 897, 908–12 (2015) (arguing that informal political constraints on presidential unilateralism are more robust than generally acknowledged).

are essential law-enforcing mechanisms in the administrative state.[411] Yet their effectiveness may be limited in the face of presidential resistance. Both GAO and IGs can be sidelined by the executive branch, as has occurred in recent years.[412] It also seems unlikely that the executive branch would impose penalties on agency officials who spend or withhold funds at the direction of the President, OMB, or their agency leadership. A future administration led by a different party might do so, but the Antideficiency Act has never been criminally enforced, and administrative penalties will not be relevant for political officials who have left the government.[413]

A more basic flaw with arguments for political rather than legal enforcement of appropriations limits is that these two types of constraints are interdependent.[414] The effectiveness of political branch appropriations checks often stems from legal checks that lie in the background. Agencies will likely be more attentive to congressional input on spending if they fear a lawsuit that would enjoin their funding moves as unauthorized, thereby forestalling independent executive branch action. The opposite is also true; particularly given the lack of transparency involving appropriations, litigation may often depend on internal watchdogs, GAO investigations, or congressional hearings for evidence of executive branch violations of appropriations statutes. In short, neither legal nor political mechanisms of enforcement may be as effective alone as they are together.

Hence, even if in theory the marginalization of appropriations in public law doctrine corresponds to the constitutional assignment of

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411. See, e.g., Gillian E. Metzger & Kevin M. Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239, 1244–45, 1256–63 (2017) (discussing how internal executive branch measures qualify as law).

412. See supra text accompanying notes 303–305; see also Jen Kirby, Trump's Purge of Inspectors General, Explained, Vox (May 28, 2020), https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson (on file with the *Columbia Law Review*).

413. 31 U.S.C. § 1350 (2018) (authorizing criminal penalties); GAO Red Book, GAO-06-382SP, supra note 48, ch. 6, at 144 (3d ed. 2006) ("As far as GAO is aware, it appears that no officer or employee has ever been prosecuted, much less convicted, for a violation of the Antideficiency Act . . . ."); see also Gordon Gray, The Antideficiency Act: A Primer, Am. Action F. (Aug. 3, 2016), https://www.americanactionforum.org/research/antideficiency-act-primer [https://perma.cc/MMY2-4V7T] (noting the lack of prosecutions and that, in the ten years preceding 2016, eight federal employees were suspended or removed from their positions for violating the Act). There is also no evidence of such enforcement against career officials by an incoming administration. Cf. Oral Argument at 40:24, U.S. House of Representatives v. Mnuchin, 969 F.3d 353 (D.C. Cir. 2020) (No. 19-5176), https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/8E4D5177F505006 4852585580063B278/$file/19-5176and19-5331.mp3 (on file with the *Columbia Law Review*) (arguing on behalf of the Trump Administration that "the political deterrent that will stop any . . . official" from engaging in illegal spending is the prospect of a future administration pursuing criminal prosecutions under the Antideficiency Act).

414. Gillian E. Metzger, The Interdependent Relationship Between Internal and External Separation of Powers, 59 Emory L.J. 423, 442–47 (2009).

appropriations to Congress, in practice it operates to erode that constitutional structure. Against the background of today's political climate and the structural barriers Congress faces in reacting to executive branch abuses of appropriations, leaving appropriations to the political branches too often amounts to transferring a de facto power over appropriations to the President. Correspondingly, expanding judicial involvement in appropriations may actually serve to enforce the separation of powers insofar as it reasserts congressional appropriations control.

This is not to deny that drawing courts more into appropriations disputes can have real downsides. In addition to a systemic risk of judicial aggrandizement, greater judicial scrutiny can tie executive branch appropriations actions up in litigation, a significant issue in the appropriations context when funds must be obligated within a one-year window and the government needs flexibility to respond to sudden demands.[415] Perhaps more concerning, greater judicial involvement can operate to further undermine longstanding appropriations norms that are not judicially enforceable, such as the practice of agencies obtaining the approval of their appropriations subcommittee before reprogramming appropriated funds.[416]

What this means is that neither judicial involvement nor judicial exclusion is appropriate across the board. Instead, a nuanced approach is required that will target judicial involvement in ways that strengthen congressional power over appropriations and recognize appropriations as a central congressional policy-setting tool.

## IV. INCORPORATING APPROPRIATIONS

Taking appropriations seriously requires action by all three branches of government. Recent developments have identified areas that could benefit from legislative reform, from the lack of transparency over budget execution and apportionment to the breadth of statutory grants of transfer authority.[417] Congress also could expand its use of appropriations to push back at other forms of executive branch excess and should consider amending its internal rules governing appropriations to better align with its actual practices.[418] Meanwhile the executive branch could renew its commitment to appropriations norms and issue new regulations and guidance that pull back from more aggressive appropriations practices.

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415. See Trump v. Sierra Club, 140 S. Ct. 1, 2 (2019) (mem.) (Breyer, J., concurring in part and dissenting in part from grant of stay).

416. For discussion of this norm, see supra text accompanying note 117.

417. For discussion of possible measures, see Pasachoff, Trump Era Budget Powers, supra note 118, at 88–91; see also supra note 296 and accompanying text.

418. See Kevin M. Stack & Michael P. Vandenbergh, Oversight Riders, 97 Notre Dame L. Rev. (forthcoming 2021) (manuscript at 5–6, 26–28) (on file with the *Columbia Law Review*) (advocating the use of riders that would prohibit the executive branch from using appropriated funds to prevent compliance with congressional subpoenas).

This Part takes up the task of sketching what taking appropriations seriously might mean for the courts. It assesses how existing public law doctrines should be altered to better take account of appropriations. It then examines what such an approach might mean in practice by applying it to the border wall dispute.

