

## LEADING CASES

### CONSTITUTIONAL LAW

#### *Appropriations Clause — History and Tradition —* CFPB v. Community Financial Services Ass’n of America

The Appropriations Clause provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>1</sup> In *CFPB v. Community Financial Services Ass’n of America*<sup>2</sup> (*CFSA*), the Supreme Court ruled that the funding scheme of the Consumer Financial Protection Bureau (CFPB) complied with this text.<sup>3</sup> Though all nine Justices nominally analyzed “text, history, and tradition,” they diverged on the proper weight and relevance to ascribe to sources of evidence. The primary fault line dividing Justice Thomas’s majority opinion, Justice Kagan’s concurrence, and Justice Alito’s dissent concerns the level of generality at which the author defined and described constitutional provisions, pre-ratification history, and post-ratification practice. The convergence in method but divergence in application underscores a simple takeaway: more choices, more discretion, more problems.

The CFPB was established after the 2008 financial crisis by the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>4</sup> (Dodd-Frank Act) to serve as an independent financial regulator.<sup>5</sup> The Bureau “acts as a mini legislature, prosecutor, and court,”<sup>6</sup> administering over eighteen laws “cover[ing] everything from credit cards and car payments to mortgages and student loans.”<sup>7</sup> To prevent political capture of the powerful financial watchdog, Congress designed the Dodd-Frank Act to grant the Bureau “novel” independence.<sup>8</sup> First, Congress insulated the Bureau from executive control by installing a single Director removable for “inefficiency, neglect of duty, or malfeasance in office.”<sup>9</sup> In *Seila Law LLC v. CFPB*,<sup>10</sup> the Court severed this provision, reasoning that the

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<sup>1</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>2</sup> 144 S. Ct. 1474 (2024).

<sup>3</sup> *Id.* at 1479.

<sup>4</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>5</sup> See *CFSA*, 144 S. Ct. at 1479 (citing 12 U.S.C. § 5491(a)).

<sup>6</sup> *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2202 n.8 (2020).

<sup>7</sup> *Id.* at 2189; see also *What Laws Does the CFPB Enforce?*, CFPB (Dec. 15, 2021), <https://www.consumerfinance.gov/ask-cfpb/what-laws-does-the-cfpb-enforce-en-2121> [<https://perma.cc/F78V-UEWX>].

<sup>8</sup> *CFSA*, 144 S. Ct. at 1479.

<sup>9</sup> 12 U.S.C. § 5491(b)(1), (c)(3).

<sup>10</sup> 140 S. Ct. 2183 (2020).

single Director’s removal protection unconstitutionally “concentrat[ed] power in a unilateral actor insulated from Presidential control.”<sup>11</sup>

Second, in addition to limiting executive supervision, the Dodd-Frank Act established a novel funding structure that reduced congressional oversight of the Bureau. The Act allows the Bureau to withdraw from the “earnings of the Federal Reserve System . . . the amount determined by the [Bureau’s] Director to be reasonably necessary to carry out” its duties.<sup>12</sup> The amount is subject only to an inflation-adjusted statutory cap of twelve percent of the Federal Reserve’s total operating expenses.<sup>13</sup> Should the Bureau run a surplus, it may “invest[]” any remaining funds “that [are] not, in the judgment of the Bureau, required to meet [its] current needs” and keep “[t]he interest on[] and the proceeds from the sale” of any of its obligations.<sup>14</sup> In fiscal year 2022, the Bureau withdrew \$641.5 million of the \$734 million available and managed investments valued at nearly \$340 million.<sup>15</sup>

The self-determined, perpetual funding mechanism shelters the Bureau from the appropriations cycle.<sup>16</sup> The Dodd-Frank Act’s authors were transparent about the goal of the Bureau’s unusual funding structure: It was “absolutely essential” that the Bureau have “adequate funding, independent of the Congressional appropriations process” to prevent the legislature from using the Bureau’s appropriations as leverage to control its operations.<sup>17</sup> To cut the Bureau’s funding, Congress would have to substantially reduce the Federal Reserve System’s net earnings — an impossibility since Congress is involved in neither the Federal Reserve’s acquisition of interest-bearing securities nor its receipt of fees from depository institutions.<sup>18</sup> Moreover, since the Bureau’s funding mechanism runs in perpetuity, Congress cannot threaten to delay disbursement, decline to appropriate, or even review the Bureau’s self-appropriation.<sup>19</sup> By minimizing Congress’s fiscal oversight of the Bureau, the Dodd-Frank Act intentionally unified funding and enforcement discretion — purse and sword — in the Bureau.

