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## Disappropriation

Matthew Lawrence, *Penn State Dickinson Law*



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## ARTICLE

### DISAPPROPRIATION

*Matthew B. Lawrence\**

*In recent years, Congress has repeatedly failed to appropriate funds necessary to honor legal commitments (or entitlements) that are themselves enacted in permanent law. The Appropriations Clause has forced the government to defy legislative command and break such commitments, with destructive results for recipients and the rule of law. This Article is the first to address this poorly understood phenomenon, which it labels a form of “disappropriation.”*

*The Article theorizes recent high-profile disappropriations as one probabilistic consequence of Congress’s decision to create permanent legislative payment commitments that the government cannot honor without periodic, temporary appropriations. Such partially temporary programs include Medicaid and scores of other important, permanent features of the administrative state. The Article’s core descriptive contribution is to explain that while dissonance between Congress’s legislative and appropriations powers creates the destructive possibility of disappropriation, it can also preserve for Congress enduring influence (over the executive) and majoritarian control (against the “dead hand” and leadership) that Congress would surrender if it instead exercised both its legislative and appropriations powers permanently.*

*This insight—that Congress’s ability to legislate permanently but appropriate temporarily makes disappropriation possible but also alters*

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\* Assistant Professor of Law, Pennsylvania State University, Dickinson Law; Affiliate Faculty, Harvard Law School, Petrie–Flom Center for Health Law Policy, Biotechnology, and Bioethics. The author expresses sincere appreciation to organizers of and participants in the Richmond Junior Faculty Forum, the ASLME Annual Health Law Professors Conference, and the Wisconsin Administrative Law New Scholarship Roundtable. Special thanks to Nicholas Bagley, Oren Bar-Gill, Jack Beermann, Amanda Chuzi, I. Glenn Cohen, Jesse Cross, Dan Deacon, Danielle D’Onfro, Dan Epps, David Kamin, A. Lawrence, Kristin Madison, Nicholas Parrillo, Eloise Pasachoff, Zachary Price, Peter Shane, Raquel Spencer, Kevin Stack, Glen Staszewski, and Laurel Terry. Although the author served as a trial attorney in the Federal Programs Branch of the U.S. Department of Justice and as a consultant for the Office of Management and Budget, the views expressed here are solely his own.

*the balance of powers—has theoretical implications for constitutional doctrine, the separation of powers, the design of new legislative commitments, and efforts to reduce the harms of disappropriation. The Article’s normative component addresses the regulation and adjudication of disappropriation in light of these implications. It conceptualizes shutdowns as aggregations of distinctive disappropriations and cautions that prior scholarly analyses of proposals to prevent shutdowns by financially penalizing legislators for failing to appropriate funds necessary to honor pre-existing commitments are incomplete because they fail to consider upstream impacts on the balance of powers. And it explains that courts could play a salutary role without interfering with the balance of powers by favoring rules that promote durability but not entrenchment, that is, by adopting rules that tend to reduce the ex ante likelihood of disappropriation without undermining the credibility of the threat of disappropriation. In practice, this weighs in favor of judicial approaches that prevent inadvertent disappropriation by reducing uncertainty and private information. Courts should therefore adopt an interpretive presumption against disappropriation, empower civil servants to enforce disappropriation ex ante rather than empower Congress to do so ex post (as the House of Representatives sought to do in *House v. Burwell*), and endeavor to adjudicate actions seeking damages in the aftermath of disappropriation in ways that make the availability of such damages more predictable while avoiding interference with the political branches.*

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## INTRODUCTION

“Here an appropriation is less a grant of money than an act of duty, to which the Constitution, that is, the will of the nation, obliges us.”<sup>1</sup>

“We need to handle our financial situation.”<sup>2</sup>

In recent years, Congress has repeatedly failed to appropriate funds necessary for the government to honor permanent, statutory payment commitments (or entitlements<sup>3</sup>), thereby forcing the government to break those commitments.<sup>4</sup> Such “disappropriations”<sup>5</sup> have been destructive and

1. 5 Annals of Cong. 699 (1796) (statement of Rep. Murray); see also Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 *Vand. L. Rev.* 357, 382–84 (2018) (extracting passages addressing the “duty” to appropriate from the Jay Treaty debates).

2. Lin-Manuel Miranda, *My Shot*, *on* Hamilton: Original Broadway Cast Recording (Atl. Records 2015).

3. The term “entitlement” engenders confusion because of the many ways it is used in describing federal programs. See Timothy Stoltzfus Jost, *Disentitlement? The Threats Facing Our Public Health Care Programs and a Rights-Based Response* 23–46 (2003) (offering four senses of “entitlement” in describing efforts to repeal or limit access to benefit programs); David A. Super, *The Political Economy of Entitlement*, 104 *Colum. L. Rev.* 633, 640–58 (2004) [hereinafter Super, *Political Economy*] (offering a taxonomy of six senses in which the word “entitlement” is used to describe federal programs). In part for this reason, this Article uses the less loaded and more inclusive term “commitment,” differentiating as appropriate in its descriptive and normative parts between legal commitments, subjective commitments, and remediable commitments. See *infra* section I.D (explaining and identifying points at which the question of whether a commitment is legal, subjective, and/or remediable is relevant in regulating or adjudicating disappropriation).

4. The Constitution prevents the federal government from complying with even a direct statutory command to pay unless Congress appropriates the funds. U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

5. See *infra* section I.D (defining disappropriation as the failure to appropriate funds necessary to honor a government commitment).

unfair for frustrated recipients and have undermined the rule of law. Moreover, the resulting “contradiction”<sup>6</sup> between a statutory command to pay and a constitutional prohibition on expenditures absent “[a]ppropriations made by law”<sup>7</sup> continues to vex the courts. When the government broke its commitment to fund tribal support contracts, tribes were forced to cut back on health care, law enforcement, and education services for decades until ultimately prevailing 5-4 in *Salazar v. Ramah Navajo Chapter*.<sup>8</sup> When the government failed to honor Affordable Care Act (ACA)<sup>9</sup> payment commitments—due to what many described as “sabotage”—insurers raised their premiums, left the ACA marketplaces, went bankrupt, and filed scores of lawsuits currently awaiting decision from the Supreme Court.<sup>10</sup> And government shutdowns in October 2013, January 2018, and December 2018–January 2019 have for increasing periods disrupted legal and subjective commitments like food stamps and tax refunds, again spurring a plethora of lawsuits.<sup>11</sup>

Despite its immense impact in recent years and the many blockbuster lawsuits it has brought about, the phenomenon of disappropriation of legal commitments to pay has not previously been isolated and analyzed in legal scholarship.<sup>12</sup> This Article closes the gap by documenting and offering a theoretical understanding of this phenomenon, then applying that understanding to address pressing questions about its regulation and adjudication.

The Article explains disappropriations of legal commitments as only one probabilistic consequence of the overlooked fact that Congress has enacted scores of payment commitments in permanent law that are

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6. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1056–57 (10th Cir. 2011).

7. U.S. Const. art. I, § 9, cl. 7.

8. 567 U.S. 182, 185–88 (2012); see also *infra* section II.A.1 (discussing tribal support contract disappropriation).

9. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1342, 124 Stat. 119, 211 (2010) (codified at 42 U.S.C. § 18062 (2012)).

10. See *infra* section II.A.2–.3 (describing risk corridors and cost-sharing reductions disappropriations).

11. See Gretchen Frazee & Lisa Desjardins, *How the Government Shutdown Compared to Every Other Since 1976*, PBS: News Hour (Dec. 26, 2016), <https://www.pbs.org/newshour/politics/every-government-shutdown-from-1976-to-now> [<https://perma.cc/5EF3-A3BZ>] (last updated Jan 25, 2019); *infra* section II.A.5 (characterizing shutdowns as numerous and usually staggered component disappropriations).

12. Section II.B explains that while essential treatments of particular disappropriation controversies exist, such treatments handle those controversies as *sui generis* and do not consider implications for the separation of powers. E.g., Nicholas Bagley, *The Supreme Court Will Hear the Risk Corridor Cases*, *The Incidental Economist* (June 24, 2019), <https://theincidentaleconomist.com/wordpress/the-supreme-court-will-hear-the-risk-corridor-cases/> [<https://perma.cc/D7X8-LW52>] [hereinafter Bagley, *Risk Corridor Cases*] (providing background about the risk corridors cases, focusing on “what Congress meant when it placed limits on the use of appropriated funds in an effort to sabotage the Affordable Care Act”).

dependent for their operation upon periodic temporary appropriations.<sup>13</sup> Medicaid and food stamps are examples of such programs, and Medicare and Social Security soon will be as their trust funds become insufficient to cover their liabilities. In creating permanent but temporarily funded commitments, Congress has exercised its legislative power to command payment in dissonance with its appropriations power to permit expenditure.

This Article's core descriptive contribution is that the dissonance between Congress's legislative power and its appropriations power that creates the risk of disappropriation also preserves an enduring sphere of legislative influence (over executive implementation) and majoritarian control (against the "dead hand" and leadership). These impacts of dissonance on the balance of powers complicate efforts to reduce the harms of disappropriation. Although the Article explains how disappropriation is destructive and unfair, many reforms to prevent or remedy it would also eliminate or reduce the underlying dissonance that gives rise to it, thereby recalibrating the balance of powers. This possibility is a reason for hesitation about many efforts to reduce the harms of disappropriation, such as by funding all permanent commitments with default appropriations.

Readers could reasonably conclude that disappropriation of legal commitments is so destructive, unfair, and harmful to the rule of law that it should be prevented or even declared unconstitutional regardless of consequences for the balance of powers.<sup>14</sup> The Article ultimately remains agnostic on such normative and constitutional questions raised by its study of disappropriation, endeavoring instead to flesh out the underlying considerations and tradeoffs. The insight that dissonance between Congress's legislative power and its appropriations power not only creates a risk of disappropriation but also preserves an enduring sphere of legislative influence and majoritarian control has important implications for the regulation and adjudication of disappropriation.

For regulation, scholars addressing temporary (so far) mass disappropriations known as "shutdowns" have failed to recognize or address the dissonance that gives rise to such crises or the implications of that dissonance for the balance of powers. This has led them to express support for legislative changes along the lines of the recently proposed Stop STUPIDITY

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13. For recent treatments assuming that entitlements do not depend on periodic, temporary appropriations, see, e.g., John Brooks, Brian Galle & Brendan Maher, *Cross-Subsidies: Government's Hidden Pocketbook*, 106 *Geo. L.J.* 1229, 1269 (2018) [hereinafter Brooks et al., *Cross-Subsidies*] (describing "entitlements" as "automatically funded" in contrast to "federal programs . . . [that] must be affirmatively provided with funding each year in an annual appropriations bill"); see also John Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 *Geo. L.J.* 229, 252 (2016) [hereinafter Brooks, *Income-Driven Repayment*] ("[E]ntitlement programs are . . . not dependent on annual appropriations.").

14. Such readers may be particularly interested in the question of the constitutionality of dissonance and disappropriation discussed in *infra* section IV.B.

Act that seek to make shutdowns less likely in ways that, the Article explains, would unintentionally enhance executive power and entrenchment.<sup>15</sup>

For adjudication, courts called upon to adjudicate disappropriation controversies have struggled to resolve the challenging legal questions they present.<sup>16</sup> Consideration of ex ante impacts on the likelihood of disappropriation and on the balance of powers reveals that judicial approaches to date have been unhelpful and counterproductive.<sup>17</sup> Such consideration also reveals that courts could play a salutary role by favoring rules that reduce the ex ante likelihood of disappropriation without significantly interfering with the balance of powers. This counsels in favor of judicial approaches that prevent inadvertent disappropriation by reducing uncertainty and private information about the predicted consequences of a potential disappropriation.<sup>18</sup> This Article therefore recommends that courts (1) adopt an interpretive presumption against disappropriation of clear

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15. See Stop the Shutdowns Transferring Unnecessary Pain and Inflicting Damage in the Coming Years Act, S. 198, 116th Cong. (2019) (proposing to automatically fund the government in the event of shutdown, except executive and legislative salaries); David Kamin, Legislating Crisis, in *The Timing of Lawmaking* 34, 60 (Frank Fagan & Saul Levmore eds., 2017) (endorsing a financial penalty for legislators in the event of a shutdown as lacking “broader social costs”); David Scott Louk & David Gamage, Preventing Government Shutdowns: Designing Default Rules for Budgets, 86 U. Colo. L. Rev. 181, 252, 255–57 (2015) (exploring a default funding extension in the event of impasse, while penalizing legislator salaries, as a means of preventing shutdowns); see also *infra* section IV.C (discussing balance-of-powers impacts of such proposals).

16. See *Nat’l Treasury Emps. Union v. United States*, No. 19-50 (RJL), 2019 WL 266381, at \*1 (D.D.C. Jan. 18, 2019) (refusing to consider the merits of a request by federal employees for an emergency nationwide injunction mandating compliance with the Anti-Deficiency Act or salary payments, despite the lack of appropriations associated with a “shutdown,” in part because “the shutdown is a *political* problem”); *California v. Trump*, 267 F. Supp. 3d 1119, 1140 (N.D. Cal. 2017) (considering but, after application of a balancing test, rejecting a request for an emergency nationwide injunction mandating payments despite the executive’s assertion of lack of appropriated funds); *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 188 (D.D.C. 2016) (refusing the government’s request for deference in determining the availability of funding to honor its commitment and applying the rule of strict interpretation); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 81 (D.D.C. 2015) (holding that the House had standing as a body to sue to enforce the Appropriations Clause against allegedly ultra vires spending to honor a statutory commitment); see also *infra* section V.B (elaborating upon and suggesting resolutions to legal questions). Compare *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012) (holding that tribes were entitled to damages for the government’s breach of its commitment to pay despite the appropriation of insufficient funds to honor the commitment), and *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1340 (Fed. Cir. 2018) (Newman, J., dissenting) (reasoning that insurers should be entitled to damages for the government’s breach), with *Ramah Navajo Chapter*, 567 U.S. at 201–02 (Roberts, C.J., dissenting) (reasoning that the appropriation of insufficient funds should have precluded a damages remedy), and *Moda Health Plan*, 892 F.3d at 1330–31 (holding that the appropriation of insufficient funds precluded a damages remedy for the commitment).

17. See *infra* section V.B (expressing skepticism about the role of courts in disappropriation controversies).

18. See *infra* section IV.D.



legal commitments rather than the deference sought by the executive or the pro-disappropriation presumption employed by the court in *United States House of Representatives v. Burwell*,<sup>19</sup>(2) empower civil servants rather than Congress to enforce disappropriation; (3) reject the nationwide preliminary injunction remedy sought by several states in *California v. Trump* in favor of expedited, but final, declaratory relief; and (4) adjudicate claims for damages without arbitrarily privileging fact-intensive categories of commitments (like “contracts”) and without considering the scorekeeping choices of the political branches.

Two metaphors illustrate the relationship between disappropriation, dissonance, and the balance of powers. It might be tempting to think of disappropriation—whether in the form of shutdowns, lapses, shortfalls, breaches, or otherwise—as a “symptom” and dissonance between the legislative powers to commit to pay (exercised permanently) and to permit payment (exercised temporarily) as the “disease” to be eradicated. This would counsel in favor of default rules that make shutdowns impossible or painless, permanent appropriations to fund any new entitlements and eliminate the risk of disruption, and expansive judicial remedies that compensate disappointed recipients fully for the costs to them of broken government commitments caused by lack of appropriations. But that metaphor is inappropriate because it ignores the potentially salutary effects of dissonance that arise from the threat of disappropriation regardless of whether disappropriation occurs.

The more appropriate metaphor is that between fission, nuclear power (harnessed through fission), hazardous waste (a cost always associated with fission), and a meltdown (a rare but profound harm risked by generating power through fission). By splitting its purse powers of commitment and appropriation, Congress derives a unique form of enduring influence connected to the threat of disappropriation (the “fission” and “nuclear power” in this metaphor), but doing so entails disparate impacts and inevitable costs for privatization and federalism associated with the mere possibility of disappropriation (the hazardous waste) and may lead to cataclysm if disappropriation actually results (the meltdown). In other words, careful calibration is necessary if the goal is to preserve the power source (the threat of disappropriation associated with dissonance) while preventing the worst consequences (actual disappropriation).

This Article proceeds in five parts. Part I begins by explaining the Article’s functional understanding of the “powers of the purse,” under which appropriations are not themselves a singular formal “purse power,” but a mechanism for controlling just one of several means of financial inducement at the disposal of the modern administrative state. It then introduces the other such means that make up the federal “bundle of carrots,” highlighting the executive and legislative commitment powers,

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19. 185 F. Supp. 3d 165.

and explains the pervasiveness of legal commitments to pay that depend on temporary appropriations in the modern welfare state. Finally, it defines “disappropriation” broadly as the failure to enact appropriations necessary to honor a government commitment, whether for payment or conduct, legal or subjective.

Part II describes the emergence of disappropriation in several recent headline-dominating controversies including shutdowns, ACA sabotage, tribal support costs, and the CHIP lapse.<sup>20</sup> And it identifies the need for and lack of theoretical understanding of disappropriations and the dissonance between Congress’s legislative power to commit to pay and its appropriations power to permit payment that gives rise to disappropriations.

Part III unpacks the consequences of dissonance between legislative commitments to pay and legislative appropriations. Dissonance is plainly a cause of disappropriations. When disappropriations materialize, they unfairly harm recipients, undermine the rule of law, can shift blame from the legislature to the executive and courts, and can confer added discretion on the executive. Dissonance also creates a probability of disappropriation, which carries its own costs for privatization and cooperative federalism whether disappropriation happens or not. But dissonance also creates the threat of disappropriation, which reduces entrenchment, can increase legislative influence, and recalibrates the intrabranched balance of power within Congress between leadership and the rank-and-file.

Part IV explores implications of the insights that disappropriation arises from Congress’s decision to exercise its legislative power to commit to pay and its appropriations power to permit payment in dissonance with one another, and that by doing so it can preserve majoritarian control and legislative influence. This Part raises and positions questions for constitutional doctrine, the separation of powers, the design of federal commitments such as new entitlements, and efforts to reduce the harms of disappropriation. And it explains that approving scholarly analyses of penalty default proposals to prevent shutdowns are incomplete because they fail to consider the impact of such proposals on the balance of powers.