### A. *Incorporating Appropriations in Public Law Doctrine*

Accepting that appropriations should be incorporated more into public law doctrine, what would that entail? At a minimum, taking appropriations seriously requires actually engaging with appropriations. As a result, of the techniques used to marginalize appropriations, appropriations silence is the hardest to justify. On the other hand, the derivation of special rules for appropriations per se—appropriations exceptionalism—often may be the proper approach. Many congressional powers are governed by distinct doctrines, reflecting their different constitutional scope and basis.[419] No reason exists why the same should not be true about the appropriations power, provided the appropriations-specific rule does not stem from an effort to minimize appropriations' significance. Put differently, appropriations exceptionalism is problematic when it unjustifiably subordinates Congress's power of the purse. Appropriations-specific rules that help ensure the effectiveness and equal treatment of Congress's appropriations power, or that reflect the scope and unique features of that power, are legitimate.

The following discussion assesses how better to integrate appropriations into current public law doctrine, focusing on the role of appropriations in separation of powers analysis, interpretation of appropriations statutes, and jurisdiction over appropriations disputes. Importantly, in many instances taking appropriations seriously does not entail changes to current doctrine, even as it requires that courts engage with appropriations more directly.

1. *Appropriations Exceptionalism and Constitutional Analysis.* — The rejection of appropriations silence, and potential acceptability of appropriations exceptionalism, are of particular relevance to constitutional analysis. The Court's general silence on appropriations in separation of powers cases is especially striking when considered against the constitutional

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419. Compare Gonzales v. Raich, 545 U.S. 1, 21–22 (2005) (upholding commerce power legislation after deferring to congressional choices of the level at which to regulate and not scrutinizing congressional findings under the commerce power), and Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475–79 (2018) (rejecting a commerce power measure that prohibited state enactments as unconstitutional commandeering under the commerce power), with Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 729–32, 735 (2003) (upholding as within Congress's Fourteenth Amendment enforcement power a measure imposing family-leave requirements on state governments after scrutinizing legislative and judicial records for adequate evidence of sex discrimination by the state).

importance of Congress's appropriations power and that power's central role as a check on the executive branch.

a. *Delegation.* — As suggested above, delegation challenges are one area where express consideration of appropriations is particularly merited, all the more so given the current interest in revitalizing the nondelegation doctrine.[420] The SORNA example discussed above[421] provides an illustration of what paying attention to appropriations in delegation challenges would look like in practice. Had the SORNA appropriation acts expressly included provision of funds to enforce application of SORNA to all pre-Act offenders, that would have defeated the delegation challenge on its own. Even an express reference in the statutory text to "the estimated caseload of 100,000 noncompliant sex offenders," a number that necessitated SORNA applying to all pre-Act offenders, should have sufficed. As discussed below, a strong argument can be made that the statements in the Appropriations Committee's reports to this effect should be viewed as establishing that Congress understood the Act to apply to all pre-Act offenders or sanctioned that application.[422] At a minimum, however, this evidence should have been considered by the Court, along with the other provisions of SORNA's text and history, as a constraint on executive branch discretion.

More broadly, the fact that Congress oversees and controls agency implementation of statutes through the appropriation process—even absent reference to the specific agency action provoking a delegation challenge—is further support for the largely moribund state of the nondelegation doctrine. In the face of this practice, nondelegation's central claim that agencies are setting policy without Congress is hard to maintain. Similarly, the fact that Congress specifically provides funds for an agency to undertake certain responsibilities should count as express delegation for purposes of assessing whether Congress wished to assign those responsibilities to the agency.[423] Taking appropriations seriously requires acknowledging that the delegation of authority in a substantive or organic statute is only one component in determining the scope of an agency's discretion; the amount of funds that Congress has provided for the agency to perform specific tasks is another crucial variable. Furthermore, although perhaps most salient to functionalist and pragmatic approaches to constitutional structure, this ongoing control through appropriations would seem relevant to assessing the constitutionality of

420. See supra section II.B.1.

421. See supra text accompanying notes 157–169.

422. See infra text accompanying notes 443–448.

423. Cf. King v. Burwell, 576 U.S. 473, 486 (2015) (stating that "had Congress wished to assign" a "question of deep 'economic and political significance' . . . central to . . . [a] statutory scheme . . . to an agency, it surely would have done so expressly" (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014))).

delegations across a range of interpretive methods.[424] The fact that this control results from appropriations statutes enacted annually through bicameralism and presentment should matter to textualists and formalists, while early British and American uses of appropriations to constrain executive officials suggest that appropriations should also be relevant for originalists.[425]

A separate question is whether Congress should be able to delegate control over appropriations to the executive branch. The constitutional importance of Congress's power of the purse as a check on the executive might suggest that delegations here should be narrow. In this vein, Stith argued that permanent appropriations are unconstitutional when Congress does not specify the total amount of spending authority and undertake periodic review and thereby check executive action.[426] Yet Congress's longstanding practices of permanent and lump-sum appropriations, combined with the historical exemption of government funds from the usual separation of power constraints, makes imposing special delegation constraints on appropriations hard to justify.[427] Concerns about delegations of appropriation authority undermining the constitutional structure are better addressed by reading such grants of authority narrowly, as suggested below.[428]

b. Bowsher*,* Clinton*, and One-House Vetoes.* — With respect to delegation, express consideration of appropriations might thus simply lead to

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424. For a classic description of different modes of constitutional interpretation, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution 6–7 (1982); see also M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1136–47 (2000) (describing functionalism and formalism in separation of powers analysis).

425. See Casper, supra note 47, at 2–8 (describing the use of appropriations by the British Parliament, as well as by colonial and early state legislatures, to control executive officials). The originalist assessment of appropriations is complicated by the early practice of distinguishing appropriations and substantive legislation. See supra text accompanying note 43.

426. Stith, supra note 34, at 1345–46, 1382–84.

427. See Clinton v. City of New York, 524 U.S. 417, 466–67 (1998) (Scalia, J., dissenting); see also Cincinnati Soap Co. v. United States, 301 U.S. 308, 321–22 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies."); supra text accompanying notes 170–174 (describing the public rights doctrine). Some scholars argue that delegation restrictions are in fact looser when public rights are involved. See Aditya Bamzai, Delegation and Interpretive Discretion: *Gundy*, *Kisor*, and the Formation and Future of Administrative Law, 133 Harv. L. Rev. 164, 180–82 (2019); Harrison, supra note 316 (manuscript at 6–13). This is on top of recent scholarship contending that no historical foundation exists for the nondelegation doctrine at all. See Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 279–82 (2021). But see Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. (forthcoming 2021) (manuscript at 4–9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559867 [https://perma.cc/HYR5-BP4N] (disputing Mortenson and Bagley's view).