<sup>11</sup> *Id.* at 2192; *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84 (2010).

<sup>12</sup> 12 U.S.C. § 5497(a)(1).

<sup>13</sup> *Id.* § 5497(a)(2)(A)–(B). The twelve percent cap has been in effect from fiscal year 2013 onward. *See* § 5497(a)(2)(A)(i)–(iii).

<sup>14</sup> *Id.* § 5497(b)(3).

<sup>15</sup> CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: FISCAL YEAR 2022, at 44–45, 66 (Nov. 15, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_financial-report\\_fy2022.pdf](https://files.consumerfinance.gov/f/documents/cfpb_financial-report_fy2022.pdf) [<https://perma.cc/6FY3-7H89>].

<sup>16</sup> *See* 12 U.S.C. § 5497(a)(2)(C).

<sup>17</sup> S. REP. NO. 111-176, at 163 (2010); *see* 156 CONG. REC. 13195 (2010) (statement of Sen. Dodd).

<sup>18</sup> *See* FED. RSRV., THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 4 (11th ed. 2021), <https://www.federalreserve.gov/aboutthefed/files/the-fed-explained.pdf> [<https://perma.cc/WSB4-L2ED>].

<sup>19</sup> 12 U.S.C. § 5497(a)(2)(A)–(B); *id.* § 5497(a)(2)(C) (“[T]he funds . . . shall not be subject to review . . .”).

Cue the litigation. In 2017, the Bureau promulgated the Payday Lending Rule to police the issuance of high-interest consumer loans.<sup>20</sup> Trade associations for payday lenders and credit-access businesses challenged the rule on six statutory and constitutional bases, including that the Bureau's funding scheme violated the Appropriations Clause.<sup>21</sup> The district court rejected this claim with a single sentence of exasperated reasoning: "Where, as here, a [law] authorizes an agency to receive funds up to a certain cap, there is no Appropriations Clause issue."<sup>22</sup>

The Fifth Circuit spent several dozen sentences enthusiastically reversing.<sup>23</sup> The unanimous panel reasoned that the Appropriations Clause "affirmatively obligates" Congress to "maintain the boundaries between the branches and preserve individual liberty from the encroachments of executive power."<sup>24</sup> When Congress authorized the Bureau's "self-actualizing, perpetual funding mechanism,"<sup>25</sup> it "ran afoul of the separation of powers embodied in the Appropriations Clause" by "abandoning its 'most complete and effectual' check" on executive authority.<sup>26</sup> Unable to sever the funding provision, the Fifth Circuit vacated the rule,<sup>27</sup> and the Supreme Court granted certiorari.<sup>28</sup>

The Court reversed.<sup>29</sup> Writing for a 7–2 majority,<sup>30</sup> Justice Thomas reasoned that "an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes."<sup>31</sup> The Dodd-Frank Act met these requirements by (1) specifying that the money should come from the Federal Reserve and (2) designating the money for use to further the CFPB's mission.<sup>32</sup> To reach this conclusion, Justice Thomas sequentially analyzed "the Constitution's

<sup>20</sup> 12 C.F.R. pt. 1041 (2024). The Bureau ratified the challenged section of the Rule in 2020, two weeks after the Court decided *Seila Law*. See *Cnty. Fin. Servs. Ass'n of Am. v. CFPB*, 558 F. Supp. 3d 350, 355 (W.D. Tex. 2021).