Part V addresses applications for courts called upon to adjudicate disappropriation controversies. To date, disappropriation debates in

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20. See, e.g., Amy Goldstein, Short-Term Spending Agreement Provides Longer-Term Relief for CHIP, Wash. Post (Jan. 22, 2018), [https://www.washingtonpost.com/national/health-science/short-term-spending-agreement-provides-longer-term-relief-for-chip/2018/01/22/b993369a-ff9e-11e7-8acf-ad2991367d9d\\_story.html](https://www.washingtonpost.com/national/health-science/short-term-spending-agreement-provides-longer-term-relief-for-chip/2018/01/22/b993369a-ff9e-11e7-8acf-ad2991367d9d_story.html) (on file with the *Columbia Law Review*) (describing the CHIP lapse); Kristina Peterson, Michael C. Bender & Rebecca Ballhaus, Shutdown Breaks Record for Longest in Modern History, Wall St. J. (Jan. 13, 2019), <https://www.wsj.com/articles/trump-plays-down-emergency-option-to-get-wall-funding-11547238564> (on file with the *Columbia Law Review*) (describing the 2018–2019 government shutdown); Sheryl Gay Stolberg & Thomas Kaplan, Democrats Outline Demands as Threat of Shutdown Looms, N.Y. Times (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/us/politics/senate-democrats-government-shutdown-immigration.html> [<https://perma.cc/WH5E-AP7Y>] (describing the lead-up to the 2018 shutdown).

Congress have played out like a game of chicken in the fog;<sup>21</sup> neither “side” is really able to judge when it has reached the point of no return or the impacts of collision due to uncertainty about what courts and the executive would do and when they would do it, among other things. Part V counsels in favor of judicial approaches to questions of interpretation, enforcement, and remedies that lift the fog, that is, make it easier for the legislature and the executive to predict whether any particular action or inaction will effect a disappropriation and, if so, what the consequences of that disappropriation will be. Finally, a brief concluding section summarizes the Article’s contribution.

### I. DEFINITIONS AND BACKGROUND

Section I.A explains the historical, conceptual, and factual bases for this Article’s functional and pluralistic understanding of the powers of the purse. Section I.B introduces and describes those purse powers implicated by the specific phenomenon that motivates this Article, that is, congressional failure to enact appropriations necessary to honor a legislative commitment to pay. Section I.C describes the pervasiveness of permanent legal commitments to pay that depend on periodic appropriations. Section I.D then offers the term “disappropriation” as shorthand for the failure to enact appropriations necessary to honor either a permanent legal commitment to pay or a subjective commitment to pay.

#### A. *Unpacking the Purse*

In modern usage, the “power of the purse” is often described as a unitary, formal power reserved to Congress by the Appropriations Clause.<sup>22</sup> Other treatments, such as Professor Zachary Price’s invaluable discussion

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21. Thanks to David Kamin for this metaphor.

22. The characterization that the Appropriations Clause gives Congress control of a unitary power of the purse has taken on the status of basic hornbook constitutional law. U.S. Gov’t Accountability Office, GAO-19-372T, Application of the Antideficiency Act to a Lapse in Appropriations 1 (2019), <https://www.gao.gov/assets/700/696771.pdf> [<https://perma.cc/B86D-T79R>] (“The framers vested Congress with the power of the purse by providing in the Constitution that ‘[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.’” (quoting U.S. Const. art. I, § 9, cl. 7)); 1 U.S. Gov’t Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, ch. 1, at 3 (3d ed. 2004) [hereinafter GAO Red Book, Third Edition] (“The congressional ‘power of the purse’ refers to the power of Congress to appropriate funds and to prescribe the conditions governing the use of those funds.”); Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61, 84–85 (2006) (referring to “the appropriations process” as the “power of the purse”); Josh Chafetz, Congress’s Constitution, 160 U. Pa. L. Rev. 715, 725 (2016) [hereinafter Chafetz, Congress’s Constitution (Article)] (describing the power of the purse as an appropriations power); Kate Stith, Congress’s Power of the Purse, 97 Yale L.J. 1343, 1344 (1987) (“The Constitution places the power of the purse in Congress: ‘No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . .’” (quoting U.S. Const. art. I, § 9, cl. 7)).

of funding restrictions, also include constitutional provisions governing taxation and borrowing in describing the “purse.”<sup>23</sup> This Article adopts a different, functional, pluralistic understanding in lieu of this traditional, formal approach.

This Article employs an understanding of the “power of the purse” on which the “purse” is the economic support of government or government purposes, “purse powers” are numerous, distinct (though sometimes interrelated) means of economic inducement potentially wielded by the government, and constitutional provisions such as the Appropriations Clause are constraints on the lawful use of some (or perhaps, by implication, all) such purse powers. This approach can be understood as analogous to the “bundle of sticks” metaphor in property.<sup>24</sup> So understood, appropriations are one in a “bundle of carrots” that the branches can and do choose among for economic inducement and that bring unique costs and benefits.<sup>25</sup> The Article employs this functional approach for historical, conceptual, and practical reasons.

A first reason not to conflate the Appropriations Clause with the power of the purse is that the Framers themselves often described the “purse” in functional rather than formal terms. To the Framers the “purse” meant control over the “supplies requisite for the support of government.”<sup>26</sup> This was in contrast to the “sword,” by which the Framers meant control over the military. Indeed, the origin of the “purse”

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23. Price, *supra* note 1, at 366 (discussing revenue powers including taxation, and the required origination of revenue raising bills in the House of Representatives, as well as expenditures including the paying down of debt and provisions for the Army and Navy).

24. Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053, 1057 (1989) (describing the connection between the bundle of sticks metaphor in property law and the Hohfeldian conception of rights consisting of “joined but distinguishable parts”).

25. See *infra* sections IV.B–C (discussing the importance of choice of purse power to support a new federal program for entrenchment, majoritarian control, political accountability, and program stability).

26. The Federalist No. 58, at 297 (James Madison) (Ian Shapiro ed., 2009). (“The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse . . . .”); see also U.S. Const. art. I, § 8, cl. 12 (stating that the Congress shall have power “[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years” (emphases added)); 1 Joseph Story, *Commentaries on the Constitution of the United States* 384 (Thomas M. Cooley ed., Boston, Little Brown & Co. 4th ed. 1873) (explaining that the legislature “holds at its own command all the resources by which a chief magistrate could make himself formidable”); *id.* (explaining that the “power over the purse of the nation and the property of the people” includes the ability of Congress to “grant or withhold supplies” and “levy or withdraw taxes”); Brutus, *Essay V: To the People of the State of New-York* (1787), reprinted in *The American Republic: Primary Sources* 382, 384 (Bruce Frohnen ed., 2002) (“There cannot be a greater solecism in politics than to talk of power in a government, without the command of any revenue. It is as absurd as to talk of an animal without blood, or the subsistence of one without food.”); cf. Paul Einzig, *The Control of the Purse* 18 (1959) (equating “control of the nation’s purse-strings” in the British constitutional system with the ability “to withhold supplies”).

metaphor was the “maxim[] that the purse and sword ought not to be put in the same hands.”<sup>27</sup>

The “purse and sword” metaphor captured the common understanding at the time of the founding that Parliament had forced the monarch to concede to it expansive powers by taking advantage of the monarch’s need for resources to support expensive foreign wars.<sup>28</sup> The Framers understood that armed force—the sovereign’s means of physical inducement—is itself resource intensive. As a result, this core sovereign power may be difficult or even impossible to exercise without the aid of economic inducements to acquire and maintain troops, supplies, and matériel. The Framers hoped to make use of that fact to empower Congress and check the Commander-in-Chief by separating “purse” and “sword,” in short, by separating the use of money and the use of force.

Of course, it was the Framers’ difficult task in drafting the Constitution to put their vision of good government into words that they hoped would, through legal processes, bring that vision to life. The Framers sought to give the legislative branch the “purse” as a check to the executive’s “sword” by including in the Constitution a series of provisions giving to Congress power to tax, to borrow, and to permit expenditures by appropriating funds.<sup>29</sup>

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27. The Debates in the Convention of the Commonwealth of Virginia, reprinted in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 1, 393 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1836) (statement of James Madison before the Assembly of Virginia); see also Story, *supra* note 26, at 384 (noting that the “power over the purse” means Congress “can unnerve the power of the sword by striking down the arm which wields it”); Federal Farmer, Letter XVII (Jan. 23, 1788), reprinted in *The Essential Antifederalist* 91 (W.B. Allen & Gordon Lloyd eds., 2002) (“It has long been thought to be a well-founded position, that the purse and sword ought not to be placed in the same hands in a free government.”).

28. The Federalist No. 58, *supra* note 26, at 297–98 (describing the progression of parliamentary dominance over the executive as driven by Parliament’s control of the purse). See generally Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* 53–77 (2017) [hereinafter Chafetz, *Congress’s Constitution* (Book)] (tracing, within the context of an overview of how Congress can most effectively wield its powers, the importance of appropriations in the history of parliament and the colonies); Einzig, *supra* note 26 (exploring how parliamentary control of the purse allowed Parliament to exercise broad powers).

29. The Federalist No. 26, at 133 (Alexander Hamilton) (Ian Shapiro ed., 2009) (defending the effectiveness of appropriations power at preventing a standing army and rejecting the possibility of the executive finding a means “to dispense with supplies from the acts of the legislature”). The formal constitutional authorities most directly associated with the purse are U.S. Const. art. I, § 8, cl. 1 (“Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, [and] to pay the Debts . . . of the United States . . .”); id. cl. 2 (“Congress shall have Power . . . To borrow Money on the credit of the United States . . .”); id. cl. 5 (“Congress shall have Power . . . To coin Money, [and] regulate the Value thereof . . .”); id. cl. 12 (“Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . .”); id. § 9, cl. 7 (Appropriations Clause). The Framers were not always consistent in which specific provisions they characterized as granting the “power of the purse.” For example,

Conflating the formal, textual provisions the Framers drafted in order to attempt to separate the functional powers of purse and sword with those functional powers themselves obscures the distinction between the ends the Framers sought to achieve and the legal means they chose to achieve them. It thereby elides the possibility that the executive might find ways to support itself—wield both purse and sword—even while nominally respecting the formal assignment of authority over appropriations and revenue to Congress. Yet, as described in the next section, the administrative state touches upon nearly every aspect of life and can generate the resources to support itself in myriad ways that circumvent or minimize the salience of appropriations.

Second and relatedly, the insight that appropriations (and the direct expenditures they permit) are just one of several means of supporting federal programs reconceptualizes constitutional questions surrounding the “power of the purse.” The characterization by prior scholarship of a singular purse power has left in constitutional limbo other means of controlling government economic inducements, such as commitments and impoundments. These means have been understood as amorphous leakages from the appropriations power.<sup>30</sup> This causes conceptual confusion that has undermined scholarly analyses of which branches constitutionally possess which powers for supporting the federal government.<sup>31</sup>

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Madison’s broad language characterizing the “power over the purse” as permitting the “redress of every grievance,” *The Federalist* No. 58, *supra* note 26, at 297–98, can be read despite its breadth to refer only to the power of the House to propose bills for the raising of revenue. See Story, *supra* note 26, at 384 (equating the “power over the purse of the nation” with the power to “grant or withhold supplies” and the “power over . . . the property of the people” with the power “to levy or withdraw taxes”).

30. See *U.S. Dep’t of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (noting that the Anti-Deficiency Act is one of several federal statutes that “reinforce Congress’s control over appropriated funds”); Price, *supra* note 1, at 368 (noting that the Anti-Deficiency Act and other statutes “back up Congress’s constitutional authority”); Stith, *supra* note 22, at 1370–72 (noting that the Anti-Deficiency Act guards the appropriations power by prohibiting executive commitments); see also GAO Red Book, Third Edition, *supra* note 22, ch. 4, at 9 (noting an “axiom” limiting executive commitments to pay absent appropriations).

31. Failure to disaggregate purse powers causes Professor J. Gregory Sidak to talk past Professor Kate Stith in their landmark debate about whether there is a “President’s Power of the Purse.” Stith focused on the expenditure power, but Sidak’s core concern was the President’s ability to utilize the armed forces to repel a foreign aggressor, that is, to commit the government to make payments for salary and matériel. Compare Stith, *supra* note 22, at 1351 (“Even where the President believes that Congress has transgressed the Constitution by failing to provide funds for a particular activity, the President has no constitutional authority to draw funds from the Treasury to finance the activity.”), with J. Gregory Sidak, *The President’s Power of the Purse*, 1989 *Duke L.J.* 1162, 1192 (“Whether the war beg[ins] by the invasion of a foreign nation or by a domestic rebellion[,] . . . ‘the President is not only authorized but bound to resist force by force . . .’” (quoting *The Brig Amy Warwick* (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1863))). But perhaps because of the imprecision of reference to a singular power of the purse, they and others have not recognized this key difference between their perspectives that makes it conceptually possible to reconcile

Although answering such questions is beyond the Article's scope, the functional understanding of purse powers it employs clarifies these constitutional questions and sets the stage for future systemic inquiry into the placement of the various purse powers in Justice Jackson's *Youngstown* categories.<sup>32</sup>

Third, practicality necessitates differentiating the powers of the purse. For decades, budget and scorekeeping rules have distinguished among various means of financial inducement. Such means—legal commitments (also known as obligations), expenditures, revenue offsets, and so on—are subject to differing budgetary rules by Congress and administrative rules by the Office of Management and Budget (OMB).<sup>33</sup> As this Article aspires

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them. See Price, *supra* note 1, at 380 (describing Stith and Sidak as having “reached opposite conclusions”); Sidak, *supra*, at 1185–94 (alternating, without acknowledging or exploring the difference, between asserting that the President has an “implied power to spend public funds” and a “minimum obligational authority,” and asserting instead an amorphous “implied power of the purse” held by the President). Though beyond the scope of this Article, it is conceptually possible that the President has the constitutional authority to commit the government to pay for combat operations necessary to repel a foreign aggressor (Professor Sidak's core assertion), but lacks constitutional authority to withdraw money out of the Treasury to honor those commitments without an appropriation from Congress (Professor Stith's core assertion).

32. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (articulating a three-part framework for analyzing questions of executive power). Examples of questions permitted by the functional frame include: Is the Anti-Deficiency Act's restriction on executive commitments constitutional? The exceptions thereto? Could Congress restrict the executive's ability to settle cases, sanction governments, or forgive debts and give away property insofar as the executive does so to support federal programs? Does the Constitution empower Congress to force the executive to spend appropriated funds? Cf. *Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth.*, 388 F.3d 405, 414 (3d Cir. 2004) (noting that, for the executive, “on its own, [to] carve out an area of nonappropriated funding would create an Executive prerogative that offends the Appropriations Clause and affects the constitutional balance of powers”); *Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (“As Commander-in-Chief, the President does not have the constitutional authority to make promises about entitlements for life to military personnel *that bind the government* because such powers would encroach on Congress' constitutional prerogative to appropriate funding.” (emphasis added)); *Nat'l Treasury Emps. Union v. United States*, No. 19-50 (RJL), 2019 WL 266381, at \*1 (D.D.C. Jan. 18, 2019) (declining to address the plaintiffs' argument that the Anti-Deficiency Act violates the Constitution insofar as it permits the executive to make commitments in advance of appropriations); CBO's Comments on S. 2381, the Legislative Line Item Veto Act of 2006: Before the S. Comm. on the Budget, 109th Cong. 1 (2006) (statement of Donald B. Marron, Director, Congressional Budget Office) (“[T]he legislative branch reasserted its constitutional control over the power of the purse with enactment of the Congressional Budget and Impoundment Control Act of 1974.”); Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 Ga. L. Rev. 1, 11 (1986) (noting that President Jefferson asserted authority to refuse to spend funds appropriated by Congress).

33. See H.R. Rep. No. 105-217, at 1014–18 (1997) (Conf. Rep.), as reprinted in 1997 U.S.C.C.A.N. 176, 635–39 (listing appropriated entitlements for fiscal year 1997); Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-11, Preparation, Submission, and Execution of the Budget § 20.4 (2019) [hereinafter OMB Circular A-11], <https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf> [<https://perma.cc/TNG6-U6MW>].

to place such technical, practical matters in conversation with separation of powers theory and associated legal questions, a common language capable of acknowledging nuances in each domain is necessary.

B. *Expenditures, Commitments, and the Federal Government's Bundle of Carrots*

If appropriations are merely one of several ways that the federal government can support itself, what are the others and how do they relate to appropriations? There are many ways the federal government can support itself with or without appropriations, whether to wage a war, to build a wall, or to provide health insurance to the poor. This Article highlights four important powers that have repeatedly arisen in several recent funding controversies: Treasury expenditures, legislative commitments, executive commitments, and cross-subsidies. Other means of supporting the government not implicated by these controversies are not elaborated upon here, despite their individual and collective importance. These include revenue expenditures,<sup>34</sup>

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34. Several constitutional provisions empower Congress to raise revenue for the federal government to spend through taxes or borrowing. See *supra* note 29 and accompanying text. Furthermore, executive agencies often have the option of raising revenue through “user fees” charged for the services, goods, or property they provide, which might take the form of lease or loan payments. See Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-25, Memorandum for Heads of Executive Departments and Establishments: User Charges (1993), <https://georgewbush-whitehouse.archives.gov/omb/circulars/a025/a025.html> [<https://perma.cc/KFF7-3R76>] (“The Circular establishes Federal policy regarding fees assessed for Government services and for sale or use of Government goods or resources.”). Congress or the executive can financially support federal programs by varying the amount owed to the government. From the payor’s perspective, there may be little difference between receiving a direct payment from the government and receiving a reduction in the amount they owe to the government. See Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 *Cornell L. Rev.* 519, 547 (2009) (“Tax incentives (or benefits) are thought by many to be the functional equivalent of a direct spending mechanism, and in recognition of this, are referred to as ‘tax expenditures.’”). But see Oversight of the Consumer Product Safety Commission: Hearing Before Subcomm. on Commerce, Mfg. & Trade of the H. Comm. on Energy & Commerce, 114th Cong. 2 (2015) (statement of Rep. Michael C. Burgess, Chairman, H. Comm. on Commerce, Mfg. & Trade) (“There is a fundamental constitutional issue with moving the power of the purse from Congress to a regulatory agency with no experience in disbursing fees.”). For example, federal agencies are increasingly converting the \$1.5 trillion in student loan debt owed the United States into a purse power, “paying” borrowers to teach in public school without appropriations by simply forgiving (or committing to forgive) their loans. See, e.g., Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 *Duke L.J.* 1677, 1698 (2017) (describing the role of executive discretion in developing income repayment programs); Zack Friedman, *Student Loan Debt Statistics in 2018: A \$1.5 Trillion Crisis*, *Forbes* (June 13, 2018), <https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018/> [<https://perma.cc/S4R7-8WHV>] (detailing the student loan debt crisis); see also Brooks, *Income-Driven Repayment*, *supra* note 13, at 258 (estimating that income-driven repayment programs will transfer \$3 billion to \$10 billion to college students each year).



sanctions,<sup>35</sup> settlements,<sup>36</sup> and voluntary services.<sup>37</sup>

1. *Treasury Expenditures.* — Of course, the expenditure of funds from the Treasury is a primary purse power. While the Constitution reserves to Congress the power to permit Treasury expenditures via the Appropriations Clause,<sup>38</sup> Congress has in many cases delegated this power to the

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35. The executive's power to impose or lift sanctions and thereby freeze or unfreeze foreign assets has proven an important source of financial support in the absence of appropriations. "As part of the deal" between the United States and Iran signed by President Obama in 2015 to limit Iran's nuclear weapons development, "the United States . . . agreed to lift various commercial sanctions against Iran." *Leibovitch v. Islamic Republic of Iran*, 297 F. Supp. 3d 816, 822 (N.D. Ill. 2018). This freed up more than \$100 billion in Iranian assets, Jackie Northam, *Lifting Sanctions Will Release \$100 Billion to Iran. Then What?*, NPR: All Things Considered (July 16, 2015), <https://www.npr.org/sections/parallels/2015/07/16/423562391/lifting-sanctions-will-release-100-billion-to-iran-then-what> [<https://perma.cc/DG8D-GKEP>], making a deal possible despite opposition in both houses of Congress. Jennifer Steinhauer, *Democrats Hand Victory to Obama on Iran Nuclear Deal*, N.Y. Times (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/us/politics/iran-nuclear-deal-senate.html> [<https://perma.cc/5L5Z-GVWN>] (quoting Speaker John Boehner that Republicans would "use every tool at [their] disposal to stop, slow and delay this agreement from being fully implemented").