428. See infra text accompanying note 442.

assimilation of appropriations into existing frameworks. In other separation of powers contexts, however, it might yield appropriations exceptionalism. Consider *Bowsher* in this regard, where the Court held that the Gramm–Rudman–Hollings Act was unconstitutional without ever engaging with the fact that the Act was regulating the appropriations process.[429] As Justice White argued in *Bowsher*, the Court's emphasis on Congress's potential role in removing the Comptroller General is an unsatisfactory basis for holding the Act unconstitutional. Indeed, given the Constitution's emphasis on congressional exercise of the appropriations power and the fact that the Act assigned the Comptroller General a central role in determining the amounts available to agencies to spend, a lack of congressional role would be constitutionally suspicious. Justice Stevens's concurrence, concluding that the Act was unconstitutional because the Comptroller was exercising legislative power outside of the bicameralism and presentment process, recognized this central point.[430] But Stevens's opinion in turn failed to consider whether the requirements of bicameralism and presentment apply the same way to appropriations measures as to other legislation.[431]

A case also can be made for allowing one-house vetoes to cancel executive branch reprogramming of appropriated funds. To be sure, the Appropriations Clause makes clear that bicameralism and presentment are required to authorize an appropriation; absent that process, an appropriation would not be "made by Law."[432] But using one-house vetoes to cancel executive branch *re*programming—the effect of which is simply to reassert the original appropriation that Congress made through bicameralism and presentment—appears more compatible with the Clause's text. Moreover, as Peter Strauss has argued, the appropriations process—marked by ongoing political negotiations, time-limited measures, at least annual use of the full legislative process, and the

429. Bowsher v. Synar, 478 U.S. 714, 763–73 (1986) (White, J., dissenting).

430. Id. at 737–39, 753–58.

431. In Stevens's defense, that application would seem to follow from the Court's decision in *INS v. Chadha* three years earlier, holding that all exercises of legislative power must go through bicameralism and presentment in the course of invalidating the legislative veto. 462 U.S. 919, 956–59 (1983). Although *Chadha* involved immigration adjudication, the Court subsequently summarily affirmed application of *Chadha* to other contexts. See, e.g., Process Gas Consumers Grp. of Am. v. Consumer Energy Council of Am., 463 U.S. 1216, 1216 (1983), aff'g Consumer Energy Council of Am. v. Fed. Energy Regul. Comm'n, 673 F.2d 425 (D.C. Cir. 1982). The D.C. Circuit paid more attention to the fact that appropriations were involved in concluding Congress would not want the President to be able to defer spending appropriated funds without the possibility of a legislative veto and therefore invalidated the deferral provision initially enacted under the ICA. But the D.C. Circuit also failed to consider if appropriations were any different, stating simply that "[t]he appellants concede, as they must, that the legislative veto provision . . . [in the ICA] is unconstitutional under" *Chadha*. City of New Haven v. United States, 809 F.2d 900, 905, 909 (D.C. Cir. 1987).

432. U.S. Const. art. I, § 9.

President's ability to gain additional discretion over spending as a result of Congress retaining veto power—differs from the enactment of permanent substantive legislation.[433] Further, although appropriations measures can affect the "legal rights [and] duties" of government officials and other individuals "outside the legislative branch," they do not directly regulate the private rights of individuals the same way that substantive legislation does.[434] Perhaps most importantly, legislative vetoes appear part of the historical gloss put on appropriations by the practice of both the legislative and executive branches.[435] Congress has long asserted its power to veto executive branch reprogramming actions through appropriations committee disapproval, including provisions to this effect in appropriations acts to this day.[436] And while the executive branch has publicly disputed the constitutionality of such measures, for just as long it has largely conformed to Congress's direction.[437]

2. *Interpreting Appropriations Legislation.* — In the statutory interpretation context, the problem is less appropriations silence than appropriations-specific interpretive rules that unjustifiably prioritize substantive legislation. Taking appropriations seriously would foreclose the exceptionally high threshold courts currently apply before an appropriations measure is found to implicitly repeal substantive legislation. The same result should follow for the requirement that an appropriations act must use particular words of "futurity" before it is read as permanently altering substantive statutes. The futurity requirement is a closer case because a core feature of appropriations acts is their one-year duration. Hence, demanding some evidence that Congress intends a provision of an appropriations statute to have a longer effect is justifiable, even if specific to appropriations. But

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433. Peter L. Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L.J. 789, 813–14; see also Am. Fed'n of Gov't Emps. v. Pierce, 697 F.2d 303, 308–09 (D.C. Cir. 1982) (Wald & Mikva, JJ., dissenting from denial of rehearing en banc) (urging en banc review of a pre-*Chadha* legislative veto decision invalidating a provision that required the House and Senate Appropriations Committees to approve the use of any funds to reorganize HUD and suggesting that legislative vetoes might be more acceptable in some contexts).

434. *Chadha*, 462 U.S. at 952; cf. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1552 (2016) (Thomas, J., concurring) (arguing that the threshold of injury to sue to enforce a public right is greater).

435. Trump v. Mazars, 140 S. Ct. 2019, 2023 (2020) ("[L]ongstanding practice 'is a consideration of great weight' in cases concerning 'the allocation of power between the two elected branches of Government'" (quoting Nat'l Lab. Rels. Bd. v. Noel Canning, 573 U.S. 513, 524–26 (2014))). See generally Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411 (2012) (discussing the role of historical practice in separation of powers analysis).