<sup>21</sup> See *Cnty. Fin. Servs. Ass'n of Am.*, 558 F. Supp. 3d at 355, 364. The associations additionally asserted that the rulemaking was (1) voided by the Bureau's unconstitutional structure, *id.* at 358; (2) arbitrary, capricious, and procedurally improper, *id.*; (3) outside the Bureau's statutory authority, *id.* at 361; (4) unreasonable in terms of costs and benefits, *id.* at 363; and (5) unresponsive to proposed amendments, *id.*

<sup>22</sup> *Id.* at 367.

<sup>23</sup> See *Cnty. Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616, 623, 635–44 (5th Cir. 2022). The Fifth Circuit affirmed the district court's conclusions that the Bureau was acting within its statutory authority, *id.* at 629, the Director's removal protection did not invalidate the rule, *id.* at 633, and the Bureau's rulemaking complied with the nondelegation doctrine, *id.* at 635.

<sup>24</sup> *Id.* at 637 (quoting *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 231 (5th Cir. 2022) (Jones, J., concurring)).

<sup>25</sup> *Id.* at 638.

<sup>26</sup> *Id.* at 639–40 (quoting THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 2003)).

<sup>27</sup> *Id.* at 643–44.

<sup>28</sup> *CFPB v. Cnty. Fin. Servs. Ass'n of Am.*, 143 S. Ct. 978 (2023) (mem.).

<sup>29</sup> *CFSA*, 144 S. Ct. at 1478–80.

<sup>30</sup> Justice Thomas was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson.

<sup>31</sup> *Id.* at 1480.

<sup>32</sup> See *id.* at 1486.

text, the history against which that text was enacted, and congressional practice immediately following ratification.”<sup>33</sup> This tripartite analysis showcased Justice Thomas’s characteristic “narrow compositional approach”<sup>34</sup>: After identifying the word “[a]ppropriation” as the fulcrum of the analysis,<sup>35</sup> he defined the term in isolation at a single moment in time, then contextualized this definition against the clause, the Constitution, and the contemporary historical practice.

Justice Thomas dispatched with the text quickly. He reasoned that “[a]ppropriation” was used in neighboring provisions to require only that Congress “assign funds for specific uses,”<sup>36</sup> not to restrict the timing or origin of the funds. These context clues about constitutional meaning tracked the term’s “ordinary usage”<sup>37</sup> at the Founding. As glossed in four Founding-era dictionaries, the term “appropriation” referred to an “application,” “assigning,” or “sequestering” of “something” to a “particular use” or “purpose.”<sup>38</sup> From this linguistic and contextual evidence, Justice Thomas cobbled together a definition: An appropriation was “a law authorizing the expenditure of particular funds for specified ends.”<sup>39</sup> Or, simply put, it identified a “source and purpose” for funds.<sup>40</sup>

Justice Thomas then narrated a whirlwind tour of constitutional history. He sketched the hard-fought transition from executive to legislative control over appropriations that occurred between the Middle Ages and the Glorious Revolution.<sup>41</sup> By the Founding era, so absolute and expected was the legislature’s plenary control over appropriations that the topic “engendered little debate and created no disagreement” among the Framers.<sup>42</sup> Scattered discussions from the Founding corroborated the term’s plain meaning, suggesting only that Congress must “designate particular revenues for identified purposes.”<sup>43</sup> But, aside from that

<sup>33</sup> *Id.* at 1481.

<sup>34</sup> See William N. Eskridge, Jr. et al., *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1635 (2023) (emphasis omitted).

<sup>35</sup> See *CFSA*, 144 S. Ct. at 1481. All nine Justices focused on this term because the parties did not dispute that the Bureau’s funds were “by Law” or “drawn from the Treasury.” U.S. CONST. art. I, § 9, cl. 7; see *CFSA*, 144 S. Ct. at 1496 (Alito, J., dissenting). But see Brief of Professors of Hist. & Const. L. as Amici Curiae in Support of Petitioners at 6, *CFSA*, 144 S. Ct. 1474 (No. 22-448) (arguing the Appropriations Clause does not apply to the Bureau’s funding because the Federal Reserve’s net earnings are not public money “drawn from the Treasury”).