36. The executive's power to enforce the law creates another mechanism through which it can generate financial support without appropriations: settlements of federal claims in which the accused agrees to make payments to a third party or for a given purpose. For example, in recent years the Department of Justice has entered billion-dollar settlement agreements with banks requiring they make various specified payments to states and credit counseling services. See *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?*: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 114th Cong. 47 (2016) (statement of Ambassador C. Boyden Gray, Partner, Boyden Gray & Associates) (describing bank settlement agreements that "obligate the banks to provide hundreds of millions of dollars to third party credit counseling services and lawyers' trust funds" and asserting that "[t]hese provisions raise difficult questions under the Appropriations Clause and the Miscellaneous Receipts Act"); Paul J. Larkin, Jr., *The Justice Department's Third-Party Payment Practice, the Antideficiency Act, and Legal Ethics*, 17 *Federalist Soc'y Rev.* 28, 29 (2016) (concluding that the Appropriations Clause, the Antideficiency Act, and the Miscellaneous Receipts Act prohibit the Justice Department's third-party payment practice).

37. People are often willing to work for the government for free; United States Attorney's Offices often hire "special" assistant U.S. attorneys, for example, who are uncompensated. Sudhin Thanawala, *Wanted: Federal Prosecutors Willing to Work for Free*, Associated Press (July 2, 2016), <https://www.apnews.com/0d0d3f7c641241cea6b544a5dfe39500> [<https://perma.cc/Z3RE-H8XP>]. Accepting such voluntary work allows the executive to perform services and tasks without appropriations. This concern led Congress to prohibit agencies from receiving voluntary services, though there are significant emergency exceptions. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1342, 96 Stat. 877, 923 (codified as amended at 31 U.S.C. § 1342 (2012)) (forbidding federal agencies from accepting "voluntary service for . . . government" or "personal service in excess of that authorized by law" absent an exception).

38. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) ("[The Appropriations Clause] means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937))); *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("[T]he expenditure of public funds is proper only when authorized by Congress . . ."); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("[N]ot a dollar . . . can be used in

executive. For example, Congress has granted the President broad authority to “reprogram” existing appropriations for new purposes in the case of an emergency declaration,<sup>39</sup> a delegated expenditure power often discussed in the context of wall construction along the United States–Mexico border.<sup>40</sup>

2. *Commitments.* — Government can commit—by contract, promise, entitlement, or simply words or actions engendering reliance—to make payments and thereby induce action or reliance in the recipients of such commitments.<sup>41</sup> The government cannot ultimately make the promised payments without an appropriation,<sup>42</sup> but that does not mean commitments collapse into expenditures. Commitments themselves support government functions by inducing action in third parties who expect the government to honor its commitments.<sup>43</sup> “Wimpy” from “Popeye” comes to mind: “I’ll gladly pay you Tuesday for a hamburger today.”

Either the executive branch or the legislative branch can make commitments. Executive commitments proved an early example of a way that the Framers’ predictions about how the government they crafted would

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the payment of any thing not thus previously sanctioned.”); *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 269 F.3d 1112, 1116 (D.C. Cir. 2001) (noting that the expenditure authority is not “negotiable”).

39. See 10 U.S.C. § 2808(a) (2012) (permitting executive reprogramming of existing appropriations under certain circumstances “[i]n the event of a declaration of war or the declaration by the President of a national emergency”).

40. E.g., Margaret Taylor, *Declaring an Emergency to Build a Border Wall: The Statutory Arguments*, Lawfare (Jan. 7, 2019), <https://www.lawfareblog.com/declaring-emergency-build-border-wall-statutory-arguments> [<https://perma.cc/Z63F-QNWA>].

41. The Constitution explicitly reserves to Congress the power to make a particular form of commitment, that is, to commit to pay money in the future in exchange for money today. U.S. Const. art. I, § 8, cl. 2 (granting power “[t]o borrow Money on the credit of the United States” to Congress). It is silent, however, about future commitments to induce (or in exchange for) behaviors other than giving the government money. See *Banks v. Mayor*, 74 U.S. (7 Wall.) 16, 25 (1868) (finding that exchanging certificates of credit for supplies did not implicate the power to borrow money because doing so involved “executing constitutional powers of the government other than of borrowing money”). On the meaning of “commitment” here and the sorts of commitments made by legislation, see *infra* section II.A.

42. See, e.g., *Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (holding that, despite recruiters’ promise of benefits to those who served twenty years, “[a]s Commander-in-Chief, the President does not have the constitutional authority to make promises about entitlements for life to military personnel *that bind the government* because such powers would encroach on Congress’ constitutional prerogative to appropriate funding.” (emphasis added)).

43. See D. Roderick Kiewiet & Matthew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* 17 (1991) (noting Congress’s historical tendency to “grant[] an agency permission either to commit or to borrow funds in advance of appropriations” and “promise[], through the requisite legislation, to liquidate the resultant borrowing or contract authority at some later date”).

operate were inaccurate,<sup>44</sup> as the executive branch used such commitments to circumvent congressional control over economic inducements. Starting with President Washington, the executive branch would commit to make payments despite the absence of appropriations, furthering its own purposes without Congress's prior permission.<sup>45</sup> Although it was (and continues to be) generally agreed that Congress retains the authority to break such an executive commitment to pay by refusing to appropriate funds,<sup>46</sup> Congress felt duty-bound to appropriate the necessary funds.<sup>47</sup>

A related practice was coercive deficiencies, which entailed the executive quickly spending through funds allotted for an entire year in order to force supplemental appropriations. John Randolph, then-Chairman of the Ways and Means Committee, colorfully described this practice in 1806: “[T]hose who disburse the money, are like a saucy boy who knows that his grandfather will gratify him, and over-runs the sum allowed him at pleasure. As to appropriations[,] I have no faith in them.”<sup>48</sup> Throughout the nineteenth century, the executive repeatedly utilized payment commitments to achieve its purposes prior to appropriation from Congress.<sup>49</sup>

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44. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *Colum. L. Rev.* 1595, 1601–02 nn.23–24 (2014) (outlining ways in which government officials' behavior has differed from the Framers' expectations).

45. See Jerald A. Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* 171–88 (1970) (describing how the Jay Treaty required appropriations—despite Senate approval—because it committed to expenditures, provoking floor debate about the power of the House to decline to appropriate funds necessary to honor the commitment).

46. See 9 *Cong. Rec.* 1894 (1879) (statement of Rep. Garfield) (“[Y]ou have the power to withhold appropriations . . . but have you the right?”); Letter from John Marshall to Alexander Hamilton (Apr. 25, 1796), *in* 20 *The Papers of Alexander Hamilton* 137, 137 (Harold C. Syrett ed., digital ed. 2011) (“We admit the discretionary constitutional power of the representatives on the subject of appropriations . . .”); Price, *supra* note 1, at 385 (“[E]ven Hayes acknowledged Congress's ultimate authority to deny funding if it wished.”).

47. E.g., 9 *Cong. Rec.* 1895 (1879) (statement of Rep. Garfield) (“I hold that to appropriate the money required by the law is my duty, and my vote shall be for the appropriation under the laws as they are . . .”); 5 *Annals of Cong.* 1017 (1796) (statement of Rep. Swift) (“Notwithstanding the power given to the Legislature to make all appropriations of money; yet, in all cases where the national faith is plighted, a contract is made, or a debt contracted, it becomes an absolute duty to make the necessary appropriation to carry it into effect . . .”); *id.* at 699 (statement of Rep. Murray) (“Here an appropriation is less a grant of money than an act of duty, to which the Constitution, that is, the will of the nation, obliges us.”); see also Price, *supra* note 1, at 382–84 (discussing Jay treaty negotiations). But cf. Letter from Alexander Hamilton to William Loughton Smith (Mar. 10, 1796), *in* 20 *The Papers of Alexander Hamilton* 72, 72 (Harold C. Syrett ed., digital ed. 2011) (asserting that Congress “cannot deliberate whether they will appropriate [and] pay the money,” but can only discuss “the mode of raising [and] appropriating the money” (emphasis omitted)).

48. 15 *Annals of Cong.* 1063 (1806).

49. See *Project Stormfury—Australia—Indemnification for Damages*, 59 *Comp. Gen.* 369, 372 (1980) (describing the frequency with which executive “legally or morally committed” the United States to make payments (emphasis omitted)); Kiewiet & McCubbins, *supra* note 43, at 221 (“[A]n agency would spend what it had been appropriated before the year

Eventually, Congress asserted control over the executive's commitment power, forbidding various forms of payment commitments in advance of appropriations.<sup>50</sup> This assertion culminated in the Anti-Deficiency Act, passed because "Congress was tired of receiving appropriation requests which it could not, in good conscience, refuse because the agency had legally or morally committed the United States to make good on a promise."<sup>51</sup> The Anti-Deficiency Act broadly prohibits agency employees and officials from "obligating" payments—by contract, commitment, or otherwise—in advance of appropriations unless Congress gives them special authority to do so or an exception applies.<sup>52</sup> This framework persists in updated form to this day and has largely—but not entirely—subjected the executive commitment power to legislative control.<sup>53</sup>

Legislative commitments are a primary focus of this Article, and an important category of such commitments—appropriated entitlements—is discussed in the next section. Like executive commitments, legislative commitments can be legal (creating a legal obligation to pay), subjective (creating an expectation of payment even if not accompanied by legal

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was out and then threaten Congress with the cessation of its services and the breach of contracts it had made if additional funds were not forthcoming."); Lucius Wilmerding, Jr., *The Spending Power: A History of the Efforts of Congress to Control Expenditures* 99–117 (1943) (describing how "[t]he struggle between the executive departments and the Congress for the control of expenditure . . . entered a phase very troublesome" from 1820 to 1860).

50. See Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (forbidding premature expenditure of agency budgets); Act of May 1, 1820, ch. 52, § 6, 3 Stat. 567, 568 (forbidding contracts in advance of appropriations).

51. Project Stormfury—Australia—Indemnification for Damages, 59 Comp. Gen. 369, 372 (1980) (emphasis omitted).

52. 31 U.S.C. § 1341(a) (2012). Technically, the Anti-Deficiency Act today forbids obligations in the absence of "budget authority," which is conveyed not only in the form of appropriations but also contracting authority, borrowing authority, and spending authority. Compare *id.* (listing limitations on federal officers' authorities, including limits on spending beyond appropriations, a prohibition on entering unauthorized contracts, and spending from offsetting collections), with OMB Circular A-11, *supra* note 33, § 20, at 11 ("Most laws provide budget authority in the form of appropriations, but some laws provide budget authority in the form of contract authority, borrowing authority, or spending authority from offsetting collections.").

53. See Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act* (Revised Statutes 3679): And Funding Federal Contracts: An Analysis, 80 *Mil. L. Rev.* 51, 55–56 (1978) (noting that violations of the Anti-Deficiency Act persisted throughout the 1970s). The Anti-Deficiency Act does not limit purely subjective commitments—actions that do not legally commit the government but engender an expectation of future action, such as spending funds to build a public pool but not setting aside funds for chlorine or a lifeguard. See, e.g., Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* 219–20 (1974) (describing such use of subjective executive commitments to force the New York legislature to approve park construction and maintenance funds); Kiewit & McCubbins, *supra* note 43, at 223 (discussing deficiencies in the modern era).

obligation), and remediable (susceptible to judicial enforcement if broken).<sup>54</sup> A commitment can be all or any of these three.<sup>55</sup> Just as the executive used commitments in advance of appropriations during the era of coercive deficiencies, Congress can use commitments in advance of appropriations to support government purposes even if those commitments are not enforceable in court.<sup>56</sup>

So understood, there is great overlap between “commitments” as described in this Article and the concept of “entitlements” in common usage. The term “commitment” is preferable, however, because the term “entitlement” variously means several different types of commitment.<sup>57</sup> It is also semantically necessary because a key topic addressed by this Article is what courts should do when Congress fails to fund a commitment, including whether courts will provide a judicial damages award for frustrated recipients (that is, will treat the commitment as remediable), which necessitates terminology for commitments broad enough to make such distinctions. Similarly, budget and scorekeeping terminology utilizes related terms including “obligation” and “entitlement” that capture particular varieties of commitments.<sup>58</sup>

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54. The term “subjective” commitment is drawn from David Super’s taxonomy of entitlements. Super, *Political Economy*, *supra* note 3, at 640 (“One aspect of an entitlement is a subjective feeling of security or self-assurance . . . . People believing they have rights feel and act differently than those believing their well-being is at the sufferance of others.”). “Legal” and “remediable” are meant to capture a distinction not captured by Super’s “positive entitlements,” that is, that between an entitlement that exists in positive law and an entitlement that can be enforced in court. See *id.* at 648–50 (describing “positive entitlement” as “a legally enforceable individual right”).

55. It would be incorrect to assume that all legal commitments automatically give rise to reliance and so become subjective commitments as well. In the cost-sharing reductions disappropriation, the legal commitment remained in law even after both the courts and the executive had declared they could not honor that commitment due to a lack of appropriations. Insurers responded by raising their premiums on the explicit assumption that the government would not honor the commitment. See *infra* section II.A.3. The cost-sharing reductions commitment thereby remained a legal commitment even after it had ceased to be a subjective commitment. It remains to be seen whether this curiosity will influence courts’ judgments about whether the cost-sharing reductions commitment is remediable.

56. See *infra* Part III (describing various consequences of disappropriation distinct from disappointed recipients’ potential right to judicial relief).

57. See Jost, *supra* note 3, at 23–46 (offering four senses of entitlement); Super, *Political Economy*, *supra* note 3, at 640–58 (offering a taxonomy of six senses in which the word “entitlement” is used to describe federal programs, including subjective, unconditional, positive, budgetary, responsive, and functional entitlements).

58. See U.S. Gov’t Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process 70* (2005), <https://www.gao.gov/products/GAO-05-734SP> [<https://perma.cc/K7LH-8J55>] [hereinafter GAO Glossary of Terms] (defining “obligation” for purposes of the Anti-Deficiency Act); see also *infra* section V.B.3 (discussing how courts occasionally use the word “entitlement” to describe those commitments to pay for which they may order a remedy under current law).

3. *Cross-subsidies*. — Finally, Congress or the executive can force third parties to “pay” one another, thereby supporting government programs without the necessity of a direct federal expenditure. In a recent article, Professors John Brooks, Brian Galle, and Brendan Maher aptly describe such cross-subsidies as “government’s hidden pocketbook.”<sup>59</sup> The ACA’s cost-sharing reductions program, described in section II.A, offers an example of such a cross-subsidy. Another is the use of grants of monopoly power (regulatory exclusivity) by the Food and Drug Administration to reward pharmaceutical manufacturers for taking certain actions like performing pediatric studies.<sup>60</sup> Professors Daniel Hemel and Lisa Ouellette describe the resulting increased costs in the marketplace as a “shadow tax,”<sup>61</sup> as indeed they are. The financial benefit they provide to manufacturers who do what government asks is a shadow expenditure that does not require appropriations.

C. *Appropriated Entitlements Create Dissonance Between Commitments and Expenditures*

A Congress can enact a legal, subjective, and/or remediable commitment while leaving the decision whether to appropriate funds necessary to honor the commitment to future Congresses. This is possible even for legal commitments—indisputable commands to pay even a set sum to a particular individual—thanks to federal legislation abrogating the doctrine of “implied appropriation.”<sup>62</sup> As a result, because of the Appropriations Clause, it is not enough for Congress to enact legislation directing a payment to a particular individual to make that payment lawful. Congress must also designate a source of funds and thereby provide an “appropriation.”<sup>63</sup> A permission or direction to pay in the absence of appropriation is merely, in appropriations parlance, an “authorization.” Commitments and expenditures are two distinct but related powers.

Congress can and sometimes does employ these two purse powers in harmony, enacting permanent commitments and simultaneously enacting

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59. Brooks et al., *Cross-Subsidies*, supra note 13, at 1229.

60. Nate Aumock, Jeff Smith & Seth Townsend, McKinsey Ctr. for Gov’t, *Do Incentives Drive Pediatric Research?* 3 (2013), [https://www.mckinsey.com/~media/McKinsey/dotcom/client\\_service/Public%20Sector/Regulatory%20excellence/Do\\_incentives\\_drive\\_pediatric\\_research.ashx](https://www.mckinsey.com/~media/McKinsey/dotcom/client_service/Public%20Sector/Regulatory%20excellence/Do_incentives_drive_pediatric_research.ashx) [<https://perma.cc/DQD2-HUV9>].

61. Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents–Prizes Debate*, 92 *Tex. L. Rev.* 303, 312 (2013) (describing the patent system’s “higher price of patented products as a ‘shadow’ tax and the patent system as a ‘shadow’ government expenditure”).

62. Cf. *infra* notes 280–282 and accompanying text (describing legislative abrogation of the historical interpretive doctrine of implied appropriation and the possibility of courts finding that doctrine to be constitutionally compelled).

63. *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (explaining the distinction between authorization to spend and appropriation).

“permanent, indefinite” appropriations to fund them.<sup>64</sup> In creating many of the most important federal commitments, however, Congress has chosen to exercise these powers in dissonance: It has enacted permanent commitments but left the government’s ability to honor those commitments dependent upon annual or semiannual appropriations enactments.<sup>65</sup>

Significantly, legislative commitments to pay that depend on annual legislation for their funding are a decades-old building block of the federal system known confusingly as “appropriated entitlements”<sup>66</sup> that make up “36–38% of funding provided in annual appropriations acts.”<sup>67</sup> These

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64. See, e.g., 20 U.S.C. § 1087a(a) (2012) (providing permanent indefinite appropriation “to make loans to all eligible students”).

65. A third option for exercising the congressional spending power involves authorizing spending for federal programs—without *committing* any funds—followed by temporary appropriations. Congress follows this model for many federal programs. See Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 *Cath. U. L. Rev.* 51, 52–53 (1979) (describing the “two-step” authorization-appropriations process). For example, Congress has permanently authorized \$900 million for the Land and Water Conservation Fund, which provides funds to state and local entities for conservation projects. See 54 U.S.C. § 200302 (Supp. V 2017). This authorization is not in and of itself a commitment to pay—and when Congress declines to appropriate the full \$900 million in annual appropriations, it is not necessarily breaching a commitment in the legal or subjective sense. See *infra* section I.D (defining “disappropriation”).

66. It is natural to think that an “appropriated entitlement” is an entitlement that has been permanently appropriated, that is, funded completely in permanent law. But an “appropriated entitlement” is actually a vested mandatory commitment to pay that does *not* have permanent funding and is therefore dependent for its continued operation on its inclusion in the annual budget and appropriations cycle. See Jessica Tollestrup, *Cong. Research Serv.*, R44582, *Overview of Funding Mechanisms in the Federal Budget Process, and Selected Examples 12* (2016) (“[F]or ‘appropriated mandatory’ spending, which is sometimes referred to as ‘appropriated entitlement’ spending, the authorization law controls the amount of spending but does not contain the necessary appropriation to fund it.”); see also GAO Glossary of Terms, *supra* note 58, at 13 (offering similar definition of appropriated entitlements); OMB Circular A-11, *supra* note 33, § 20, at 6 (same).

67. Bill Heniff Jr., *Cong. Research Serv.*, RS20129, *Entitlements and Appropriated Entitlements in the Federal Budget Process 1* (2012) [hereinafter Heniff, *Appropriated Entitlements*]. A list of such entitlements compiled for the conference report of the 1997 Balanced Budget Act includes fifty-three statutory commitments across sixteen agencies. H.R. Rep. No. 105-217, at 1014–18 (1997) (Conf. Rep.), as reprinted in 1997 U.S.C.C.A.N. 176, 635. Appropriations Committees (which oversee the annual process) felt that the legislative committees (which oversee permanent legislation) were using appropriated entitlements in part as a way to effectively force spending without the Appropriations Committees’s input. The 1997 Balanced Budget Act sought to address this by requiring that new appropriated entitlements create a “point of order” that necessitated approval by the Appropriations Committees before enactment. 2 U.S.C. § 900(c)(17) (2012) (“As used in this subchapter, all references to entitlement authority shall include the list of mandatory appropriations included in the joint explanatory statement of managers accompanying the conference report on the Balanced Budget Act of 1997.”); see also H.R. Rep. No. 105-217, at 995 (“The conference agreement refers to ‘new entitlement authority.’ The conferees intend that this term applies to legislation that either expands an existing entitlement or creates a new entitlement. The existing controls on backdoor spending authority have been retained.”).

included veterans' benefits, food stamps and child nutrition, federal crop insurance, the DOJ's independent counsel, federal employee retirement and annuity funds, Medicaid, coal miner annuities, oil spill recovery, veterans' burials, and tribal support costs, among dozens of others.<sup>68</sup> Reflect on that: In a time when Congress so often seems unable to act,<sup>69</sup> funding for most nursing home stays and food stamps depends on Congress's enacting (and the President's signing) legislation *every single year*.

While the budgetary category of "appropriated entitlements" includes many of the most important government payment programs, it does not capture the full range of federal commitments to pay that depend on periodic appropriations. The Children's Health Insurance Program (CHIP) is one example; it is generally funded in increments of two or more years and includes language nominally limiting expenditures in any year to appropriations.<sup>70</sup>

Moreover, Medicare coverage for the aged and disabled and Social Security retirement benefits will soon depend on periodic appropriations. Neither is considered an appropriated entitlement because each is funded by permanent appropriations of payroll taxes.<sup>71</sup> To date, payroll taxes paid by employees each year have been sufficient to fund these programs without added appropriations. That will soon change. In 2026, Medicare's permanent appropriation will become insufficient to cover its costs; Social Security's will become insufficient in 2034.<sup>72</sup> By those years, Congress and the President will need to agree on new legislation funding or cutting Medicare and Social Security if the programs are to avoid disappropriation.

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68. See H.R. Rep. No. 105-217, at 1014–18.

69. Cf. Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 *Geo. Mason L. Rev.* 501, 505 (2015) (describing congressional dysfunction).

70. See *infra* section II.A.4 (discussing CHIP).

71. See John Harrison, *New Property, Entrenchment, and the Fiscal Constitution*, in *Fiscal Challenges: An Interdisciplinary Approach to Budget Policy* 401, 404–05 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008) (describing Social Security's financing structure).

72. The Bds. of Trs., *Fed. Hosp. Ins. & Fed. Supplementary Med. Ins. Tr. Funds*, 2018 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds 7 (2018), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2018.pdf> [<https://perma.cc/Q6CF-FX7Z>] (stating that the Medicare trust fund will "become[] depleted in 2026"); The Bd. of Trs., *Fed. Old-Age and Survivors Ins. & Fed. Disability Ins. Tr. Funds*, The 2018 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds 3 (2018), <https://www.ssa.gov/oact/TR/2018/tr2018.pdf> [<https://perma.cc/KJY4-PM89>] (stating that the Social Security trust fund will "become depleted in 2034").



D. *Defining “Disappropriation”*

Readers pondering Congress’s ability to create a permanent legal commitment to pay that depends for its satisfaction on future appropriations enactments may well be wondering, “What happens when Congress fails to enact the necessary appropriations?” Legislative reference materials say virtually nothing about this possibility, reflecting the assumption that Congress would always fund legislative commitments to pay.<sup>73</sup> Thus, there is neither a concise term nor phrase in mainstream appropriations law for a legislative failure to appropriate funds necessary to honor a legal commitment to pay. Nor is there an understanding of the results of such failures.

To describe the phenomenon of congressional failure to appropriate funds necessary to honor a government commitment, this Article unearths the word “disappropriation” from Ecclesiastical Law.<sup>74</sup> The word is apropos and other potentially useful terms already have entirely distinct and inapposite meanings in constitutional and appropriations law.<sup>75</sup> Moreover, the word’s isolated prior usage in appropriations and occasional prior usage in legal scholarship is consistent with the “failure to appropriate necessary funds” sense employed here.<sup>76</sup>

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73. The Government Accountability Office says just a few vague words regarding what happens in the event of disappropriation, to wit, “if Congress does not appropriate the money necessary to fund the payments, eligible recipients may have legal recourse.” GAO Glossary of Terms, *supra* note 58, at 13. The Congressional Research Service simply paraphrases these unhelpful words. Heniff, *Appropriated Entitlements*, *supra* note 67, at 1 (“[E]ligible beneficiaries may have legal recourse if full payment under the law is not provided.”); see also Tollestrup, *supra* note 66, at 12 n.50 (“Entitlement payments are legal obligations of the federal government, and eligible beneficiaries may have legal recourse if full payment under the law is not provided.”).

74. Disappropriation, Black’s Law Dictionary (11th ed. 2019) (“*Eccles. law*. The alienation of church property from its original use; the severance of property from church ownership or possession.”).

75. See, e.g., *United States v. Hopkins*, 427 U.S. 123, 125 n.2 (1976) (“A ‘nonappropriated fund instrumentality’ is one which does not receive its monies by congressional appropriation.”); Daniel H. Cole & Carol S. Comer, *Rhetoric, Reality, and the Law of Unfunded Federal Mandates*, *Stan. L. & Pol’y Rev.*, Summer 1997, at 103, 104, 111 (addressing “unfunded mandates” and their effects on state, local, and tribal governments); Jan Dennis, ‘Unfunded Liabilities’ a Financial Myth, *Expert Says*, *Ill. News Bureau* (Apr. 1, 2009), <https://news.illinois.edu/view/6367/205985> [<https://perma.cc/VUS5-CWYB>] (referring to the use of the term “unfunded liabilities” in debates over large spending programs such as Social Security and Medicare).

76. Two commentators used “disappropriation” in the context of a 2004 budget dispute in Oregon to describe a funding measure that would have left certain state programs unfunded had voters repealed a tax surcharge by referendum. See Joshua C. Gaul, *Foster v. Carson: The Ninth Circuit Misapplies the Capable-of-Repetition-Yet-Evading-Review Exception to the Mootness Doctrine and Lends a Free Hand to Budget-Cutting State Officials*, 79 *Wash. L. Rev.* 665, 682 (2004) (noting that the bill “would disappropriate funds to various state agencies in the event voters repeal the income tax surcharge”); Cliff Collins, *A Case of Déjà Vu?*, *Or. St. B. Bull.* (Nov. 2003) <https://www.osbar.org/publications/bulletin/03nov/dejavu.html> [<https://perma.cc/Y9PK-LKU6>] (quoting a trial court administrator discussing

Note that the Article’s definition of disappropriation—legislative failure to appropriate funds necessary to honor a government commitment in time to honor that commitment—is deliberately broad. It captures failures to enact appropriations necessary to honor both legal commitments (those in permanent law) and subjective commitments (enactments that create an expectation even in the absence of a direction).<sup>77</sup> It also captures failures to enact appropriations needed to honor conduct commitments, not just payment commitments, like the ongoing failure to enact funds necessary to process Medicare claims within the ninety-day deadline set by Congress.<sup>78</sup> It does not include the absence of appropriations when no subjective commitment is present, as is often the case when Congress creates a discretionary program but declines to fund that program fully or at all or predictably varies its funding from year to year.

The Article includes failures to appropriate funds necessary to honor subjective payment commitments as well as conduct commitments as “disappropriations” for five reasons. First, labeling only breaches of legal payment commitments and not other forms of commitments as “disappropriations” would reify one but not the other. There may be those for whom subjective commitments are more important than many legal commitments, or for whom conduct commitments are more important than payment commitments.<sup>79</sup> Second, this inclusive definition captures the

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the risk that funding for judiciary might be “disappropriated” if the surcharge were repealed). The word has been employed rarely in other contexts in modern law, always to describe the severance of a property, idea, or thing from an association. See *Russ v. Wilkins*, 410 F. Supp. 579, 583 (N.D. Cal. 1976) (“The Reservation has had a tragic history whereby proximity to settlers has resulted in a disappropriation of land from the Indians.”); Roberto Chacon de Albuquerque, *The Disappropriation of Foreign Companies Involved in the Exploration, Exploitation and Commercialization of Hydrocarbons in Bolivia*, 14 *Law & Bus. Rev. Am.* 21, 21 n.2 (2008) (considering “the scenario of the government disappropriating facilities belonging to foreign companies involved in the exploration, exploitation and commercialization of hydrocarbons in Bolivia”); Andrea C. Loux, Note, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 *Cornell L. Rev.* 183, 200 (1993) (“[T]he restriction of the use of the commons to those who had an interest in the manorial land disappropriated those landless cottagers who lived on the lord’s waste and subsisted on the products of the common.”).

77. To be sure, the recent phenomenon of legislative failure to fund legal commitments to pay is the motivation for and focus of this Article, and further study is necessary to determine whether the Article’s normative framework and recommendations for courts adjudicating disappropriation apply fully to disappropriations of conduct commitments or even disappropriations of subjective payment commitments that are indisputably not legal commitments. Thus, the Article points out relevant ways that disappropriation of a legal payment commitment differs from disappropriation of a subjective payment commitment. See, e.g., *infra* section III.A.4 (discussing rule of law costs of broken commitments); *infra* note 343 (offering legal support for anti-disappropriation presumption).

78. See Matthew J.B. Lawrence, *Procedural Triage*, 84 *Fordham L. Rev.* 79, 90–91 (2015) (discussing the Medicare claims backlog).

79. Sorting commitments deserving of heightened attention from those that are not is beyond this Article’s scope. For a compilation of scholarship that explores extending the

Framers' concern that Congress may occasionally have a duty to enact appropriations to honor a commitment.<sup>80</sup> Third, many of the practical and separation of powers consequences of legislative failure to appropriate funds arise whether the broken commitment is legal or merely subjective<sup>81</sup> or whether the broken commitment is for payment or for conduct.

Fourth, it might be objected that the outer bounds of the entire category of "subjective" commitments are murky because they depend on identifying the expectations of third parties, just as it might be objected that there is not a clear line between "conduct" and "payment." This is a good thing. Focusing on the reasons mere legislative inaction comes to be perceived as a legislative failure to act, with all the pejorative content that the word "failure" sometimes carries, facilitates understanding of how the temporal aspects of legislation are not binary ("temporary" or "permanent") but rather a continuum of legislative features interacting with real world contexts to alter the practical, political, and separation of powers impacts of legislative "action" or "inaction." The Article's study of failures to fund legal commitments to pay lays bare the need for a concise term to describe legislative inaction that may be perceived as legislative failure to act and the need to focus attention on how the nature of the object of that failure shapes its consequences—be it a legal or subjective commitment, to pay or for conduct.

Fifth and finally, in many cases, there will be little doubt to scorekeepers, legislative staff, agency staff, and recipients about whether a "commitment" exists. But determining whether a court would deem that commitment to be "legal" rather than merely "subjective" would be difficult if not impossible. This Article aspires to promote understanding among players at every step of the chain—from legislature, to agency, to recipients, to court. Terminology that could be employed with certainty only by courts at the end of this chain would frustrate that goal.

## II. DISAPPROPRIATION OF LEGAL PAYMENT COMMITMENTS IS AN EMERGING AND POORLY UNDERSTOOD PHENOMENON

Until recently, exceptions to the rule that the legislature always enacts appropriations when necessary to honor legal commitments to pay were "virtually unheard of in federal fiscal history."<sup>82</sup> That is not true anymore.

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protections of the due process clause beyond legitimate claims of entitlement grounded in positive law, see *Super, Political Economy*, supra note 3, at 650 n.68.

80. See supra note 47 and accompanying text.

81. See infra section III.A.1–3.

82. *Harrison*, supra note 71, at 405. Historical exceptions were small or momentary. See *United States v. Vulte*, 233 U.S. 509, 511–13 (1914) (finding that Congress failed to appropriate funds sufficient to grant a service member a ten-percent raise committed by underlying legislation); *United States v. Langston*, 118 U.S. 389, 393–94 (1886) (finding that Congress appropriated only \$5,000 when underlying legislation entitled the

Recent years have seen repeated, prolonged, and indefinite disappropriations of legal commitments to pay, as surveyed in section II.A. Section II.B describes the urgent need for greater understanding of disappropriation.

A. *Dissonance Increasingly Results in Disappropriation*

Several of the most significant recent legislative and bureaucratic controversies have entailed disappropriation of legal or subjective commitments to pay. These disappropriation controversies have surrounded tribal support contracts, the “sabotage” of the ACA’s cost-sharing reduction and risk corridors entitlements, the Children’s Health Insurance Program, and government shutdowns.

1. *Tribal Contract Support Costs.* — The disappropriation controversy surrounding tribal contract support costs began before the modern era, in the early 1990s, but was not resolved until 2016. It saw tribes forced to cut back law enforcement, health care, and social services due to federal shortfalls throughout the 1990s, only to receive a billion dollars in missed payments decades later as the result of settlements spurred (slowly) by the Supreme Court’s decision in favor of the tribes in *Salazar v. Ramah Navajo Chapter*.<sup>83</sup> It featured the congressional dysfunction, uncertainty, real-world disruption, waste, and judicial turbulence that have typified subsequent disappropriations of legal commitments. Indeed, the unusual 5-4 split in the Supreme Court that ultimately set *Ramah* on the path to final resolution illustrates the odd place of disappropriation in our legal system: Justice Sotomayor wrote for the majority joined by Justices Kagan, Scalia, Kennedy, and Thomas.<sup>84</sup> Chief Justice Roberts dissented joined by Justices Ginsburg, Breyer, and Alito.<sup>85</sup>

a. *Commitment.* — In 1975, Congress enacted the Indian Self-Determination and Education Act (ISDA)<sup>86</sup> to empower tribes to provide to their members services that had historically been provided directly by the federal government.<sup>87</sup> Under the current version of the ISDA, tribes have a choice between continuing to receive services from the federal government or instead “request[ing] . . . to enter into a self-determination contract . . . to plan, conduct, and administer” the services themselves.<sup>88</sup> In exchange, the federal government will periodically pay electing tribes a lump sum equal to what the Secretary of Interior “would have otherwise

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ambassador to Haiti to \$7,500); see also *infra* section II.A.5 (discussing government shutdown litigation).

83. 567 U.S. 182 (2012).

84. *Id.* at 184.

85. *Id.* at 201 (Roberts, C.J., dissenting).

86. Indian Self-Determination and Education Act (ISDA), Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified in scattered sections of 25 U.S.C.).

87. 25 U.S.C. § 5302 (2012).