436. Fisher, Legislative Veto, supra note 225, at 290.

437. See Schick, Federal Budget, supra 44, at 271; Lazarus, supra note 90, at 649–52; supra text accompanying note 115; see also Bradley & Morrison, supra note 435, at 454 (emphasizing that there is a greater basis on which to infer executive branch acquiescence from conformity over time).

requiring that evidence to take a magic-words form seems to go too far, as Congress could indicate that intent in a variety of ways.[438]

On the other hand, the appropriations-specific rule of giving weight to GAO's views appears a legitimate reflection of the central role Congress has assigned GAO in appropriations disputes. While the courts' reluctance to defer to agency interpretations of appropriations statutes often reflects broader deference doctrines,[439] it also accords with core features of appropriations. The general presumption that Congress intends agencies to fill gaps in the statutes they implement does not fit well with appropriations realities, given Congress's use of appropriations to control the executive branch and close supervision of how appropriated funds are used. The control that OMB wields on appropriations and budget matters within the executive branch also weighs against according agencies deference for their interpretations of appropriations statutes.

Appropriations-specific interpretive rules also can be an important means of reinforcing Congress's constitutional power of the purse. Federalism clear-statement canons are a helpful analogy. Under these canons, the Court invokes federalism concerns as justification for requiring Congress to make its intention to impose a burden on states plain in a statute.[440] A current example in the appropriations context is the requirement that appropriations must be express and not implied. This requirement is statutorily codified and embodied in GAO precedent, but its rigorous enforcement also follows from the Appropriations Clause's demand that every appropriation must be authorized by law.[441] A further possibility in this vein would be a rule that grants of unilateral appropriations authority to the executive branch should be narrowly construed. Under such a rule, ambiguities in statutory provisions authorizing transfers of appropriated funds or delays in expenditures would be read to narrow executive authority. As with other forms of constitutional avoidance, there is a risk that the resulting interpretation will differ from what Congress intended.[442] But that risk is justified to

438. Cf. McCubbins & Rodriguez, supra note 287, at 708–14 & n.137 (arguing that courts should not apply any presumptions and simply analyze congressional intent in the case at hand).

439. See supra text accompanying notes 263–269.

440. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (outlining a federalism "plain statement rule"); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); see also Ernest A. Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1373–80 (2001) (briefly listing, and then normatively evaluating, these "process federalism" doctrines).

441. See U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168–69, 174, 184–85 (D.D.C. 2016), vacated in part sub nom. U.S. House of Representatives v. Azar, No. 14-1967 (RMC), 2018 WL 8576647 (D.D.C. May 18, 2018) (citing 31 U.S.C. § 1301(d) (2018)).

442. See Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71, 74.

protect congressional control of the purse and guard against the real danger of de facto presidential spending authority.

A harder issue is whether taking appropriations seriously entails courts giving legal effect to statements in appropriations committee reports. Doing so would reflect the realities of the appropriations process. Unlike other committee reports, appropriations reports are drafted by the same legislative counsel used to draft bills, rather than by committee staff.[443] As noted above and contrary to the Supreme Court's assertions in *Hill*, evidence suggests that even members of Congress who are not on the Appropriations Committee treat appropriations reports as akin to legislation.[444] Indeed, members of Congress would have little understanding of the import of an appropriations measure without recourse to the report, given the lack of detail and frequent lump-sum allocations in the appropriations bill itself. Meanwhile, the fact that executive branch officials generally adhere to the reports in practice gives them de facto binding effect.[445] As a result, the concern that committee reports are not enacted through bicameralism and presentment is mitigated in the appropriations context. Put differently, members of Congress and the President understand that they are to some extent enacting the committee reports when enacting appropriations legislation. Indeed, although committee reports are not amendable on the floor, sometimes amendments are offered to an appropriations bill expressly to counter a provision in the report.[446]

Militating against making appropriations reports enforceable is the fact that Congress could include this detail in the text of an appropriations act if it so chose. Moreover, Congress's decision to omit these details from the appropriations act itself likely reflects concern that agencies have flexibility to deviate from specific allocations and other restrictions if the need arises, without having to obtain additional legislation.[447] Combined with the limited duration of appropriations measures, which means that Congress will have both a regular opportunity and the potential leverage of appropriations' must-pass status to force inclusion of such details in statutory text, these factors provide a strong basis for not treating

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443. Gluck & Bressman, supra note 293, at 980.

444. See supra text accompanying note 293.

445. Gluck & Bressman, supra note 293, at 980–82 (describing how "the purpose of the committee report in the appropriations context," unlike in other contexts, "is essentially to legislate"); see also Jessica Tollestrup, Cong. Rsch. Serv., R44124, Appropriations Report Language: Overview of Development, Components, and Issues for Congress 1 (2015) ("Although report language itself is not law and therefore not binding in the same manner as language in the statute, agencies usually seek to comply with any directives contained therein.").

446. Tollestrup, supra note 445, at 4.

447. See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("[T]he very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.").

appropriations reports as directly legally enforceable.[448] But these factors provide much less reason for courts not to give substantial weight to appropriations reports when it comes to interpreting what an appropriation means. In this context, the reports are not providing new requirements that Congress declined to include in enacted legislation but are instead supplying congressionally sanctioned explanations of the meaning of enacted provisions.[449]

Finally, what does taking appropriations seriously mean for determining when an appropriations measure amends substantive law? Although it is unjustified to impose a particularly high threshold before an appropriations measure is read as implicitly amending substantive law, finding such amendment whenever Congress fails to fully fund statutory authorizations is equally mistaken. Congress regularly appropriates less than is statutorily authorized and less than the executive branch needs to fully implement governing statutes. As a result, ordinarily Congress's decision to provide less funding than a statute requires in a given year should not be read to repeal the unfunded aspects. Sometimes, however, congressional funding decisions should be given substantive significance. The saga of the ACA's risk corridor funding provides such an instance. There, Congress did not simply underfund a statutory provision; instead, it expressly refused to fund a time-limited provision for the entire three-year period the provision was operative. In short, through the appropriations process Congress denied the provision any possible direct effect; the provision could only have an impact as a basis for judgment fund liability. In such a context, and contrary to the Supreme Court's decision in *Maine Community Health Options*, Congress's appropriations actions should have been found to repeal the risk corridor funding requirement.