<sup>36</sup> *CFSA*, 144 S. Ct. at 1482.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (quoting 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); 1. J. ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1795); 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); T. DYCHE & W. PARDON, A NEW GENERAL ENGLISH DICTIONARY (14th ed. 1771)). Justice Thomas’s goal of defining the term at “the time the Constitution was ratified” is undermined by his primary reliance on Webster’s 1828 dictionary, which postdates the Founding by four decades. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1482–84.

<sup>42</sup> *Id.* at 1484.

<sup>43</sup> *Id.*

bare-bones requirement, the legislature could “exercise[] a wide range of discretion”<sup>44</sup> over the amount, timing, and specificity of funding.

Finally, Justice Thomas lingered on tradition — or, more accurately, “[t]he practice of the First Congress.”<sup>45</sup> To Justice Thomas, “preratification appropriations laws” and “[p]ostratification practice” liquidated the fixed meaning of the term “[a]ppropriation.”<sup>46</sup> This Founding-era practice — but not the next two centuries of tradition — “provide[d] contemporaneous and weighty evidence of the Constitution’s meaning.”<sup>47</sup> Justice Thomas concluded that “flexible,” “open-ended” fee-based revenue collection schemes that vested discretion in the recipient were common at the Founding and therefore constitutional at present.<sup>48</sup> For instance, like the Bureau, the Customs Service and Post Office were funded by fees and duties pegged to their relatively autonomous operations instead of an annual appropriation.<sup>49</sup> The Founding-era practice cemented Justice Thomas’s “source-and-purpose understanding”<sup>50</sup>: To validly appropriate public money, Congress needed to designate a source and identify a purpose for the funds — no more, no less.

Justice Kagan, joined by Justices Sotomayor, Kavanaugh, and Barrett, concurred to emphasize the role of post-Founding historical practice.<sup>51</sup> Justice Kagan agreed with Justice Thomas’s “source-and-purpose” understanding of the text and history.<sup>52</sup> She wrote separately solely to underscore that “[l]ong settled and established practice” may have “great weight” in interpreting constitutional provisions about the operation of government.<sup>53</sup> While the majority focused exclusively on Founding-era practice, Justice Kagan treated “continuing tradition” and “unbroken” practice from the Founding to present as relevant to the analysis.<sup>54</sup> As she explained, the Bureau’s funding structure would have “fit right in” at the Founding — or “at any other time in our Nation’s history.”<sup>55</sup> To her, two centuries of “innovation and adaptation” in

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1486, 1488. Like Justice Thomas, James Madison references post-Founding “discussions and adjudications” as key sources to “liquidate[] and ascertain[]” a law’s “obscure and equivocal meaning.” THE FEDERALIST NO. 37, *supra* note 26, at 225 (James Madison). See generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (explaining liquidation).

<sup>47</sup> *CFSA*, 144 S. Ct. at 1484 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)); see also Baude, *supra* note 46, at 60 (distinguishing *Bowsher*’s account of practice from Madisonian liquidation).

<sup>48</sup> *CFSA*, 144 S. Ct. at 1485–86 (collecting statutes).

<sup>49</sup> See *id.*

<sup>50</sup> *Id.* at 1484.

<sup>51</sup> *Id.* at 1490 (Kagan, J., concurring). Justice Jackson filed a separate concurrence to emphasize that separation of powers counseled judicial restraint. *Id.* at 1492–93 (Jackson, J., concurring).

<sup>52</sup> *Id.* at 1490 (Kagan, J., concurring).

<sup>53</sup> *Id.* (quoting *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020)).

<sup>54</sup> *Id.* at 1492.