88. *Id.* § 5321.

provided for his direct operation of the programs” plus “contract support costs,” equal to the costs to the tribe of operating and administering the programs previously run by the Secretary of the Interior.<sup>89</sup> That said, the statute includes language making these commitments “subject to the availability of appropriations,”<sup>90</sup> the meaning of which would come to be heavily disputed.

b. *Disappropriation.* — Hundreds of tribes elected to operate their own services under the ISDA, entering self-determination contracts in the early 1990s and taking up responsibility for operating health care, education, economic support, social programs, and law enforcement services for their members.<sup>91</sup> Congress did not keep its side of the bargain. As the cost of providing services increased throughout the 1990s, Congress failed to appropriate sufficient funds to the Secretary of Interior to reimburse tribes as the ISDA mandated.<sup>92</sup> With appropriations insufficient to comply with the statutory command to pay, the Bureau of Indian Affairs and the Indian Health Service (IHS) reduced all tribes’ payments, pro rata.<sup>93</sup>

c. *Consequences.* — The harm to tribes was immediate. Contracts “for programs absolutely essential to self-government, such as law enforcement, economic development, and natural resource management, [became] ‘unworkable’ in the words of a tribal representative.”<sup>94</sup> As a result, tribes cut back on all these services for their members throughout the 1990s.<sup>95</sup>

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89. Id. § 5325(a).

90. Id. § 5325(b).

91. *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 187 (2012); see also Press Release, Updated Estimated Dollar Shares for Each Class Member (Jan. 2016), [http://www.rmcsettlement.com/\\_press\\_release/Jan%206%20Tribal%20Share%20Amounts.pdf](http://www.rmcsettlement.com/_press_release/Jan%206%20Tribal%20Share%20Amounts.pdf) [<https://perma.cc/LKN8-P3QN>] (listing 699 tribes participating in the *Ramah* class action settlement).

92. U.S. Gen. Accounting Office, GAO/RCED-99-150, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed* 3 (1999) [hereinafter GAO ISDA] (“Tribes’ allowable contract support costs have tripled from 1989 through 1998—increasing from about \$125 million [annually] to about \$375 million.”).

93. See *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694, 68,694 (Dec. 28, 1993) (stating that the agency “can only utilize the amount appropriated”); see also *Distribution of Fiscal Year 2001 Contract Support Funds*, 66 Fed. Reg. 15,275, 15,276 (Mar. 16, 2001) (noting that agency contract payments are limited by appropriations); *Distribution of Fiscal Year 2000 Contract Support Funds*, 65 Fed. Reg. 10,100, 10,101 (Feb. 25, 2000) (same); *Distribution of Fiscal Year 1999 Contract Support Funds*, 64 Fed. Reg. 2658, 2658 (Jan. 15, 1999) (same); *Distribution of Fiscal Year 1998 Contract Support Funds*, 63 Fed. Reg. 5398, 5399 (Feb. 2, 1998) (same); *Distribution of Fiscal Year 1997 Contract Support Funds*, 62 Fed. Reg. 1468, 1469 (Jan. 10, 1997) (same); *Distribution of Fiscal Year 1996 Contract Support Funds*, 61 Fed. Reg. 16,106, 16,106 (Apr. 11, 1996) (same); *Distribution of Fiscal Year 1995 Contract Support Funds*, 59 Fed. Reg. 55,318, 55,318 (Nov. 4, 1994) (same).

94. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1057 (10th Cir. 2011).

95. See GAO ISDA, *supra* note 92, at 3–4.

The Government Accountability Office (GAO) issued a report noting the inconsistency between the legal commitment to pay and the lack of appropriations. It called for Congress to “ensure consistent implementation” of the law (resolve the disappropriation) either by providing the appropriations necessary to honor the statutory commitment to pay or by amending the Act to remove the underlying (arguable) statutory commitment that IHS was breaking year after year.<sup>96</sup> Congress would not do so until 2014.<sup>97</sup>

The tribes naturally sued, but the lawsuits proceeded at a glacial pace.<sup>98</sup> “We are faced with an apparent contradiction,” the Tenth Circuit wrote when called upon to adjudicate the controversy in 2011.<sup>99</sup> “Congress has mandated that all self-determination contracts provide full funding of [contract support costs] . . . but has nevertheless failed to appropriate funds sufficient to pay all [contract support costs] every year since 1994 . . . .”<sup>100</sup> A circuit split eventually developed about whether courts would order damages for breach of contract payable from the permanent indefinite Judgment Fund appropriation despite the insufficiency of congressional appropriations for the program.<sup>101</sup>

The dispute centered on the meaning of the language “subject to the availability of appropriations” on which the payment commitments were conditioned. The government argued that with this language Congress had foreclosed the possibility of disappropriating the legal commitment by automatically capping it at the level of appropriations.<sup>102</sup> The Supreme Court ruled by a narrow margin that such language did not alter the amount of the tribes’ contract because Congress appropriated funds sufficient for the agency to comply with *some* (though not all) of its contracts.<sup>103</sup> In so doing, the majority opted to resolve ambiguities about the import of the “subject to availability” language in favor of the tribes under the “Ferris doctrine,” which favors government contractor rights in part to promote

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96. *Id.* at 9.

97. *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1223 (D.N.M. 2016).

98. Initial disputes concerned the secretary’s pro rata allocation formula. See, e.g., *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1342–43 (D.C. Cir. 1996) (describing tribes’ claims).

99. *Salazar*, 644 F.3d at 1056.

100. *Id.* at 1056–57.

101. See *id.* at 1057 (ruling in favor of the tribes); *id.* at 1090–91 (Hartz, J., dissenting) (“My view is supported by three opinions of two other circuits . . . .”); *Arctic Slope Native Ass’n, Ltd. v. Sebelius*, 629 F.3d 1296, 1305–06 (Fed. Cir. 2010) (ruling for government); see also *Babbitt*, 87 F.3d at 1349 (ruling that the statute requires pro rata distribution in the event of insufficient appropriations).

102. The specific ambiguity was regarding the import of statutory language providing that the contracts were “subject to the availability of appropriations.” 25 U.S.C. §§ 5325(b), 5329(c) (2012).

103. See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 193 (2012) (citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

“contractors’ confidence that they will be paid.”<sup>104</sup> Thus, as understood by the Supreme Court, a disappropriation had indeed taken place, and the Supreme Court went on to hold that the disappropriated commitment was remediable, that is, that the tribes were entitled to a damages remedy.

“[T]hree and one-half years” of settlement negotiations ensued after the Supreme Court’s ruling for the tribes.<sup>105</sup> On February 23, 2016, the district court approved a settlement whereby the government agreed to pay \$940 million in damages to the tribes.<sup>106</sup> This amount reflects estimates of the magnitude of the foregone payments.<sup>107</sup> By March 31, 2018, twenty-five years after the disappropriation began, \$861,220,274.97 had finally been distributed to class members (with the rest going to attorneys and administrative expenses).<sup>108</sup>

2. *Risk Corridors*. — The all-out political war over the ACA has in two instances produced the very same “contradiction” that the Tenth Circuit observed in *Ramah* of a legal command to pay with which the government could not constitutionally comply due to a lack of appropriations.<sup>109</sup> The first of these has been the \$12 billion risk corridors disappropriation.

a. *Commitment*. — The centerpiece of the ACA’s effort to provide health insurance for forty-seven million uninsured Americans<sup>110</sup> was its effort to create a functioning “exchange” marketplace in which individuals and small employers could purchase health insurance.<sup>111</sup> The

104. *Id.* at 193–94. This nuanced rule meant that “[c]ontractors are responsible for knowing the size of the pie, not how the agency elects to slice it.” *Id.* at 191.

105. *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1230 (D.N.M. 2016) (attributing delay to complexity of calculating damages).

106. See *id.* at 1240–42, 1246 (describing approval of settlement); *Ramah Settlement Funds Finally Released by Obama Administration*, *Indianz* (Aug. 11, 2016), <https://www.indianz.com/News/2016/08/11/ramah-settlement-funds-finally-released.asp> (on file with the *Columbia Law Review*) (“After being announced in September 2015, the \$940 million settlement was approved in court on February 23, 2016.”).

107. Press Release, U.S. Dep’t of the Interior, Bureau of Indian Affairs, Interior, Justice Departments Announce \$940 Million Landmark Settlement with Nationwide Class of Tribes and Tribal Entities (Sept. 17, 2015), <https://www.indianaffairs.gov/as-ia/opa/online-press-release/interior-justice-departments-announce-940-million-landmark-settlement> [<https://perma.cc/GN8G-5C2A>].

108. Class Counsel’s Second Report to the Court on the Distribution of Class Funds at 2, *Ramah Navajo Chapter v. Zinke*, No. 90-cv-00957, ECF No. 1604 (D.N.M. Apr. 9, 2018); see also *Jewell*, 167 F. Supp. 3d at 1245–47 (describing an 8.5% attorneys’ fee award).

109. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1056 (10th Cir. 2011).

110. Rachel Garfield, Rachel Licata & Katherine Young, Kaiser Family Found., *The Uninsured at the Starting Line: Findings from the 2013 Kaiser Survey of Low-Income Americans and the ACA*, at i (2014), <https://www.kff.org/uninsured/report/the-uninsured-at-the-starting-line-findings-from-the-2013-kaiser-survey-of-low-income-americans-and-the-aca/> [<https://perma.cc/9YRN-8FRU>] (“47 million Americans . . . were without health insurance coverage.”).

111. See Sarah Dash, Christine Monahan & Kevin Lucia, *Health Policy Brief: Health Insurance Exchanges and State Decisions*, *Health Affairs* 2–4 (2013), [https://www.healthaffairs.org/doi/10.1377/hpb20130718.132696/full/healthpolicybrief\\_96.pdf](https://www.healthaffairs.org/doi/10.1377/hpb20130718.132696/full/healthpolicybrief_96.pdf) [[https://www.healthaffairs.org/doi/10.1377/hpb20130718.132696/full/healthpolicybrief\\_96.pdf](https://www.healthaffairs.org/doi/10.1377/hpb20130718.132696/full/healthpolicybrief_96.pdf)]

temporary three-year “risk corridors” program was an important part of that. Congress knew that health insurers would be reluctant to participate in the brand new individual insurance marketplace because, without past history as a guide, predicting the cost of health care claims would be difficult.<sup>112</sup> So it included a program—the “risk corridors program”—that effectively insured insurers against the risk that the premiums they charged during the first three years of the new marketplace would be insufficient to cover their costs.<sup>113</sup>

The statutory provisions creating the risk corridors program directed the Secretary of the Health and Human Services (HHS) to make a payment, pursuant to a statutory formula, to any insurer who chose to participate in the new exchanges and enrolled beneficiaries who were unexpectedly costly to insure.<sup>114</sup> It simultaneously provided that if such insurers enrolled beneficiaries who were unexpectedly inexpensive to insure, they would have to make a payment to the Secretary pursuant to the same statutory formula.<sup>115</sup>

b. *Disappropriation.* — The launch of the ACA individual marketplace was rocky, depressing enrollment and skewing the enrolled population sicker (and so costlier to insure) than had been anticipated.<sup>116</sup> Insurers who had gambled by participating in the marketplaces stood to lose billions if not for the risk corridors program. But with that program

perma.cc/PK9B-6KAL] (describing the ACA’s health insurance exchange scheme as originally envisioned); Amy B. Monahan & Daniel Schwarcz, *Saving Small-Employer Health Insurance*, 98 Iowa L. Rev. 1935, 1945–50 (2013) (discussing the ACA’s impact on individual and small-group markets).

112. See *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1330 (Fed. Cir. 2018) (describing insurer reluctance to participate in the absence of such protection). By “individual market,” this Article refers to both the individual and the small group markets, though they are distinct. See generally John Aloysius Cogan Jr., *Does Small Group Health Insurance Deliver Group Benefits? An Argument in Favor of Allowing the Small Group Market to Die*, 93 Wash. L. Rev. 1123 (2018) (discussing individual and small group markets).

113. 42 U.S.C. § 18062 (2012); see also Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010), <https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/amendreconprop.pdf> [<https://perma.cc/Y8PM-YU24>] (describing the ACA’s impacts on federal spending and revenue).

114. 42 U.S.C. § 18062(b)(1).

115. *Id.* § 18062(b)(2).

116. See Cong. Budget Office, Pub. No. 4869, *The Budget and Economic Outlook: 2014 to 2024*, at 112 (2014), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45010-outlook2014feb0.pdf> [<https://perma.cc/7WBV-CG7T>] (describing “technical problems . . . encountered in the initial phases of implementing the ACA” that decreased enrollment); Robert Pear, *Newest Policyholders Under Health Law Are Sicker and Costlier to Insurers*, N.Y. Times (Mar. 30, 2016), <https://www.nytimes.com/2016/03/30/us/politics/newest-policyholders-under-health-law-are-sicker-and-costlier-to-insurers.html> [<https://perma.cc/884X-SBML>] (describing how insurance companies underestimated the cost increases that would result from insuring more Americans under the ACA).



expected to require HHS to make billions in payments, members of Congress soon asked HHS questions about the source of funding for the program.

In response to these inquiries from Congress, HHS explained its view that the risk corridors program was funded annually as an appropriated entitlement, and that the agency's broadly worded annual "program management" appropriation was available for the risk corridors payments.<sup>117</sup> Members challenged that view, seeking the opinion of the Comptroller General in the GAO. The Comptroller General essentially endorsed the HHS position.<sup>118</sup>

The Comptroller General's opinion was naturally limited to the text of the annual appropriations acts as written when it conducted its review. Congress responded in the 2014 iteration of the program management appropriation by including a rider limiting the availability of that appropriation for risk corridors payments.<sup>119</sup> It included identical language in subsequent years' iterations of the program management appropriation, effectively limiting the availability of that appropriation for risk corridors payments.<sup>120</sup>

The new appropriations riders left HHS without sufficient available appropriations to comply with its statutory mandate to make risk corridors payments. So HHS did not pay insurers the \$12.3 billion called for by the statutory formula over the three-year run of the program, even while recording the unpaid amounts in "obligations" in its financial reports.<sup>121</sup>

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117. See U.S. Gov't Accountability Office, *Opinion Letter on Department of Health and Human Services—Risk Corridors Program* to Jeff Sessions, Ranking Member, U.S. Senate Comm. on the Budget & Fred Upton, Chairman, House of Representatives Comm. on Energy & Commerce 3–4 (Sept. 30, 2014), <https://www.gao.gov/assets/670/666299.pdf> [<https://perma.cc/59MY-28R4>] [hereinafter GAO Risk Corridors Opinion Letter].

118. See *id.*

119. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (2014) ("None of the funds made available by this Act . . . , or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).").

120. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 223, 131 Stat. 135, 543 (2016); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225, 129 Stat. 2242, 2624 (2015).

121. See *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1332 (Fed. Cir. 2018) (Newman, J., dissenting) (noting that HHS was recording unpaid amounts as "obligation[s] of the United States Government for which full payment is required" (internal quotation marks omitted) (quoting Memorandum from Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Risk Corridors Payments for the 2014 Benefit Year 1* (Nov. 19, 2015))); *Molina Healthcare of Cal., Inc. v. United States*, 133 Fed. Cl. 14, 25 (2017) ("On October 1, 2015, HHS announced that it owed insurers \$2.87 billion in risk corridor payments for the 2014 plan year."); Leslie Small, *Government's Unpaid Risk Corridor Tab Swells to \$12.3B*, *FierceHealthcare* (Nov. 16, 2017), <https://www.fiercehealthcare.com/aca/government-s-unpaid-risk-corridor-tab-swells-to-12-3b> [<https://perma.cc/VYT8-Z26T>]

c. *Consequences.* — The risk corridors disappropriation had immediate adverse impacts for insurers, insureds, and those barely able to afford insurance. The disappropriation meant that insurers could not claim expected risk corridors payments as “assets” to satisfy regulatory solvency requirements, which drove dozens of insurers out of business.<sup>122</sup> Other insurers left the ACA marketplaces altogether, rather than double down on the federal government’s broken commitment, and those that remained increased their premiums by significant margins.<sup>123</sup> Predictable downstream results of these three impacts from the disappropriation of the risk corridors program—insurer bankruptcies, insurer exits, and double-digit premium increases—include reductions in the number of uninsured individuals able to afford insurance through the exchanges and increases in costs borne by those who could afford insurance.<sup>124</sup>

These impacts in turn had political consequences. Insurer bankruptcies, insurer exits, and premium hikes were and continue to be cited in support of a political narrative that the ACA was dysfunctional.<sup>125</sup> Simultaneously, a counter-narrative emerged in pro-ACA circles that the law’s struggles were due to Republican “sabotage,” of which the risk corridors disappropriation was offered as exhibit one.<sup>126</sup> This narrative was

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(“The federal government’s unpaid balance for the Affordable Care Act risk corridor program has now ballooned to \$12.3 billion.”).

122. See Nat’l Assoc. of Ins. Comm’rs, *Accounting for the Risk-Sharing Provisions of the Affordable Care Act 10–12* (2014) [https://www.naic.org/sap\\_app\\_updates/documents/150\\_a.pdf](https://www.naic.org/sap_app_updates/documents/150_a.pdf) [<https://perma.cc/A6A8-6N6E>] (providing that, in light of risk corridors disappropriation, insurers should not consider expected payment as an asset for accounting purposes); see also *Molina Healthcare*, 133 Fed. Cl. at 25 (describing insurer bankruptcies).

123. Daniel W. Sacks, Khoa Vu, Tsan-Yao Huang & Pinar Karaca-Mandic, *The Effect of the Risk Corridors Program on Marketplace Premiums and Participation 1* (Kelley Sch. of Bus., Research Paper No. 18-57, 2018), <https://ssrn.com/abstract=3201686> (on file with the *Columbia Law Review*) (finding that the end of the risk corridors program led to a substantial increase in premiums); Craig Garthwaite & John A. Graves, *Success and Failure in the Insurance Exchanges*, *NEJM Catalyst* (Oct. 18, 2017), <https://catalyst.nejm.org/success-failure-insurance-exchanges> [<https://perma.cc/M8JB-XM7A>] (explaining how insurers cited risk corridors disappropriation as a reason for exit from marketplaces).

124. See Paul Demko, *Obamacare’s Sinking Safety Net*, *Politico* (July 13, 2016), <https://www.politico.com/agenda/story/2016/07/obamacare-exchanges-states-north-carolina-000162> [<https://perma.cc/X5WT-AGZR>] (explaining the impacts of the risk corridors disappropriation on affordability and enrollment).

125. *Id.* (claiming that the risk corridors disappropriation caused “bad Obamacare headlines in an election year when Republicans are again running on a pledge to repeal it”).