3. *Jurisdiction over Appropriations Challenges.* — This leaves the question of when appropriations challenges should be judicially reviewable. As noted above, *Lincoln*'s holding that agency allocation decisions with respect to a lump-sum appropriation are nonreviewable is another appropriations-specific rule.[450] Arguably, the *Lincoln* rule goes too far in

448. See Jesse M. Cross, When Courts Should Ignore Statutory Text, 26 Geo. Mason L. Rev. 453, 487–91 (2018) (arguing that the Court's approach to report language is "faithful to congressional intent" because Congress does not direct report language to the courts for enforcement).

449. Courts occasionally look to appropriations committee reports in interpreting appropriations legislation, although they do not suggest that appropriations committee reports deserve more weight in interpretation than other committee reports. See, e.g., Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340, 1352–57 (Fed. Cir. 2020) (invoking appropriations and conference reports); Pontarelli v. U.S. Dep't of the Treasury, 285 F.3d 216, 226–29 (3d Cir. 2002) (relying heavily on appropriations reports in interpreting 18 U.S.C. § 925(c) (2000)). Contra Bean v. Bureau of Alcohol, Tobacco and Firearms, 253 F.3d 234, 237 (5th Cir. 2001) (rejecting reliance on committee reports in interpreting Section 925(c)), rev'd sub nom. United States v. Bean, 537 U.S. 71 (2002).

450. See supra text accompanying notes 234–241.

shielding executive action, and a better stance would be to hold that such decisions are simply presumptively nonreviewable, in line with the approach courts take to nonenforcement decisions. But unlike nonenforcement, the decision to provide a lump sum rather than itemized appropriation lies with Congress, and Congress is frequently consulted on agency decisions to reprogram lump-sum appropriations. Moreover, the certainty of the *Lincoln* rule is particularly helpful in the appropriations context, given the time-limited window in which appropriated funds can be obligated and agencies' needs for flexibility and discretion. Given these factors, the *Lincoln* rule appears justified.[451]

On the other hand, for these arguments to work, it is also necessary that the specific limits Congress includes in appropriations acts be judicially enforceable. Absent such enforceability, Congress's ability to police executive branch funding actions would be compromised; its threat of punishing agencies who use appropriated funds in ways Congress did not intend or approve through greater statutory constraints or funding cut-offs would have no bite. As discussed above, the APA's cause of action requires plaintiffs to show that the interests they assert are arguably within the zone of interests protected by the statute in question. Still, weak as the test is, it would exclude instances in which individuals are particularly and concretely harmed by challenged agency appropriations decisions, yet have no other relationship to the agency or appropriation at issue.[452] Moreover, injuries of this sort appear more likely in the appropriations context, given the fungibility of appropriated funds.

One response would be for courts to apply an even more lenient version of the zone of interests test in the appropriations context or exempt suits alleging violation of appropriations statutes from the test altogether.[453] This would be an appropriations-specific rule keyed to reinforcing congressional control of appropriations, and to that extent it resonates with the approach articulated here. But this approach ducks the question of whether Congress would want to allow third parties to sue in its stead in this fashion. That is surely at least debatable, given the potential for delay and loss of flexibility as agency appropriations decisions are mired in litigation. Moreover, these suits actually could serve to undercut congressional appropriations controls, if they were to go forward even when congressional appropriations committees had been consulted and had informally approved the appropriations change at issue. Allowing such congressional action to preclude suit, however, would come close to sanctioning binding legislative action outside the bicameralism and

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451. See Pasachoff, Trump Era Budget Powers, supra note 118, at 88–89 (emphasizing the need for spending discretion and cautioning that courts cannot reliably "police executive budget decisions").

452. See supra text accompanying notes 245–250.

453. See supra notes 251–255.

presentment process, which is what doomed the legislative veto. Another route would be to allow private suits if Congress provides a private right of action, thereby signaling its desire for private enforcement in court.[454] Yet this approach would force Congress to the choice of opening up appropriations actions broadly to suit or leaving some potentially major violations of appropriations statutes without legal recourse.

An alternative that bypasses these concerns is to allow Congress itself—either both houses collectively or one house on its own—to sue to challenge unauthorized uses of appropriated funds. Such a move would more tightly connect appropriations litigation to the constitutional appropriations framework. It would also directly enforce Congress's political control over appropriations, not simply because Congress could back up its complaints by suit but also because no suit would be forthcoming when Congress was consulted and approved the action at issue. And by thereby reinforcing the executive branch's incentive to obtain congressional approval for transfers and reprogramming of appropriated funds, allowing Congress to sue might actually serve to limit judicial involvement.[455]

The problem is that it is far from clear that Congress could have standing to sue for a violation of an appropriations statute. Recently, the D.C. Circuit took a capacious view of congressional standing, concluding that the House of Representatives had standing to challenge the border wall transfers, as well as that a House committee—and, further, just seven members of a committee—could sue over the Trump Administration's refusal to comply with subpoenas and information requests.[456] However, whether the Supreme Court will follow suit is unclear. Although the Court has expressly left open the possibility that Congress could sue to vindicate its institutional interests, it has also signaled some doubt about such suits.[457] Congressional standing is also a topic of much academic debate.

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454. Bennett v. Spear, 520 U.S. 154, 164 (1997) (finding that a citizen-suit provision negates the prudential zone of interests requirement).

455. For an analogous approach that seeks to empower Congress using appropriations and courts, see Stack & Vandenbergh, supra note 418, at 27, 30 (suggesting congressional use of oversight riders, which would prohibit use of appropriated funds to resist congressional subpoenas unless a court determined that the information sought was subject to executive privilege, as a means of creating ex ante incentives for executive officials to comply with such subpoenas).

456. Maloney v. Murphy, 984 F.3d 50, 70 (D.C. Cir. 2020); U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 12–14 (D.C. Cir. 2020); Comm. on the Judiciary v. McGahn, 968 F.3d 755, 764–71 (D.C. Cir. 2020) (en banc).