<sup>55</sup> *Id.* at 1490.

appropriations provided relevant insight into “[t]he way our Government has actually worked, over our entire experience.”<sup>56</sup>

Justice Alito, joined by only Justice Gorsuch, dissented.<sup>57</sup> As he argued, the clause allocated power over funding decisions to Congress, meaning Congress could not entrust to an executive branch agency the power to control its own appropriations.<sup>58</sup> Instead of finding historical parallels for each element of the Bureau’s funding structure, Justice Alito looked for an entity that shared the Bureau’s combined features in the context of its statutory authority.<sup>59</sup> The funding scheme allowed the Bureau to: (1) determine its own funding, (2) receive funds indefinitely without subsequent congressional action, (3) keep and invest the surplus, and (4) withdraw funds from budgets allocated to other self-funding entities.<sup>60</sup> Justice Alito concluded that no other agency, past or present, displayed all four elements of the Bureau’s funding structure in the context of its vast enforcement authority — indeed, none contained more than *one* element of the Bureau’s funding in the context of *no* enforcement authority.<sup>61</sup> His “holistic, . . . non-compositional approach”<sup>62</sup> seemed to lead inexorably to a conclusion of unconstitutionality.

*CFS*A is much ado about method. The case demonstrates that the generality of the definition and description of challenged provisions and their analogous historical practices determines the outcomes of cases. Justice Thomas’s majority and Justice Alito’s dissent diverged over the specificity at which to define the elements of the Bureau’s funding structure, while Justice Thomas’s majority and Justice Kagan’s concurrence split on the time frame and weight of relevant historical evidence. The majority’s decision to define the elements of the Bureau’s funding structure in isolation and compare them to analogues at the Founding emphasizes the number of discretionary, interdependent choices required by text, history, and tradition analyses.<sup>63</sup> Ultimately, *CFS*A highlights that selective definitions magnify the discretion — and the unpredictability and uncertainty — inherent in constitutional analyses that rely on multiple sources of meaning.

*CFS*A underscores that the more specifically a challenged provision’s elements are defined and the more generally they are described, the more likely the Court is to find a historical analogue for them. At the outset, Justice Thomas never justified his choice to (a) divide the funding mechanism into its component parts and then (b) describe those parts at a

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<sup>56</sup> *Id.* at 1492.

<sup>57</sup> *Id.* at 1493 (Alito, J., dissenting).

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* at 1504 (describing the CFPB funding scheme’s “combination of features”).

<sup>60</sup> *See id.* at 1503.

<sup>61</sup> *See id.* at 1505–06.

<sup>62</sup> *See* Eskridge et al., *supra* note 34, at 1636 (emphases omitted).

<sup>63</sup> *See generally* Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023).

high level of generality. These unspoken definitional choices determined the outcome of the case, making the subsequent analysis confirmatory instead of investigative. For instance, Justice Thomas described the origin of the Bureau's funds as outside the Treasury, not as "another self-funding agency" or "the Federal Reserve."<sup>64</sup> The selection of this definition ensured that the majority was able to find colorable historical analogues in the Post Office and Customs Service.<sup>65</sup> Though the agencies are, indeed, funded from outside the Treasury, the majority's definition conveniently sidestepped the fact that both receive funding pegged to their own congressionally supervised operations,<sup>66</sup> not from another self-funding agency or the independent central bank. The broad-strokes description of the elements of the Bureau's funding allowed the majority to create analogies that justified its conclusions. Yet the opinion's reasoning for adopting general definitions of specifically defined elements remained unstated.

*CFSA*'s constitutional synecdoche follows the method of constitutional comparison developed in the Second Amendment context in *New York State Rifle & Pistol Ass'n v. Bruen*<sup>67</sup> and *United States v. Rahimi*.<sup>68</sup> In *Bruen* and *Rahimi*, the Court declined to consider the challenged firearms laws in light of the cumulative burden on the right to bear arms imposed by New York and Texas's gun control schemes as a whole.<sup>69</sup> Instead, in each case, the Court isolated the challenged provision from the surrounding regulatory context, then compared it to historical analogues from the time of the Founding.<sup>70</sup>

In *CFSA*, all nine Justices signed onto opinions applying the Second Amendment cases' "historical analogues" approach to the Appropriations Clause,<sup>71</sup> one of the first unanimous applications of the method as a form of general constitutional analysis.<sup>72</sup> When the majority in *CFSA* divided the CFPB's funding structure into its "essentials,"<sup>73</sup> it implicitly confirmed the approach adopted in *Bruen* and *Rahimi*. As in the

<sup>64</sup> See *CFSA*, 144 S. Ct. at 1485–86.