126. See, e.g., Nicholas Bagley, *A Big Loss for Insurers in the Risk Corridor Litigation*, *The Incidental Economist* (June 14, 2018), <https://theincidentaleconomist.com/wordpress/a-big-loss-for-insurers-in-the-risk-corridor-litigation/> [<https://perma.cc/369S-NL2W>] (“Congress shut off the funding stream in a deliberate effort to sabotage the ACA.”); Patrick Caldwell, *3 Ways Republicans Have Already Sabotaged Obamacare*, *Mother Jones* (July 12, 2017), <https://www.motherjones.com/politics/2017/07/republicans-obamacare-trump-csr-medicaid/> [<https://perma.cc/V4UD-DX9P>] (citing refusals to expand Medicaid, the risk corridors, and cost-sharing reductions as “sabotage”).

occasionally embraced by Republicans. Presidential hopeful Senator Marco Rubio cited his role in the disappropriation during the presidential primaries, stating on Twitter that “[I]ast year, I stopped an Obamacare bailout and saved taxpayers \$2.5 billion.”<sup>127</sup>

Finally, as in *Ramah*, disappointed recipients have sought judicial relief, bringing dozens of lawsuits in the months and years following the risk corridors disappropriation.<sup>128</sup> Decisions in the insurers’ favor from the Court of Federal Claims were reversed by the Federal Circuit in a divided decision, which found that the appropriations riders (limiting the availability of the program management appropriations) precluded a judicial damages award.<sup>129</sup> The insurers’ petition for rehearing en banc was denied over the objections of Judges Pauline Newman and Evan J. Wallach, with Judge Newman writing separately to explain the decision’s broad ramifications (including privatization impacts) that she believed supported full court consideration<sup>130</sup> and Judge Wallach writing separately to detail his objections to the panel’s legal analysis.<sup>131</sup> The insurers’ petition for certiorari has been granted and the case heard, so the Supreme Court will in all likelihood soon be deciding once and for all whether the courts will order damages in the risk corridors cases or not.<sup>132</sup>

3. *Cost-Sharing Reductions*. — The cost-sharing reductions program provides another storied disappropriation of a legal commitment to pay that has disrupted the ACA’s individual marketplaces and dominated headlines.

a. *Commitment*. — The core, permanent ACA commitments specifically target the two aspects of health insurance that most directly affect the affordability of health insurance (and so health care). “Premium tax credits” reduce the monthly premium an eligible insured must pay each month in order to stay insured.<sup>133</sup> And “cost-sharing reductions” reduce the out-of-pocket costs in the form of deductibles, copays, and coinsurance that eligible insureds must pay if they become sick.<sup>134</sup>

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127. Marco Rubio (@MarcoRubio), Twitter (Dec. 1, 2015), <https://twitter.com/marcorubio/status/671862122796613632> [<https://perma.cc/TT7W-RYKW>].

128. Katie Keith, *Litigation Update: Challenges to Kentucky’s Medicaid Waiver, Cost-Sharing Reductions, and Risk Corridors*, *Health Affairs: Following the ACA* (Jan. 25, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180125.91141/full/> [<https://perma.cc/X8QJ-TSK3>] (noting that more than three dozen such lawsuits have been filed).

129. *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1330–31 (Fed. Cir. 2018).

130. *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 740–41 (Fed. Cir. 2018) (Newman, J., dissenting).

131. *Id.* at 741–48 (Wallach, J., dissenting).

132. *Petition for Writ of Certiorari, Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (2016) (No. 18-1038).

133. 26 U.S.C. § 36B (2012).

134. 42 U.S.C. § 18071 (2012).

The ACA's cost-sharing reductions subsidy has a complicated structure involving multiple purse powers. First, the ACA mandates that insurers reduce the cost sharing they require of low-income individuals, which means the insurers must bear a greater share of insureds' costs.<sup>135</sup> Second, in order to prevent this cross-subsidy from pushing insurers to raise their premiums to offset their increased costs, the ACA mandates that insurers be compensated for this reduced cost sharing. The "cost-sharing reductions" entitlement, then, refers to two things: insureds' entitlement to reduced cost sharing from insurers, and the government's commitment to compensate insurers for the cost of providing this entitlement to insureds.

b. *Disappropriation.* — The ACA amended an existing permanent, indefinite appropriation in a way that indisputably makes that appropriation available for its premium tax credit subsidy.<sup>136</sup> The funding mechanism the law envisioned for compensatory payments to insurers for providing cost-sharing reductions to their insureds, however, has been the subject of much dispute.

President Obama's Budget Request for 2014 sought an annual appropriation of \$4 billion from Congress to fund cost-sharing reduction payments, treating the entitlement like Medicaid or other appropriated entitlements.<sup>137</sup> However, HHS's Assistant Secretary for Financial Resources subsequently informed the Senate Appropriations Committee that Congress should not provide such an appropriation because the Administration "would not need" one after all.<sup>138</sup> Accordingly, Congress appropriated no new funds.<sup>139</sup>

After significant internal deliberations, the Administration began making cost-sharing reduction payments out of the permanent, indefinite appropriation from which premium tax credits are indisputably funded.<sup>140</sup> Republicans in Congress asserted that the program was in fact disappropriated, and the expenditure of funds on it therefore violated the Appropriations Clause.<sup>141</sup> Pursuant to a House-passed resolution, the House of Representatives brought a closely watched suit seeking, as an entity, to enjoin the payments.<sup>142</sup> The House was successful in the District Court for

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135. 26 U.S.C. § 36 (amending 31 U.S.C. § 1324 (2012)).

136. *Id.*

137. House Comm. on Energy & Commerce (Majority Staff) & House Comm. on Ways & Means (Majority Staff), Joint Congressional Investigative Report into the Source of Funding for the ACA's Cost Sharing Reduction Program 41–42 (2016) [hereinafter Joint CSR Report].

138. *Id.* at 45–46.

139. *Id.* at 45.

140. *Id.* at 85–86.

141. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 188 (D.D.C. 2016).

142. *Id.*

the District of Columbia, which ruled both that the House had standing to enforce the Appropriations Clause and that the payments were unlawful.<sup>143</sup>

The district court stayed its injunction pending appeal,<sup>144</sup> and the Obama Administration continued to make payments. The Trump Administration did the same for the first nine months of 2017 before halting the payments in October on the ground that there was no appropriation permitting the expenditures.<sup>145</sup>

*c. Consequences.* — The ACA marketplaces were scrambled by the halt of cost-sharing reduction payments. Because of the interaction between health insurance premiums and cost sharing, on the one hand, and the premium tax credits and missing cost-sharing reduction payments, on the other, health insurance in the marketplaces has become less affordable for some but more affordable for others. Insurers responded to the disappropriation by either exiting the marketplaces or increasing their premiums significantly to offset the cost of foregone cost-sharing reduction payments from the government.<sup>146</sup> But the amount of the premium tax credit is itself tied to the cost of premiums,<sup>147</sup> which meant that the low-income insureds who receive premium subsidies were either insulated from the premium increases or, in some cases, actually received more generous subsidies on net as a result. Those who did not receive such low-income subsidies, however, were in many cases priced out of the insurance marketplace.<sup>148</sup> These effects have combined to increase net federal expenditures on ACA subsidies.<sup>149</sup>

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143. *Id.* (finding that the payments were unlawful); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 74 (D.D.C. 2015) (finding that the House had standing to bring the suit).

144. *Burwell*, 185 F. Supp. 3d at 189.

145. Memorandum from Eric Hargan, Acting Sec’y, U.S. Dep’t of Health & Human Servs. to Seema Verma, Adm’r, Ctrs. for Medicare & Medicaid Servs., Payments to Issuers for Cost-Sharing Reductions (CSRs) 1 (Oct. 12, 2017), <https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf> [<https://perma.cc/U4CL-98Y4>] (“The Attorney General of the United States has provided . . . the attached legal opinion regarding . . . CSR payments [which] are prohibited unless and until a valid appropriation exists.”).

146. Letter from Keith Hall, Dir., Cong. Budget Office, to Lamar Alexander, Chairman, S. Comm. on Health, Educ., Labor & Pensions, Appropriation of Cost-Sharing Reduction Subsidies 2–4 (Mar. 19, 2018), <https://www.cbo.gov/system/files?file=115th-congress-2017-2018/reports/53664-costsharingreduction.pdf> [<https://perma.cc/9EUP-PSXR>] (“[The Congressional Budget Office] and [Joint Committee on Taxation] estimate that gross premiums . . . are, on average, about 10 percent higher in 2018 than they would have been if CSRs were funded . . . [and] project that amount will grow to roughly 20 percent by 2021.”); see also Louise Norris, The ACA’s Cost-Sharing Subsidies, [HealthInsurance.org](http://HealthInsurance.org) (Sept. 23, 2019), <https://www.healthinsurance.org/obamacare/the-acas-cost-sharing-subsidies/> [<https://perma.cc/EAC8-LMX3>] (“Some insurers had opted earlier in 2017 to exit the exchanges for 2018, and the uncertainty over CSR funding was generally cited as a reason for the exits.”).

147. Letter from Keith Hall to Lamar Alexander, *supra* note 146, at 2–4.

148. *Id.* at 3.

149. *Id.*

Several states sued the Trump Administration immediately after it halted the payments.<sup>150</sup> Whereas the House of Representatives had alleged that the Obama Administration engaged in unconstitutional executive appropriation by *making* the payments, the states now argued that the Trump Administration was violating its statutory obligation by *not* making the payments. The states sought a nationwide preliminary injunction from the District Court for the Northern District of California.<sup>151</sup> The court denied the motion, citing both its doubt about the availability of appropriations for the payments and the lack of clarity about whether the payments actually made residents of the plaintiff states better or worse off.<sup>152</sup>

4. *CHIP*. — The Children’s Health Insurance Program is a cooperative federalism program that covers the health care of 35 million children and newborns, often as part of Medicaid in a given state.<sup>153</sup> For a record-breaking 114 days from September 30, 2017 to January 22, 2018, the program was disappropriated.<sup>154</sup>

a. *Commitment*. — Through Medicaid, states receive federal subsidies to build and operate health care coverage programs for eligible low-income beneficiaries pursuant to federal rules.<sup>155</sup> CHIP expands the population of children eligible for federal-state coverage, often through a state’s Medicaid program.<sup>156</sup> While Medicaid is appropriated on an annual basis, CHIP’s \$14.5 billion in annual federal contributions have come through multi-year enactments. It began with ten years of funding that ran through 2007 and,<sup>157</sup> after a five-day lapse,<sup>158</sup> CHIP’s funding was extended

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150. See, e.g., *California v. Trump*, 267 F. Supp. 3d 1119, 1121 (N.D. Cal. 2018).

151. *Id.*

152. *Id.* at 1121–22.

153. June 2019 Medicaid & CHIP Enrollment Data Highlights, Medicaid.gov, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> [<https://perma.cc/WL3A-BNZ2>] (last updated Aug. 29, 2019).

154. Tricia Brooks, *CHIP Funding Has Been Extended, What’s Next for Children’s Health Coverage?*, Health Affairs Blog (Jan. 30, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180130.116879/full/> [<https://perma.cc/JQ8R-HQSD>] [hereinafter Brooks, *CHIP Funding*].

155. See Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 *Stan. L. Rev.* 1689, 1733–34 (2018) (describing Medicaid expansion and cooperative federalism).

156. June 2019 Medicaid & CHIP Enrollment Data Highlights, *supra* note 153.

157. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 2104, 111 Stat. 251, 558–60 (codified as amended at 42 U.S.C. § 1397dd (2012)).

158. Tricia Brooks, Joan Alker & Karina Wagnerman, Georgetown University Health Policy Institute, *What Are the Consequences of Congressional Delay on CHIP?* 10 n.3 (2017), <https://ccf.georgetown.edu/wp-content/uploads/2017/10/CHIP-delay-10-25.pdf> [<https://perma.cc/2JRH-5AQU>].

to 2009,<sup>159</sup> 2013,<sup>160</sup> 2015,<sup>161</sup> and 2017.<sup>162</sup> The nature of the commitment, including whether states may cut off CHIP benefits for enrollees immediately when the flow of federal funds ceases—whether immediately, over time, or at all—varies based on the interaction between particular state programs and federal law.<sup>163</sup> Unlike CSRs, risk corridors, and tribal support contracts, CHIP is not straightforwardly a legal commitment, though state Medicaid programs' reliance on CHIP undeniably created a subjective commitment and has arguably crystallized the program into a legal commitment.

b. *Disappropriation.* — The two-year appropriation for CHIP enacted in 2015 ran out on September 30, 2017.<sup>164</sup> Despite bipartisan support for the program, the CHIP funding decision was implicated in conflicts over whether to fund cost-sharing reductions, the end of the deferred action program for “dreamers,” and the effort to pass a tax reform bill.<sup>165</sup>

Congress enacted a temporary funding measure associated with tax reform on December 22, 2017.<sup>166</sup> Then, after a three-day government shutdown largely motivated by the CHIP impasse, Congress appropriated the program for six years, through 2023, at the same time that it reopened the government on January 22, 2018.<sup>167</sup>

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159. Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. No. 110-173, § 201, 121 Stat. 2492, 2509–13 (codified as amended at 42 U.S.C. § 1397dd (2012)).

160. Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, § 101, 123 Stat. 8, 11 (codified as amended at 42 U.S.C. § 1397dd (2012)).

161. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10203, 124 Stat. 119, 927–31 (2010) (codified as amended at 42 U.S.C. § 1397dd (2012)).

162. Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, § 301, 129 Stat. 87, 154–58 (2015) (codified as amended at 42 U.S.C. § 1397dd (2012)). For an alternate example of federal authority to reduce services for expenditures otherwise required by Congress but which fail to be adequately funded, see, e.g., Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. § 2027(b) (2012) (providing funding for SNAP, but addressing allotment reduction for participating states in the event that program costs exceed appropriations).

163. See, e.g., Patient Protection and Affordable Care Act § 2101(b)(1), 124 Stat. at 286–87 (providing that states must set up backup plans through their state insurance exchanges to cover CHIP-eligible children who may lack access to coverage because of funding shortfalls); see also Ctrs. for Medicare & Medicaid Servs., SHO# 18-010, Key Provisions of Legislation Extending Federal Funding for the Children's Health Insurance Program 2–5 (2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/sho18010.pdf> [<https://perma.cc/5ABG-CH53>] (describing flexibilities and requirements for states administering CHIP that stemmed from the newly extended program, which was reauthorized in 2018 for ten years).

164. Medicare Access and CHIP Reauthorization Act of 2015 § 301.

165. See Abby Goodnough & Robert Pear, The CHIP Program Is Beloved. Why Is Its Funding in Danger?, N.Y. Times (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/health/childrens-health-insurance-program.html> [<https://perma.cc/532G-354W>].

166. CHIP and Public Health Funding Extension Act, Pub. L. No. 115-96, § 3201, 131 Stat. 2048, 2050–52 (2017).

167. Helping Ensure Access for Little Ones, Toddlers and Hopeful Youth by Keeping Insurance Delivery Stable Act (HEALTHY KIDS Act), Pub. L. No. 115-120, § 3002, 132 Stat.

c. *Consequences.* — CHIP’s complicated financing structure left states with varying degrees of wiggle room to cope with missing federal contributions.<sup>168</sup> States had differing levels of funds reserved that they could spend to avoid a disruption in benefits to their residents in reliance on the expectation that Congress would come through to fund CHIP retroactively, which states like Arizona and Oregon opted to do.<sup>169</sup> Moreover, at the federal level, HHS had access to emergency funds that it could use to mitigate the impacts of the disappropriation.<sup>170</sup>

The record-breaking CHIP disappropriation tapped out these cushions, forcing states to take disruptive steps toward winding down programs or limit the damage. Many states—including Alabama, Colorado, Connecticut, Oklahoma, Utah, Virginia, Washington, and West Virginia— notified beneficiaries that their CHIP coverage was ending. Despite the scare, this gave families coverage that was ultimately able to continue once the program was funded.<sup>171</sup> Connecticut also froze additional enrollment in the program as a result of the lapse, and Alabama would have done so as of February 1, 2018, if the program had not been funded by then.<sup>172</sup>

5. *Shutdowns.* — Another recent record-breaking impasse, the 2018–2019 government shutdown,<sup>173</sup> illustrates that shutdowns are aggregations of disappropriations—each shutdown contains multitudes of unique cutoffs and consequences (as is said of Congress, shutdowns are a “they” not an “it”). The importance of particular disappropriations of both legal and subjective commitments in shaping the narrative, impacts, and resolution of the shutdown became clear over its thirty-five-day course. Important, too, was the interaction between three purse powers: Congress’s commitment power, Congress’s appropriations power, and the executive’s commitment power.

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28, 31–35 (2018); Stolberg & Kaplan, *supra* note 20 (describing the prominent role of CHIP in government shutdown negotiations).

168. See Press Release, Georgetown Univ. Health Policy Inst. Ctr. for Children & Families, *When Will CHIP Funding Run Out?* 1–2 (Dec. 20, 2017) [https://ccf.georgetown.edu/wp-content/uploads/2017/12/20171220\\_PressRelease\\_CHIP.pdf](https://ccf.georgetown.edu/wp-content/uploads/2017/12/20171220_PressRelease_CHIP.pdf) [<https://perma.cc/5BQ9-7CLX>] (describing how the CHIP redistribution and carryover funds support states during an emergency shortfall, and how states have an option of enrolling CHIP-eligible children in Medicaid to reduce their risk of losing coverage).

169. Brooks, *CHIP Funding*, *supra* note 154.

170. *Id.*; see also Georgetown Univ. Health Policy Inst. Ctr. for Children & Families, *supra* note 168 (describing analysis and projection for emergency shortfall redistribution payments).

171. Brooks, *CHIP Funding*, *supra* note 154; see also Status of Federal Funding for CHIP and Implications for States and Families, Kaiser Family Found. (Jan. 10, 2018), <https://www.kff.org/medicaid/fact-sheet/status-of-federal-funding-for-chip-and-implications-for-states-and-families/> [<https://perma.cc/8M62-2BJR>].