457. See Raines v. Byrd, 521 U.S. 811, 823–28 (1997); see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 n.12 (2015) (noting that "a suit between Congress and the President would raise separation-of-powers concerns" that the Court did not need to address in the case at hand). Compare United States v. Windsor, 570 U.S. 744, 790 (2013) (Scalia, J., dissenting) (arguing that "*Raines* did not formally decide [the] issue . . . [of congressional standing,] but its reasoning" precludes it), with id. at 803–

Some opponents of congressional standing argue that litigation to enforce a statute represents an executive function that Congress is constitutionally prohibited from performing.[458] This claim proves too much; it would also mean that private parties cannot sue to challenge executive branch action as violating a statutory mandate and might raise questions about whether Congress can participate in litigation in any form, even as an amicus. To my mind, the more pressing concern is that allowing Congress to sue for executive branch failure to enforce statutes would open the courts to adjudicate a vast array of legislative–executive branch disputes, thereby elevating judicial power over the political branches and engulfing the courts in political battles.[459] One solution might be to distinguish between Congress suing to enforce the Appropriations Clause and suing to enforce statutes, a move the district court made in *U.S. House of Representatives v. Burwell*.[460] Such a distinction is impossible to sustain, however, given that whether the Clause is violated will turn on whether an obligation of funds by the government was statutorily authorized.[461]

This is admittedly a hard question, but ultimately the arguments for limited congressional standing in the appropriations context are more persuasive. Accepting that harm to Congress's appropriations power from executive branch violation of an appropriations limit is sufficient injury to allow suit, Congress as a whole could meet the core injury-causation-redressability requirements for standing.[462] Granted, the assumption that Congress's institutional injury can be concrete and particularized enough to support standing is contentious, and Congress suing in court is surely not the main mechanism that the Constitution envisions for Congress

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07 (Alito, J., dissenting) (arguing that congressional standing was available and not precluded by *Raines*).

458. *Windsor*, 570 U.S. at 788–91 (Scalia, J., dissenting); Tara Leigh Grove & Neal Devins, Congress's (Limited) Power to Represent Itself in Court, 99 Cornell L. Rev. 571, 574–76 (2014) (arguing that litigation to enforce a statute is an executive function that Congress cannot perform and also violates the constitutional norm of bicameralism).

459. See Comm. on the Judiciary v. McGahn, 951 F.3d 510, 517–19 (D.C. Cir. 2020), vacated en banc, 968 F.3d 755 (D.C. Cir. 2020); Chafetz, Executive Branch Contempt, supra note 401, at 1149–51; Pasachoff, Trump Era Budget Powers, supra note 118, at 88–89; see also Vicki C. Jackson, Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy, 93 Ind. L. J. 845, 856–58 (2018) (expressing concern that having standing to sue may reinforce Congress's disinclination to take governance and compromise seriously).

460. 130 F. Supp. 3d 53, 69–70, 72–73 (D.D.C. 2015).

461. See U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 18–19 (D.D.C. 2019), aff'd in part, vacated in part, remanded, 976 F.3d 1 (D.C. Cir. 2020).

462. *Arizona State Legislature* suggests that such an institutional interest is sufficient injury, even though the Court there noted that separation of powers concerns nonetheless might forestall congressional standing. *Ariz. State Legislature*, 135 S. Ct. at 2663–66 & n.12.

asserting its interests.[463] Still, it is Congress that is constitutionally granted the power of the purse, providing a basis for claiming particularized harm. Moreover, despite the Court's rejection of one-house legislative standing in some contexts,[464] the Appropriations Clause's requirement that each appropriation be authorized by statute arguably grants each house a distinct institutional interest in protecting its ability to block an appropriation.[465] And although the distinction between constitutional and statutory appropriations challenges fails, the critical role of the Appropriations Clause as a core congressional check on the executive branch can distinguish the appropriations context from other instances of executive branch statutory violations.[466]

In the end, standing rests on separation of powers principles, and there are strong separation of powers concerns on both sides. Particularly when a lack of congressional standing would allow the executive branch to violate an appropriations provision with legal impunity, the separation of powers may be better served by allowing Congress to sue, especially since doing so may give the executive branch more reason to negotiate with Congress in the first place.[467] It is also worth noting that Congress's need to sue to enforce its appropriations power is to some extent a problem of the Supreme Court's making, in invalidating the legislative veto across the board. Indeed, the very political and intragovernmental character of legislative–executive appropriations disputes that provides reason to deny Congress standing also supports allowing the legislative veto for appropriations actions.

### B. *Incorporating Appropriations in Practice: The Border Wall Litigation*

The border wall litigation provides a good illustration of what this approach to taking appropriations seriously might mean in practice.

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463. See Grove, supra note 401, at 615–16 (challenging the idea of institutional injuries on the ground that government "[i]nstitutions have no greater interest in their constitutional powers and duties than any other member of society").

464. See Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953–55 (2019) ("The Court's precedent . . . lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment.").

465. The D.C. Circuit makes an argument along these lines. See U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 14 (D.C. Cir. 2020).

466. Cf. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 69–70 (D.D.C. 2015) (finding standing for statutory violations under the "Non-Appropriation Theory," a constitutional argument that alleged the executive branch intruded on Congress's appropriations power, and denying standing under the "Employer-Mandate Theory," a statutory argument that alleged the executive branch was unfaithful to the ACA).

467. See Jonathan Remy Nash, A Functional Theory of Congressional Standing, 114 Mich. L. Rev. 339, 343 (2015) (arguing for standing where "a majority of a house of Congress . . . challenged executive action that systematically and substantially diminished the majority's bargaining power").

Although now on hold at the Court while the Biden Administration reviews the funds transfers at issue and potentially moot,[468] the border wall litigation raised challenging jurisdictional and interpretive issues.