<sup>65</sup> *Id.*

<sup>66</sup> For the Customs Service's funding, see Act of July 31, 1789, ch. 5, 1 Stat. 29, 44, 48; Act of July 4, 1789, ch. 2, 1 Stat. 24; and Act of July 20, 1789, ch. 3, 1 Stat. 27–28. For the Post Office, see 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 208 (Worthington Chauncey Ford ed., 1905).

<sup>67</sup> 142 S. Ct. 2111 (2022).

<sup>68</sup> 144 S. Ct. 1889 (2024).

<sup>69</sup> *Bruen*, 142 S. Ct. at 2134 (noting that the case "do[es] not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment" (second alteration in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008))).

<sup>70</sup> *Id.* at 2133; *Rahimi*, 144 S. Ct. at 1898.

<sup>71</sup> See *Bruen*, 142 S. Ct. at 2133.

<sup>72</sup> See *Nat'l Republican Senatorial Comm. v. FEC*, No. 24-3051, 2024 WL 4052976, at \*7 (6th Cir. Sept. 5, 2024) (en banc) (Thapar, J., concurring) (recommending that courts "engage in the two-step inquiry that our Second Amendment jurisprudence uses" when analyzing other constitutional text (citing *Bruen*, 142 S. Ct. at 2133–56)).

<sup>73</sup> *CFSA*, 144 S. Ct. at 1492 (Kagan, J., concurring); see *id.* at 1505 (Alito, J., dissenting).

Second Amendment context, the Court’s analysis of the Bureau focused on the validity of the challenged provision instead of its effect on litigants or its broader regulatory implications.<sup>74</sup> In all three cases, the constitutionality of various parts of the regulatory scheme served as a proxy for the constitutionality of the whole.

The ascendance of *Bruen* and *Rahimi* casts doubt on *Seila Law*’s mosaic approach to constitutionality. In *Seila Law*, the Court viewed the Director’s removal protection in the context of the Bureau’s unprecedented responsibility “for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens.”<sup>75</sup> Against this constellation of novel powers, the Court diagnosed the central defect at a crescendo: “And, of course, it is the only agency of its kind run by a single Director.”<sup>76</sup>

In theory, *CFSA* required the Court to simply swap out “Director” for “funded from the Federal Reserve” to resolve the case. Adopting this reasoning, Justice Alito and the Fifth Circuit both examined the Bureau’s “capacious portfolio of authority”<sup>77</sup> as a whole for constitutional infirmities.<sup>78</sup> Both opinions concluded that *Seila Law*’s reasoning — novel statutory authority requires close supervision — justified oversight by Congress as surely as by the Executive.<sup>79</sup> The majority, by contrast, ignored *Seila Law*’s reasoning about the need for holistic analysis of the Bureau and disregarded its dicta about the practical consequences of the Bureau’s structure.<sup>80</sup> *CFSA* suggests that *Seila Law* was an interpretive one-off and *Bruen* and *Rahimi* are the new norm.

While the threshold definition of the challenged provision proved critical to the outcome, the definition of the scope and span of relevant historical practice fractured the majority’s sizeable coalition. Justice Thomas’s majority and Justice Alito’s dissent unite on the core methodological point that Founding-era practice provides insight into original meaning. This conclusion accords with conventional theories of liquidation,<sup>81</sup> as well as the Court’s traditional treatment of — and recent skepticism about<sup>82</sup> — the relevance of practice. But, along the road to consensus, the majority and dissent created a hidden coalition of four Justices, spearheaded by Justice Kagan, supporting a divergent position.

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<sup>74</sup> See *id.* at 1486 (majority opinion).

<sup>75</sup> *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2202 n.8 (2020).

<sup>76</sup> *Id.*

<sup>77</sup> *Cnty. Fin. Servs. Ass’n of Am. v. CFPB*, 51 F.4th 616, 640 (5th Cir. 2022).