172. Brooks, *CHIP Funding*, *supra* note 154.

173. Peterson et al., *supra* note 20.



a. *Commitments*. — The 2018–2019 shutdown was a “partial” shutdown; seventy-seven percent of government programs had already received annual appropriations by the time of the lapse.<sup>174</sup> The remaining programs in need of funding came in all shapes and sizes across nine federal departments, including many permanent commitments dependent on annual appropriations. These included (but were not limited to): discretionary programs for which there was no prior commitment to pay of any sort (such as new federal research grant awards), federal employee salaries,<sup>175</sup> transportation infrastructure projects on which the government’s ability to honor state-level contracts and plans depended, and budgetary “appropriated entitlements” like food stamps.<sup>176</sup>

b. *Disappropriations*. — Congress aspires to enact annual appropriations on a fiscal year basis; October 1 is fiscal “new year.”<sup>177</sup> Budget laws set out a process, rarely followed in the modern era, by which the President proposes a budget and Congress then enacts annual appropriations in thirteen separate funding bills, each with a particular subject-matter focus.<sup>178</sup>

The modern era often sees Congress missing the October 1 deadline for updated annual appropriations by a wide margin but nonetheless appropriating funds in a “continuing resolution” that simply appropriates funds for all or some programs in need of them at the prior year’s funding levels.<sup>179</sup> A “shutdown” occurs for any programs not yet funded if Congress

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174. See Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115–245 (2018) (partial spending bill); Niv Elis, House Passes \$854B Spending Bill to Avert Shutdown, Hill (Sept. 26, 2018), <https://thehill.com/policy/finance/408608-house-passes-854b-spending-bill-to-avert-shutdown> [<https://perma.cc/XZ3S-L9ZJ>] (stating that seventy-seven percent of the annual discretionary spending was funded by the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019).

175. The government has arguably not *legally* committed to pay federal employee salaries. However, these could reasonably be deemed “subjective” commitments. For a description of subjective commitments, see *supra* notes 53–53.

176. Agency Contingency Plans, Office of Mgmt. & Budget, <https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/> [<https://perma.cc/8ANB-N9G8>] (last visited Sept. 11, 2019) (providing contingency plans for agencies across the government including USDA, OPM, NIH, and DOT); Laurel Wamsley, How Is the Shutdown Affecting America? Let Us Count the Ways, NPR (Jan. 9, 2019), <https://www.npr.org/2019/01/09/683642605/how-is-the-shutdown-affecting-america-let-us-count-the-ways> [<https://perma.cc/EX3M-6RG7>] (last updated Jan. 10, 2019) (describing the various federal programs affected by the partial government shutdown); see also *supra* notes 66–69 and accompanying text (describing appropriated entitlements).

177. GAO Glossary of Terms, *supra* note 58, at 55.

178. See *id.* at 106–11 (describing the annual appropriations process, beginning with the submission of the President’s Budget Request).

179. Hate P. McClanahan, James V. Saturno, Megan S. Lynch, Bill Heniff Jr. & Justin Murray, Cong. Research Serv., R42647, Continuing Resolutions: Overview of Components

fails to enact either a continuing resolution or a new funding bill by October 1 or the expiration of any prior continuing resolution.<sup>180</sup>

The 2018–2019 shutdown began when the then-governing continuing resolution expired on December 22, 2018.<sup>181</sup> This left many programs without a new source of funding, but many agencies had built up reserves for their programs that delayed cliffs by days, weeks, or even months.<sup>182</sup> An important example was the Supplemental Nutrition Assistance Program (“food stamps”). Although at the start of the shutdown it was believed that USDA only had sufficient funding to pay food stamps through January, USDA worked in the first weeks of the shutdown to free up funding to permit it to run the program through the end of February, extending the “deadline” for disappropriation of a particularly important commitment caught up in the shutdown.<sup>183</sup> Ultimately, the shutdown ended with a new three-week continuing resolution that allowed the government to reopen and temporarily forestalled disruptions of food stamps until February 15, 2019,<sup>184</sup> followed by a longer-term funding measure enacted on February 15.<sup>185</sup>

c. *Consequences.* — Differentiating purse powers brings into view the fact that shutdowns entail a nuanced interaction between Congress’s power to commit to pay, Congress’s appropriations power, and the executive’s limited remaining power to commit to pay in accordance with the Anti-Deficiency Act. Without executive commitments to pay, a “shutdown” would require breaking each and every commitment involved as soon as the administering agency exhausted any funding reserves. In 2019, this would have included not just federal employee salaries but air traffic control on which our system of air travel depends, federal workers to staff VA hospitals, active combat operations by members of the armed forces, the administration of social security and Medicare benefits, and so forth.

The executive can and does make commitments to pay during shutdowns despite the absence of appropriations, however. It sends officers, employees, and service members to work despite the lack of funding for their salaries, creating a commitment in advance of appropriation just as

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and Practices 1 (2019) (describing CRs and noting that “Congress has enacted one or more CRs in all but three of the 43 fiscal years since fiscal year 1977”).

180. *Id.*

181. Peterson et al., *supra* note 20.

182. E.g., Press Release, USDA, USDA Announces Plan to Protect SNAP Participants’ Access to SNAP in February (Jan. 8, 2019), <https://www.usda.gov/media/press-releases/2019/01/08/usda-announces-plan-protect-snap-participants-access-snap-february> [<https://perma.cc/7NKK-FNXX>] (describing USDA’s plans to continue SNAP funding “despite the inability of Congress to pass an appropriations bill”).

183. *Id.*

184. Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 132 Stat. 3124 (2019).

185. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019).

the executive so frequently did in the first half of the nineteenth century.<sup>186</sup> It mitigates the consequences of Congress failing to provide the funds necessary to honor the government's commitments by using its own executive commitment power.

This use of the executive commitment power to mitigate the consequences of shutdowns is lawful because the Anti-Deficiency Act—which Congress enacted to reign in executive commitments—contains explicit exceptions.<sup>187</sup> That said, the executive's reading and application of these exceptions has occasionally engendered controversy and, in any case, gives the executive discretion to exacerbate or mitigate the consequences of shutdowns by modulating its use of its commitment power.<sup>188</sup>

The treatment of tax refunds in the 2018–2019 shutdown illustrates the executive's use of the commitment power to mitigate disappropriation. Many commitments to pay that have the benefit of a permanent, indefinite appropriation depend for their execution on administrative functions that depend on annual appropriations. In other words, money for the checks is permanently appropriated, but money to pay workers to cut them depends on annual appropriations. Payments for tax refunds are one example of this phenomenon.<sup>189</sup> In 2013, the

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186. See *supra* section I.C (describing the history of executive commitments).

187. 31 U.S.C. § 1341(a)(1)(B) (2012) (permitting commitments “authorized by law”); *id.* § 1342 (permitting “voluntary services” or employment in “emergencies involving the safety of human life or the protection of property”); see also Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 42 Op. Att’y Gen. 293, 294 (1981) (articulating an expansive reading of Anti-Deficiency Act exceptions); Memorandum from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel to the Dir., Office of Mgmt. & Budget, Government Operations in the Event of a Lapse in Appropriations 5–9 (Aug. 16, 1995) (on file with the *Columbia Law Review*) (finding that expansive interpretations of the Anti-Deficiency Act’s exceptions in the 1981 opinion were largely unchanged by a 1990 congressional amendment that narrowed the exceptions).

188. Compare Louise Radnofsky, *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*) (describing how the Trump Administration’s approach to a government shutdown differed from the Obama Administration’s), with Jordan Sekulow, “A Tale of Two Shutdowns”: Obama Closes War Memorials to Veterans; Trump Admin Keeps Them Open to Public, Am. Ctr. for Law & Justice, <https://aclj.org/american-heritage/a-tale-of-two-shutdowns-obama-closes-war-memorials-to-veterans-trump-admin-keeps-them-open-to-public> [<https://perma.cc/WM2Z-2MG5>] (last visited Sept. 11, 2019) (“Thankfully, this time, the Trump Administration did not repeat the unconstitutional and disgraceful mistakes of his predecessor.”).

189. See Letter from Mark R. Warner, U.S. Senator, to Charles P. Rettig, Comm’r, Internal Revenue Serv. 2 (Jan. 22, 2019) [hereinafter Warner Letter] (on file with the *Columbia Law Review*) (discussing programs and Anti-Deficiency Act exceptions); see also Jory Heckman, *Can IRS Pay Tax Refunds During Shutdown? It Depends Who You Ask*, Fed. News Network (Jan. 10, 2019), <https://federalnewsnetwork.com/government-shutdown/2019/01/can-irs-pay-tax-refunds-during-shutdown-it-depends-who-you-ask/> [<https://perma.cc/3S3F-YGJX>] (discussing the Trump Administration’s tax refunds exception to the Anti-Deficiency Act).

executive read the Anti-Deficiency Act not to provide an exception that permitted the payment of employees to issue tax refunds.<sup>190</sup> But during the 2018–2019 shutdown, Treasury announced that it had concluded that it could use the exception to force employees to work unpaid to process tax refunds, which ultimately ensured that the shutdown would not cause delays in Americans' receipt of their refund checks.<sup>191</sup> Senators expressed concern that this use of the executive commitment power to dampen the impacts of the tax refund administration disappropriation component of the shutdown pushed the exceptions in the Anti-Deficiency Act too far.<sup>192</sup>

While the executive's commitment power has significantly mitigated the adverse impacts of government shutdowns, shutdowns have of course been incredibly costly. The 2018–2019 shutdown not only harmed those who had to wait weeks for the government to provide \$18 billion in compensatory payments, but it also cost the U.S. economy \$3 billion, delayed home buyers waiting for federally backed mortgages, and snarled the airports, among other harms.<sup>193</sup>

Despite their relative transience, shutdowns have generated their share of litigation. Such litigation falls into three general categories that track the purse powers at play in a shutdown. Specifically, lawsuits can (1) challenge the scope of a professed disappropriation, arguing that the executive (or judiciary) has interpreted funding limitations overly narrowly or overly broadly; (2) challenge the scope of the executive's professed authority to commit to payments in the absence of appropriations, arguing that the executive has either read the exceptions in the Anti-Deficiency Act too broadly or not broadly enough; and (3) seek judicial relief for the failure to honor one or more commitments to pay associated with a shutdown, such as suits by federal employees challenging the non-payment of their salaries.<sup>194</sup> Often, however, courts have found shutdowns to have

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190. See, e.g., Heckman, *supra* note 189 (noting that the IRS delayed the issuance of tax refunds during the 2013 shutdown).

191. See, e.g., Warner Letter, *supra* note 189, at 2.

192. *Id.*

193. Cong. Budget Office, *The Effects of the Partial Shutdown Ending in January 2019*, at 1 (2019), <https://www.cbo.gov/system/files/2019-01/54937-PartialShutdownEffects.pdf> [<https://perma.cc/A8F3-389N>]; Alan Blinder, *Government Shutdown Across America*, N.Y. Times (Jan. 13, 2019), <https://www.nytimes.com/2019/01/13/us/government-shutdown-impact.html> [<https://perma.cc/T938-LSLD>].

194. See *Nat'l Treasury Emps. Union v. United States*, No. 1:19-cv-00050-RJL, 2019 WL 266381, at \*2 (D.D.C. Jan. 16, 2019) (refusing a request for a temporary restraining order to force the government to pay federal employees during the 2018–2019 shutdown); *Am. Fed'n of Gov't Emps. v. Rivlin*, No. 95-2115 (EGS), 1995 WL 697236, at \*4 (D.D.C. Nov. 17, 1995) (refusing to prohibit the executive from forcing federal employees to work); *Martin v. United States*, 130 Fed. Cl. 578, 584–85 (2017) (finding that the government violated the Fair Labor Standards Act (FLSA) by failing to pay employees overtime during the 2013 shutdown); Complaint at 1–2, *Tarovsky v. United States*, No. 19-4C (Fed. Cl. filed Jan. 2, 2019) (alleging that lack of pay violates the FLSA); Erich Wagner, *Judge Consolidates Shutdown Lawsuits, Schedules Hearing this Week, Gov't Exec.* (Jan. 14, 2019), <https://>

been too short in duration to give rise to a justiciable suit. For example, when the National Treasury Employees Union brought suit to challenge the executive's decision to make commitments during the 2018–2019 shutdown by forcing employees to work despite the Anti-Deficiency Act, Judge Richard Leon of the District Court for the District of Columbia refused a temporary restraining order and set a briefing schedule for subsequent proceedings on the emergency motion only in the event of a second shutdown.<sup>195</sup>

B. *The Lack of and Need for an Understanding of Disappropriation and Dissonance*

“Winter is coming.”<sup>196</sup> The disappropriations surveyed above have each grown out of a unique context and had unique repercussions, but they demonstrate a trend when viewed together. While once “unheard of,”<sup>197</sup> recent years have seen three indefinite congressional failures to appropriate funds necessary to honor legal commitments—tribal support costs, risk corridors, and cost-sharing reductions. And they have seen two record-breaking temporary failures to appropriate funds for subjective, arguably, or partially legal disappropriations that could be measured in months, not weeks—the CHIP lapse and the 2018–2019 shutdown.

There is reason to believe that this trend reflects changes in underlying political dynamics that increase the likelihood of disappropriation. In a time of “asymmetric constitutional hardball” and a “new fiscal politics,” the parties are showing an escalating willingness to engage in realpolitik, especially over fiscal issues and entitlements.<sup>198</sup> The magnitude

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[www.govexec.com/pay-benefits/2019/01/judge-consolidates-shutdown-lawsuits-schedules-hearing-week/154149/](http://www.govexec.com/pay-benefits/2019/01/judge-consolidates-shutdown-lawsuits-schedules-hearing-week/154149/) [<https://perma.cc/4ZKH-VALL>] (reporting that federal workers were challenging the requirement of work without pay under the Fifth and Thirteenth Amendments).

195. *Nat'l Treasury Emps. Union*, 2019 WL 266381, at \*2; Minute Order, *Nat'l Treasury Emps. Union*, No. 1:19-cv-00050-RJL (Feb. 22, 2019). A motion to dismiss is now pending in the case. See Reply Memorandum in Support of Motions to Dismiss at 1, *Nat'l Treasury Emps. Union*, No. 1:19-cv-00050-RJL (Apr. 23, 2019).

196. George R.R. Martin, *A Game of Thrones* 684 (1996).

197. Harrison, *supra* note 71, at 405.

198. See Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 *Colum. L. Rev.* 915, 938 (2018) [hereinafter Fishkin & Pozen, *Asymmetric Constitutional Hardball*] (“[A] number of factors, taken together, strongly support our reading of the post-1994 record as containing more methodical and unabashed constitutional hardball on the right.”); Louk & Gamage, *supra* note 15, at 201–12 (contending that “new fiscal politics” sees legislators “indulg[ing] their bases instead of forging compromise”); Mark Tushnet, *Constitutional Hardball*, 37 *J. Marshall. L. Rev.* 523, 523 (2004) (defining “constitutional hardball” as “political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings”). But cf. David Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 *Colum. L. Rev. Online* 207, 208–09 (2018) (disputing Fishkin and Pozen’s claims of “asymmetry”). Fishkin and Pozen discuss

of opportunities to do so will only increase as Medicare and Social Security exhaust their trust funds, requiring either revision or new entitlement funding legislation to avoid disappropriation.<sup>199</sup>

Prior scholarship has not sought to understand disappropriation or the dissonance between commitments and expenditures that gives rise to it. While developing vitally important context for understanding disappropriation, the few past scholarly treatments that have addressed particular disappropriation controversies in depth have not acknowledged their commonality or explored the relationship between legislative commitments, disappropriations (individually or collectively), and the balance of powers.<sup>200</sup> And prior theoretical scholarship has assumed away dissonance,

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shutdowns as one form of asymmetric constitutional hardball, but do not discuss other forms of disappropriation. See Fishkin & Pozen, *Asymmetric Constitutional Hardball*, *supra*, at 963.

199. *Supra* note 72 and accompanying text.

200. In the context of a study of some of the Obama Administration's legally controversial decisions during the Affordable Care Act rollout, Professor Nicholas Bagley analyzes the cost-sharing reductions and risk corridor disappropriations from a doctrinal perspective as a "focal point for understanding how law restrains executive discretion in a time of polarized politics." Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. Pa. L. Rev. 1715, 1716 (2016) [hereinafter Bagley, *Legal Limits and Implementation*]. Professor Bagley has also written extensively about developments in the cost-sharing reductions and risk corridors cases, exploring and anticipating the merits of disputed questions of standing, procedure, and statutory meaning in those cases at a granular level. See Bagley, *Risk Corridor Cases*, *supra* note 12 (listing Professor Bagley's prior scholarship on the risk corridors case). Professors David Gamage, David Scott Louk, and David Kamin discuss shutdowns and possible framework legislation to discourage shutdowns, but do not consider the implications of shutdowns, or threats for entrenchment or the balance of powers, or the role of permanent commitments in fueling shutdowns. See *supra* note 15 and accompanying text. This leads them to support reforms to penalize legislators and their staffs for shutdowns. *Id.* However, their support is based on incomplete analyses of the benefits and costs of such reforms. See *infra* section IV.C (discussing the general need to consider the impact of disappropriations on the balance of powers). Professor Josh Chafetz's discussion of shutdowns insightfully emphasizes the leverage over the executive that the threat of a shutdown gives to Congress. See Chafetz, *Congress's Constitution (Article)*, *supra* note 22, at 731–35 ("Few actions would give teeth to a congressional demand, a congressional desire for action, or even a congressional finding of contempt quite like a credible threat to withhold funds."). While acknowledging this potential use of the "shutdown" tool, however, Professor Chafetz does not have cause to explore how Congress's choices, when creating new legal commitments, give rise to and determine the strength of this tool. Nor does Professor Chafetz address how such choices influence the collateral consequences of having or using the "shutdown" tool. See *infra* Part III (discussing the risks, byproducts, and functions of dissonance). Finally, Professor Mila Sohoni treats both cost-sharing reductions and student-loan forgiveness as new payment commitments created by the executive and analyzes them as such. See Sohoni, *supra* note 34, at 1698–1701 (discussing student-loan forgiveness). While this provides the springboard for a helpful theoretical analysis of the potential separation of powers downsides of using the executive commitment power to create entitlements, only student-loan forgiveness arguably involves the executive commitment power. To date, that policy has entailed neither disappropriation nor the threat thereof.

treating federal programs as either fully temporary (in the case of temporary legislation scholarship) or fully permanent (in the case of appropriations scholarship), creating a blind spot that both elides the possibility of disappropriation and artificially divides these lines of scholarship.<sup>201</sup>

Members of Congress and their staff must make decisions about appropriations, framework legislation, and the funding structure for new commitments. Understanding disappropriation will help them to do so, whether their goal is to reduce the harms of disappropriation, prevent disappropriation, enhance legislative power, or delegate greater power to the executive.