The jurisdictional problem here is not finding a plaintiff who has standing; it is instead finding a plaintiff with standing who has a cause of action. In the Ninth Circuit, even the government agreed that the potential environmental effects of the wall meant that states in which the wall is being built and environmental organizations had standing.[469] As noted above, the problem is that these environmental interests are marginal to the statutes involved, Section 8005 of the FY2019 DOD Appropriations Act and 10 U.S.C. §§ 284 and 2808, that govern the zone of interests inquiry for purposes of suing under the APA.[470] Other plaintiffs come closer, in particular Washington and El Paso County, who claim that federal funds Congress had appropriated for defense projects in their jurisdictions were diverted to pay for the wall, resulting in lost economic activity and tax revenue for their jurisdictions.[471] Members of Congress have long sought to direct appropriations money to benefit their districts economically—either through earmarks or other means[472]—so these interests bear a more plausible relationship to the FY2019 DOD Appropriations Act and Section 8005. But allowing such incidental economic effects to suffice for bringing suit under the APA also could open up appropriations actions broadly to legal challenge. That would also be the result of the Ninth Circuit's holding that an equitable action will lie to challenge an executive branch appropriations action as ultra vires (and therefore violating the Appropriations Clause).[473]

On the other hand, the institutional interests that the House of Representatives is asserting in its lawsuit challenging the border wall funds transfer lie at the heart of Section 8005. As the Ninth Circuit stated, "In enacting Section 8005, Congress primarily intended to benefit itself and its constitutional power to manage appropriations."[474] On its face, Section 8005 seeks to enforce congressional appropriations decisions,

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468. See Howe, supra note 7; supra text accompanying note 119.

469. See Sierra Club v. Trump, 963 F.3d 874, 884 n.9 (9th Cir. 2020), cert. granted, 141 S. Ct. 618 (2020). So did the dissenting judge. Id. at 901–03 (Collins, J., dissenting); see also California v. Trump, 963 F.3d 926, 935–36 n.10 (9th Cir. 2020), cert. granted sub nom. Trump v. Sierra Club, 141 S. Ct. 618 (2020); id. at 953–55 (Collins, J., dissenting).

470. See supra text accompanying notes 246–250.

471. Washington v. Trump, 441 F. Supp. 3d 1101, 1113 (W.D. Wash. 2020); El Paso County v. Trump, 408 F. Supp. 3d 840, 848–52 (W.D. Tex. 2019), aff'd in part, rev'd on other grounds, 982 F.3d 332 (5th Cir. 2020).

472. See Rebecca M. Kysar, Listening to Congress: Earmark Rules and Statutory Interpretation, 94 Cornell L. Rev. 519, 534–36 (2009) (describing earmarks and their prevalence during the George W. Bush Administration).

473. *Sierra Club*, 963 F.3d at 890.

474. *California v. Trump*, 963 F.3d at 942.

prohibiting a transfer of funds that Congress had previously denied. And Congress has a particular institutional interest in ensuring agencies adhere to the requirements of a statute that gives an agency discretion to transfer funds that Congress appropriated for one use to another.[475] The fact that transfer authorizations are at issue is also helpful given that only the House of Representatives is suing. If the Trump Administration cannot transfer funds under existing appropriations acts, it would need to obtain a new statute to do so—a statute that the House on its own could prevent from being enacted given the requirement of bicameralism. As a result, the House is asserting its own institutional interests in ensuring that its approval is needed for any new use of funds, even if it is also asserting Congress's collective institutional interest in having its laws enforced.[476] In finding that the House had standing, the D.C. Circuit made an argument to just this effect, concluding that "the House is individually and distinctly injured because the Executive Branch has allegedly cut the House out of its constitutionally indispensable legislative role . . . . [and] defied an express constitutional provision that protects each congressional chamber's unilateral authority to prevent expenditures."[477]

Under the approach advocated here, the best course would be to allow the House to sue rather than the states and environmental organizations. The whole point of a transfer provision is to allow the government flexibility to respond to a new development and to do so quickly without getting a supplemental appropriations bill passed. As a result, broadly available third-party litigation could be particularly costly in this context. But if the House is denied the ability to sue, then—as the Ninth Circuit argued—separation of powers concerns with protecting Congress's power of the purse and preventing de facto independent presidential spending authority support applying a very lenient zone of interests inquiry or doing away with it altogether.

On the interpretive front, the question is whether DOD's transfer of billions of dollars to DHS to build the wall satisfied Section 8005's requirement that the "the funds will be used for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress"?[478] The Ninth Circuit held it

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475. See 31 U.S.C. § 1532 (2018) ("An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.").

476. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 14 (D.C. Cir. 2020) (concluding that the House had standing to challenge transfers under Section 8005 of the FY2019 DOD Appropriations Act and 10 U.S.C. §§ 284 and 2808).

477. Id. at 13.

478. The additional statutory provisions that the government invoked to authorize the funds transfer included counterdrug and military construction authorities. See 10 U.S.C. §§ 284, 2808 (2018); see also John S. McCain National Defense Authorization Act for Fiscal

did not, concluding that given the battles over border wall funding that had led to the thirty-five-day shutdown, DOD was on notice it might be asked to provide funds to build the wall. Nor, against this background, could it be said Congress did not anticipate the claimed need for the wall; instead, Congress opted repeatedly to deny wall funding, making the transfer doubly violative of Section 8005's terms.[479] Indeed, the appellate court also ruled that the border wall did not qualify as a "military requirement," noting that the wall was not connected to a military installation or needed for troops, weapons, or war effort.[480] Instead, its primary purpose was to benefit DHS, a civilian agency.[481] GAO, however, reached the opposite conclusion. It agreed with the government that "unforeseen" refers to whether DOD was aware of the need to provide funds for border wall construction at the time DOD submitted its budget request and when Congress enacted DOD's appropriations.[482] And it further agreed that Congress did not deny the request by only providing $1.375 billion in border fencing funds, because that was a denial of DHS's request for additional funds, with DOD not making any such funding request at all.[483]

As suggested above, in an ordinary appropriations dispute GAO's views deserve special weight, given its expertise and Congress's delegation to it of an appropriations-policing role. Surprisingly, the Ninth Circuit never addressed GAO's contrary view, despite it being relied upon by the dissenting judge. That was an unjustified omission; even if a court reaches a different conclusion, GAO's views on the meaning of appropriations statutes deserve serious consideration. The harder question is whether the Ninth Circuit should have deferred to GAO's views.