<sup>78</sup> See *CFSA*, 144 S. Ct. at 1502–04 (Alito, J., dissenting) (citing *Seila L. LLC*, 140 S. Ct. at 2183); see also *Cnty. Fin. Servs. Ass’n of America*, 51 F.4th at 640.

<sup>79</sup> See *CFSA*, 144 S. Ct. at 1504 (Alito, J., dissenting); *Cnty. Fin. Servs. Ass’n of Am.*, 51 F.4th at 640.

<sup>80</sup> See *CFSA*, 144 S. Ct. at 1478–90.

<sup>81</sup> See Baude, *supra* note 46, at 4, 7, 16–17.

<sup>82</sup> See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring); *Samia v. United States*, 143 S. Ct. 2004, 2019–20 (2023) (Barrett, J., concurring in part and concurring in the judgment). See generally Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023) (casting doubt on the validity of post-ratification practice for originalist interpretation).

The back-and-forth between the majority and Justice Kagan's concurrence demonstrates that the definition of the relevant historical time frame determines the Court's ability to find historical analogues.

Justice Kagan's examination of tradition multiplies the discretion inherent in the historical analysis. Justice Kagan offered no insight into her selection of the relevant "practice" as "discretion," "innovation," and "adaptation" in funding instead of any specific funding structure or combination of elements.<sup>83</sup> Nor did she explain the number of instances of a practice required for it to constitute a "tradition," much less the required frequency for a practice to be "unbroken" or "continuing."<sup>84</sup> The drawback of her method is exposed by her failure to diagnose any error in the Fifth Circuit's analysis. Like Justice Kagan, the Fifth Circuit focused on a two-hundred-year tradition — but, instead of "discretion," the Fifth Circuit analyzed "exclusive [congressional] power over the federal purse."<sup>85</sup> Justice Kagan never justified why her preferred tradition of "discretion" should trump a tradition grounded in constitutional text and bedrock principles about separation of powers.<sup>86</sup>

A high-level approach to tradition is likely unworkable as a general strategy of constitutional interpretation because it encourages courts to backfill principles to suit their preferred outcomes. In her concurrence, Justice Kagan examined the original meaning of constitutional terms by construing the text, history, and practice at a high level of generality over a long period. When examined from a bird's-eye view, these sources of evidence can be "water[ed] down" to endorse amorphous principles<sup>87</sup> — for instance, "discretion," "innovation," or "adaptation"<sup>88</sup> — that add a layer of gloss to the terms' fixed meaning. Ultimately, in *CFSA*, this high-level view of unbroken traditions of discretion harmonized the analysis of text, history, and tradition with Justice Kagan's "evolutionary or progressive sensibility."<sup>89</sup> To paraphrase her oft-quoted remark, we can all be originalists now<sup>90</sup> — but only because some of us can read text, history, and tradition broadly.<sup>91</sup>

The scatter pattern of opinions highlights a key problem with text, history, and tradition analyses: They require judges to make numerous interdependent choices about the specificity with which to define a

<sup>83</sup> *CFSA*, 144 S. Ct. at 1490, 1492 (Kagan, J., concurring).

<sup>84</sup> *Id.* at 1492.

<sup>85</sup> *Cnty. Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616, 637 (5th Cir. 2022) (emphasis omitted) (citing *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990)).

<sup>86</sup> Kate Stith, *Congress' Power of the Purse*, 97 *YALE L.J.* 1343, 1344, 1348–49 (1988).

<sup>87</sup> See *United States v. Rahimi*, 144 S. Ct. 1889, 1926 (2024) (Barrett, J., concurring) (cautioning against "read[ing] a principle at such a high level of generality that it waters down the right").

<sup>88</sup> *CFSA*, 144 S. Ct. at 1492 (Kagan, J., concurring).

<sup>89</sup> Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1, 29 (2009).

<sup>90</sup> *Kagan Confirmation Hearing, Day 2, Part 1*, C-SPAN (June 29, 2010) ("[W]e are all originalists."), <https://www.c-span.org/video/?c4910015/user-clip-originalists> [<https://perma.cc/553R-HPX8>].

<sup>91</sup> Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 *HARV. J.L. & PUB. POL'Y* 495, 496 (1996) ("[W]e are all originalists.").

provision, and the relevance and persuasiveness of historical sources. The volume of choices increases judicial discretion and reduces judicial restraint.<sup>92</sup> In the process, it makes decisions susceptible to the accusation that the interpreters have “cherry-pick[ed],”<sup>93</sup> created “judge-made test[s],”<sup>94</sup> and dabbled in judicial “gerrymandering.”<sup>95</sup> To borrow the commonly cited rebuke of purposivism, the Justices appear to have entered “a crowded cocktail party and look[ed] over the heads of the guests for [their] friends”<sup>96</sup> — or, more accurately, they have entered three different cocktail parties and chosen between three groups of friends.<sup>97</sup>

Most concerning, the unspoken reasoning about generality requires lower courts to exercise similar discretion to resolve future cases arising under the Appropriations Clause. As Justice Barrett observed later in the Term, “judge-made” rules “rendering [history or] tradition dispositive” ensure that the Court will eventually “be forced to articulate a test for analyzing” structures without clear analogues.<sup>98</sup> *CFSA*’s failure to provide clear guidance about the appropriate method to identify elements of a challenged provision, properly contextualize them, and compare them to relevant analogues problematizes its future application. Indeed, at present, under either the majority or Justice Kagan’s concurrence, it is difficult to envision a funding structure that would be unconstitutional.<sup>99</sup> Though *CFSA* “has the virtue of clarity,”<sup>100</sup> the majority’s failure to identify impermissible appropriations will require the Court to intervene at a later date to clarify the Appropriations Clause’s limits.

The tensions and selective silences in *CFSA* reveal the divergence in application that characterizes the Court’s recent convergence in

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<sup>92</sup> See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748–50 (2017) (book review); cf. Adam M. Samaha, *Looking Over a Crowd — Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 583, 587–89 (2017); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 189 (2006).

<sup>93</sup> William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 536 (2013) (book review).

<sup>94</sup> *Vidal v. Elster*, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

<sup>95</sup> William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1721 (2021).

<sup>96</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 377 (2012).

<sup>97</sup> See *Vidal*, 144 S. Ct. at 1534 (Sotomayor, J., concurring in the judgment).

<sup>98</sup> *Id.* at 1532 (Barrett, J., concurring in part).

<sup>99</sup> An extreme hypothetical exposes the problem: Could a single Congress allocate “a quadrillion dollars” to the federal government in perpetuity to carry out its mission? See Transcript of Oral Argument at 25, *CFSA*, 144 S. Ct. 1474 (No. 22-448), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2023/22-448\\_4f15.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-448_4f15.pdf) [<https://perma.cc/MKF5-GKED>]. Shockingly, the absurd scheme seems to pass muster under the majority’s analysis by identifying a source and purpose for the funds and the concurrence’s reasoning by demonstrating innovation and discretion. Only Justice Alito’s dissent would likely bar the scheme, though it remains difficult to generalize what element or combination would push the funding structure over his constitutional line.

<sup>100</sup> *CFSA*, 144 S. Ct. at 1506 (Alito, J., dissenting). But see *id.* at 1492 (Jackson, J., concurring) (“When the Constitution’s text does not provide a limit to a coordinate branch’s power, we should not lightly assume that Article III implicitly directs the Judiciary to find one.”).

methodology. Justice Thomas's unexplained decision to analyze the provisions of the Bureau's funding scheme separately contradicted the method applied by the Fifth Circuit, Justice Alito, and the *Seila Law* Court. Justice Kagan's equally unspoken decision to construe traditions of funding discretion at a high level of generality seemed to backfill outcomes from jurisprudential preferences. Though all nine Justices analyzed the text, history, and tradition, the opinions illustrate that defining and describing sources without a clear method of weighing evidence increases the selectivity and uncertainty of judgments — or, simply put, more sources may lead to more discretion and more problems.