Two factors counsel against such deference here. The first is that this was no ordinary appropriations dispute. Instead, it involves the executive branch's unilateral reallocation of billions of dollars in furtherance of a

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Year 2019, Pub. L. No. 115-232, § 1001, 132 Stat. 1636, 1945 (2018) (providing authority similar to Section 8005). Leaving aside whether 10 U.S.C. §§ 284 and 2808 on their own terms support DOD actions, a question exists as to whether they can operate independently of permission in an appropriations act such as Section 8005, given that Section 739 of the Consolidated Appropriations Act of 2019 prohibited the administration from "increas[ing] . . . funding for a[ny] program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an Appropriations Act," or is made pursuant to provisions in an appropriations act. See Washington v. Trump, 441 F. Supp. 3d 1101, 1109, 1116–17 (W.D. Wash. 2020) (concluding that Section 739 prohibits independent use of Section 2808 authority).

479. *California v. Trump*, 963 F.3d at 945–46.

480. Id. at 947.

481. Id.

482. Dep't of Def.—Availability of Appropriations for Border Fence Constr. to Cong. Requesters, B-330862, 2019 WL 4200949, at *6 (Comp. Gen. Sept. 5, 2019).

483. Id. at *8–9. GAO also concluded that the use of the funds to build border fences was a permissible use of funds under 10 U.S.C. § 284. Id. at *10–14.

highly contentious immigration initiative that had just triggered the longest government shutdown in history. Arguably, therefore, this case involves the type of major "question of deep 'economic and political significance'" that the Supreme Court has held is inappropriate for deference in non-appropriations contexts.[484] Taking a standard public law approach to appropriations, therefore, would support a court deciding this question using its independent judgment, as the Ninth Circuit did. The second is that, in authorizing DOD to transfer appropriated funds to a different use without having to obtain legislation approving the change, Section 8005 serves to delegate unilateral appropriations authority to the executive branch. It is therefore the type of provision that, as suggested above, should be read with an eye to reaffirming congressional control of the purse. Particularly in light of Congress's subsequent resolutions condemning the transfer, the Ninth Circuit's narrow reading represents the better account of Section 8005's scope.[485]

## CONCLUSION

In today's deeply polarized and politically competitive world, appropriations are a critical means by which both Congress and the President seek to control policy. This increased dependence on and exploitation of appropriations has significant impact on agencies' functioning and the relationship between Congress and the executive branch. It is also leading to litigation, as a number of high-profile appropriations disputes spill over into courts. Yet while appropriations are the contemporary linchpin of government, they are marginalized in public law doctrine. Across several major domains of public law—constitutional law, administrative law, and statutory interpretation—a number of doctrines exclude appropriations disputes from court or minimize the importance of appropriations when judicial review occurs. Even when appropriations' significance is not downplayed, they are often either pulled out of standard analytic frameworks or simply ignored. Appropriations are center stage in the political branches, however. These two phenomena are closely related; appropriations' marginalization in public law doctrine is based in part on

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484. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

485. The argument would also support narrowly reading 10 U.S.C. § 2808, the other transfer provision relied on by the Trump Administration. Even capaciously read, however, Section 2808 fails to support the border wall funds transfers. Section 2808 provides that "[i]n the event of a . . . declaration by the President of a national emergency . . . that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects . . . that are necessary to support such use of the armed forces," using funds appropriated for military construction. As the Ninth Circuit held, the border wall was "intended to benefit DHS and its subagencies, . . . not the armed forces" and failed to meet the statutory definition of military construction as "'carried out with respect to a military installation.'" Sierra Club v. Trump, 977 F.3d 853, 879–88 (9th Cir. 2020), petition for cert. filed, No. 20-685 (U.S. Nov. 17, 2020) (quoting 10 U.S.C. § 2801(a)).

the belief that appropriations are inherently matters for the political branches, not the courts. But appropriations marginalization also rests on a judicial prioritizing of substantive legislation over appropriations measures.

Recognizing the doctrinal marginalization of appropriations and the resultant disconnect with appropriations reality is only the first step. The harder questions are whether this marginalization is nonetheless justified—and if not, how appropriations should be better incorporated into public law. This Article has argued that the current marginalization of appropriations is at odds with the Constitution. The very centrality of appropriations to policy disputes today reinforces the conclusion that prioritizing substantive enactments illegitimately undercuts Congress's appropriations power. It also highlights the separation of powers costs of appropriations marginalization in public law doctrine, with jurisdictional exclusion in particular serving to expand the President's de facto independent spending authority. Yet at the same time, this centrality also underscores the deeply political nature of appropriations and the dangers of expanding the judicial role. The challenge is to construct a doctrinal approach that better accords with the constitutional appropriations framework and gives appropriations measures their due weight in court, while also reinforcing political branch regulation of appropriations.

This Article has sought to sketch such an approach, identifying how taking appropriations seriously might alter constitutional analysis, statutory interpretation, and access to judicial review. Although focusing on appropriations, this approach is animated by two ideas with implications for separation of powers disputes more broadly, both keyed to the deep governance challenges posed by partisan polarization and division today. One is that courts should be sensitive to the branches' needs to wield their powers in new ways.[486] Both Congress and the executive branch have turned to appropriations as a means of asserting policy control in the contemporary polarized environment, and courts should not discourage such efforts absent a clear constitutional foundation for doing so. The other is that courts should seek to set separation of powers rules that encourage interbranch negotiation. Embracing both of these ideas would not only lead to taking appropriations seriously, it would help to construct a separation of powers doctrine that would better suit our polarized era.

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486. See Leah M. Litman, Debunking Antinovelty, 66 Duke L.J. 1407, 1412, 1423 (2017).