Moreover, an understanding of disappropriation is necessary to inform courts that are called upon to adjudicate the controversies it brings, and to remediate the harms. Disappropriations are not just theoretical phenomena. They are real-world controversies that present courts with a common set of recurring questions about the Appropriations Clause, the Anti-Deficiency Act, and the Judgment Fund, independent of the particular questions of statutory meaning implicated in any specific case. As discussed in Part V, these include (1) whether and how disappropriation will be enforced against a resistant executive who continues making payments or operates a program despite the lack of appropriations, including the possibility of legislative standing; (2) whether and how a fully funded commitment will be enforced against an executive who refuses to make payments that have in fact been appropriated, including the possibility of a preliminary or permanent nationwide injunction; (3)

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201. Stith's masterful treatment of the Appropriations Clause consciously assumes that permanent but temporarily funded commitments to pay are permanent. Professor Stith treats the legislation creating the commitment to pay as itself exercising Congress's appropriations power. Stith, *supra* note 22, at 1379–80 (noting that in the case of “entitlement benefits[] and contract payments . . . the constitutional function of ‘Appropriations made by Law’ is performed, if at all, at the creation of the backdoor spending program”). Stith describes the subsequent appropriation as “largely irrelevant.” *Id.* at 1382. Meanwhile, theoretical scholarship on temporary legislation has consciously made the opposite (and likewise incorrect) assumption that a permanent program that depends on temporary appropriations is itself “essentially temporary.” See Jacob E. Gersen, *Temporary Legislation*, 74 *U. Chi. L. Rev.* 247, 276–77 (2007) (discussing the Endangered Species Act); see also Rebecca M. Kysar, *Lasting Legislation*, 159 *U. Pa. L. Rev.* 1007, 1014–15 (2011) (using the constitutional limitation on the duration of appropriations for the army as an example of temporary legislation). The examples of disappropriation surveyed above exist within the previously unexplored ambiguity of Stith's description of appropriations as “largely irrelevant” and Gersen's description of permanent commitments as “essentially temporary.” Similarly, Sohoni treats the controversial executive action in the CSR case—which a district court held made an *appropriation* available to honor a commitment in the ACA—as itself creating the *entitlement*. See Sohoni, *supra* note 34, at 1680–81 (“In a nutshell, the executive branch committed to spending billions of government dollars . . .”); *id.* at 1725 (“[T]he Obama administration committed billions of dollars . . .”); see also John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 *Cal. L. Rev.* 1773, 1812 (2003) (“[W]e can see no theoretical difference between appropriations and other legislation.”).

what principles should guide courts in deciding whether an appropriation is available to honor a legal commitment or whether instead the commitment has been disappropriated, including the possibility of deference to agency interpretations; and (4) what principles should guide courts in deciding whether to award damages for broken commitments. Decisions in such cases have split the Supreme Court and the circuits.<sup>202</sup> Yet courts' resolutions of these questions so far have had important and unhelpful upstream impacts on the likelihood and consequences of disappropriation and on the balance of powers.

### III. THE RISKS, BYPRODUCTS, AND FUNCTIONS OF DISSONANCE BETWEEN CONGRESS'S COMMITMENT AND APPROPRIATIONS POWERS

This Part offers an understanding of disappropriation itself as one of several downstream consequences of Congress's decision to create permanent but temporarily appropriated payment commitments. Section III.A describes disappropriations and their associated real-world harms as a materialized risk of dissonance. Section III.B explains that the mere *probability* of disappropriation creates costs for those who rely on government commitments, hindering both privatization and cooperative federalism. Section III.C explains that the *threat* of disappropriation has important separation of powers impacts; it preserves majoritarian control against entrenchment and congressional power against executive encroachment.

#### A. *Disappropriation as Materialized Risk*

##### 1. *Financial Costs and Benefits*

a. *Recipients.* — The tribal support contract and risk corridors disappropriations demonstrated the severe and immediate financial impacts of disappropriation for recipients. These impacts may greatly exceed the actual dollar value of the broken commitment because many commitments—whether legal or subjective—induce reliance or support those in acute need. In either case, the opportunity cost for the recipients associated with nonpayment is greater than the actual monetary value of the payments to the government.

For example, small insurers reliant on risk corridors payments did not just lose money as a result of the program's disappropriation, they went bankrupt, harming employees and shareholders and disrupting the coverage of their enrollees.<sup>203</sup> Tribes that had relied on tribal-support payments to administer law enforcement, health care, and educational services were forced by the disappropriation of those payments to cut back on these services throughout the 1990s.<sup>204</sup> And a family dependent upon food

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202. See *supra* note 16 and accompanying text.

203. See *supra* notes 122–125 and accompanying text.

204. See *supra* notes 94–108 and accompanying text.



stamps or a federal employee dependent on a salary could be left without food or unable to make a mortgage payment as a result of a disappropriation, which may hurt not only the family but the economy in a community with many affected families.<sup>205</sup>

b. *Federal Government.* — Disappropriation forces the federal government to break a commitment to pay, which saves the government the cost of the prevented payments themselves, at least temporarily. That said, the federal government has often wound up paying the value of foregone payments in the long run. After shutdowns the government has done so directly and deliberately; in every shutdown to date, Congress has enacted legislation providing for retroactive pay to furloughed federal workers for the time they were unable to work due to the lapse.<sup>206</sup> In the tribal contract support costs case the government paid \$1 billion in foregone payments due to the Supreme Court's determination that the broken legislative commitment to pay also entailed a right to judicial relief.<sup>207</sup> And in the cost-sharing reductions disappropriation the government paid indirectly because the disappropriation changed real-world behavior in ways that increased the cost to the government of operating other programs.<sup>208</sup> Finally, in the one "exception," the risk corridors disappropriation, the government may come to pay foregone amounts yet, given the Supreme Court's grant of certiorari.<sup>209</sup>

Relatedly, the changes in the timing and amount associated with federal spending frustrate the efforts of scorekeepers to predict federal expenditures for purposes of making informed tradeoffs between revenues and expenditures in constructing a budget. Scorekeepers presently count all appropriated entitlements as "direct" spending that they assume will be made in future years.<sup>210</sup> If the government never ultimately spends as predicted due to disappropriation of a commitment that the courts

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205. See Eli Saslow, Food Stamps Put Rhode Island Town on Monthly Boom-and-Bust Cycle, *Wash. Post* (Mar. 16, 2013), [https://www.washingtonpost.com/national/food-stamps-put-rhode-island-town-on-monthly-boom-and-bust-cycle/2013/03/16/08ace07c-8ce1-11e2-b63f-f53fb9f2fcb4\\_story.html](https://www.washingtonpost.com/national/food-stamps-put-rhode-island-town-on-monthly-boom-and-bust-cycle/2013/03/16/08ace07c-8ce1-11e2-b63f-f53fb9f2fcb4_story.html) (on file with the *Columbia Law Review*); see also Gene Falk, Cong. Research Serv., RL32780, *The Temporary Assistance for Needy Families (TANF) Block Grant: Responses to Frequently Asked Questions 1, 6* (2019) (describing the funding mechanism for TANF and the characteristics of recipients).

206. See Ryan Guina, The Financial Impact of the Partial Government Shutdown on Federal Employees, *Forbes* (Jan. 12, 2019), <https://www.forbes.com/sites/ryanguina/2019/01/12/financial-impact-of-government-shutdown-on-federal-employees> [<https://perma.cc/TM34-N7AY>] (noting the retroactive salary appropriations for time not worked in prior shutdowns).

207. See *supra* notes 103–106 and accompanying text.

208. See *supra* section II.A.3.c.

209. See *supra* note 132 and accompanying text (noting the certiorari grant). See generally *supra* section I.D (describing trends towards increasing disappropriations).

210. See *Frequently Asked Questions About CBO Cost Estimates*, Cong. Budget Office, <https://www.cbo.gov/about/products/ce-faq> [<https://perma.cc/2A5H-L9CD>] (last visited Oct. 5, 2019) (providing background on how CBO categorizes entitlement spending).

ultimately deem nonremediable, it may mean that tradeoffs were made in budget formation that did not need to be because costs were assumed for the disappropriated commitment that the government did not ultimately incur.

2. *Disparate Impact on Small Businesses and Individuals.* — Disappropriation has a disparate impact on small businesses, startups, and individuals, and favors larger entities for whom promised payments represent a tiny share of overall revenue. Such entities can afford to miss government payments resulting from a disappropriation (and wait for a potential Court of Federal Claims payout years later).<sup>211</sup> But thinly capitalized small businesses or beneficiaries living month to month are not so resilient; for them a year-long (or even months-long) delay in getting paid may be tantamount to never getting paid, forcing sacrifices to stay afloat or bankruptcy.

This disparate impact is illustrated by the fate of health insurance cooperatives due to the risk corridors disappropriation. Funded by ACA startup loans as innovative member-governed insurance plans, cooperatives were lightly capitalized businesses for which the ACA exchanges were the primary source of revenue.<sup>212</sup> As a result, the disappropriation of the risk corridors program pushed more than a dozen of the cooperatives into bankruptcy proceedings initiated long before the risk corridors cases were resolved.<sup>213</sup> By contrast, many larger insurers—such as Blue Cross Blue Shield—not only were better capitalized and so able to wait for a potential money judgment, they also had more diversified business profiles such that the risk corridors payments were a smaller part of their expected revenue.<sup>214</sup>

3. *Blame for the Legislature, Executive, or Judiciary.* — No branch has been free of blame for disappropriation, at least judged by the finger-pointing of commentators and policymakers. That shutdowns entail blame shifting between the executive and legislative branches is well known.<sup>215</sup>

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211. Cf. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev.* 95, 123 n.72 (1974) (noting that litigation tends to benefit institutional repeat players more than individual one-off participants).

212. See Amendments to Special Enrollment Periods and the Consumer Operated and Oriented Plan Program, 81 *Fed. Reg.* 29,146, 29,150–52 (May 11, 2016) (to be codified at 45 C.F.R. pts. 155, 156) (describing co-ops).

213. Brief of Amicus Curiae the Nat’l Ass’n of Ins. Comm’rs in Support of Plaintiff-Appellee at 12–15, *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018) (No. 17-1994), 2017 WL 4077798 (explaining that due to risk corridors disappropriation “only six of the 24 CO-OPs operating at peak participation were still in business”).

214. See *id.* at 11–13 (describing how co-ops, though initially more locally competitive than established insurance companies like Blue Cross Blue Shield, “were largely unable to withstand the capital demands of participating on the Exchanges”).

215. E.g., Chafetz, *Congress’s Constitution (Article)*, *supra* note 22, at 731–32 (describing the importance of expectations of which branch will be blamed in assessing whether shutdowns further executive or legislative power); Joseph Fishkin & David E. Pozen,

The cost-sharing reductions example illustrates how the courts can also be blamed for disappropriation; numerous headlines surrounding the district court's order prohibiting payments in that case framed the disruption as caused by that order, not by the legislature or executive.<sup>216</sup> On this point, it is notable that when HHS ultimately halted the payments eighteen months later, some headlines blamed the executive rather than the judiciary (or legislature).<sup>217</sup> In that example, at least, some commentators directed blame toward the actor that was the immediate—rather than the proximate or ultimate—cause of the broken commitment.

4. *Rule of Law.* — The preceding consequences result from disappropriation of any payment commitment, whether legal or merely subjective. Disappropriations of legal commitments carry two additional direct consequences that disappropriations of subjective commitments do not. First, separate and apart from its tangible costs, disappropriation of a legal commitment undermines the rule of law by forcing the federal government to violate its own laws and fail to honor its own commitments.<sup>218</sup> Although it is sometimes controversial, compliance with legal requirements is a bedrock aspect of the rule of law, such that “we scorn the legal system that fails to uphold its own rules.”<sup>219</sup> Hence the Tenth Circuit's uneasiness with the “apparent contradiction” of the ISDA mandating that the executive make tribal contract support payments to tribes that the Appropriations Clause forbids the executive from making.<sup>220</sup>

A related but distinct rule of law consideration is the possibility that disappropriation breaches a duty to fund that arises when Congress creates a permanent commitment. Recall that the Framers worried that failing to appropriate funds necessary to honor an executive commitment to pay

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Evaluating Constitutional Hardball: Two Fallacies and a Research Agenda, 119 *Colum. L. Rev. Online* 158, 161–62 (2019) (discussing the blame shifting that surrounds shutdowns).

216. See, e.g., Richard Wolf, Gregory Korte & Jayne O'Donnell, *Federal Judge Strikes Down Obamacare Payments*, USA Today (May 12, 2016), <https://www.usatoday.com/story/news/politics/2016/05/12/federal-court-obamacare-president-obama-republicans/84281474/> [https://perma.cc/G9YW-6D89].

217. See, e.g., Bob Bryan, *Trump Just Made a Huge Move that Could Blow Up Obamacare*, Bus. Insider (Oct. 13, 2017), <https://www.businessinsider.sg/trump-ends-cost-sharing-reduction-csr-payments-2017-10/> [https://perma.cc/AK7L-T2L2].

218. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

219. Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 *Yale J. Int'l L.* 189, 189 (2006).

220. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1056 (10th Cir. 2011); cf. *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 741 (Fed. Cir. 2018) (Newman, J., dissenting from denial of petition for rehearing en banc) (noting obliquely, in support of reconsidering insurers' claim for damages remedy, that “[o]ur national strength is our government ruled by law”).

would violate a moral obligation.<sup>221</sup> Professor Gillian Metzger modernizes this moral obligation, describing the possibility that a “constitutional duty to supervise” carries with it a self-enforcing obligation for Congress to fund government responsibilities in certain circumstances.<sup>222</sup> As Professor Metzger understands it, it would be the violation of such a duty that draws the line between entirely proper repeal of existing substantive legislation and improper “sabotage” by refusal to fund.<sup>223</sup>

5. *Executive Discretion.* — Disappropriation of a legal commitment also gives the executive branch discretion by simultaneously forcing and empowering it to decide how to act when compliance with the law is impossible. Disappropriation converts legislative direction into delegation. Both the risk corridors disappropriation and the contract support cost disappropriation illustrate this transformation. In both cases the lack of sufficient appropriations to honor the statutory direction to pay left the agency to decide how to spend what funds had been appropriated, including which recipients to pay and how much to pay them.<sup>224</sup>

#### B. *The Probability of Disappropriation and Its Byproducts*

Regardless of whether disappropriation occurs, the probability that disappropriation might occur has important consequences for the federal government, recipients of legislative commitments, and federalism.

1. *Federal Preparation Costs.* — The probability of disappropriation forces the federal government to take precautionary measures. These include designing and operating programs to mitigate the costs of disappropriation, such as declining to spend all appropriated funds in order to create a “reserve” bank to tap into when needed, as well as the costs of planning mitigating or remedial action in the event of disappropriation, such as the complicated wind-down process for federal employees when a shutdown approaches.<sup>225</sup>

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221. See *supra* notes 45, 47 and accompanying text.

222. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *Yale L.J.* 1836, 1931–32 (2015).

223. *Id.* (“Congress can alter the government’s substantive responsibilities, but it violates the duty if it leaves these responsibilities in place but *sabotages* the government’s ability to meet them.” (emphasis added)).

224. In the risk corridors case, the agency opted to maximize payment to insurers owed for the first year in the program, which left claims arising in the second and third years of the program entirely unpaid. See *Ctrs. for Medicare & Medicaid Servs., Risk Corridors and Budget Neutrality 1* (2014), <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf> [<https://perma.cc/HX52-JHY4>]. In the contract support cost case, the agency opted to reduce all support costs pro rata. See *supra* notes 91–93 and accompanying text.

225. See U.S. Office of Pers. Mgmt., *Guidance for Shutdown Furloughs* (2015), <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf> [<https://perma.cc/M8CH-X6LW>]; Eric Yoder, *OMB Tells Federal Agencies to Prepare for Shutdown*, *Wash. Post: PowerPost* (Jan. 19, 2018), <https://www>.

2. *Recipient Financial Risk and Privatization Costs.* — The probability of disappropriation creates financial risk for recipients of payment commitments, who may (and probably should) take costly steps *ex ante* to mitigate the harm they would suffer in the event a lengthy or permanent disappropriation were to materialize.<sup>226</sup> The extent of such steps, and their costs, varies with the probability of disappropriation. Insurers' premium-setting decisions are a straightforward illustration: As the risk of a cutoff in their cost-sharing reduction payments appeared to increase over the course of 2016 and 2017, insurers raised their premiums as a precaution.<sup>227</sup> As a result, some such insurers had to raise their rates to compensate by small amounts, if at all, when the Trump Administration actually halted the payments in October 2017.<sup>228</sup> They had already baked in the high probability of disappropriation.

Courts and commentators have recognized that this additional cost to recipients of relying on legislative commitments associated with the probability of disappropriation is ultimately passed on to the federal government.<sup>229</sup> The probability of disappropriation diminishes the value to recipients of legislative commitments of the government's promised dollars, as the recipients must expend time and money safeguarding against the risk of government default. The government, in turn, must commit to higher payments that cover the cost of such precautions in order to obtain the same goods or services from recipients. In short, it must pay a "disappropriation premium."

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washingtonpost.com/news/powerpost/wp/2018/01/19/omb-tells-federal-agencies-to-prepare-for-shutdown/ (on file with the *Columbia Law Review*) (describing preparation efforts for shutdown).

226. See Tollestrup, *supra* note 66, at 16 ("The approach of providing appropriations for set fiscal years, however, . . . has the potential to make funding less predictable for funding recipients, even if Congress intends that the funding will be extended before it lapses.").

227. *Supra* notes 146–149 and accompanying text.

228. *Supra* notes 146–149 and accompanying text.

229. See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 191–92 (2012) ("If the government could be trusted to fulfill its promise . . . only when more pressing fiscal needs did not arise, would-be contractors would bargain warily . . . and only at a premium large enough to account for the risk of nonpayment . . . . [C]ontracting would become more cumbersome . . . and willing partners more scarce."); Darrell Curren, *Government Contracting in the Shadow of the October 2013 Federal Government Shutdown*, 44 *Pub. Cont. L.J.* 349, 350 (2015) ("If the government could, at any time, simply refuse to continue paying or stop the contract, the price of dealing with that kind of risk would make contracting prohibitively expensive and difficult for the government."); Craig Garthwaite & Nicholas Bagley, *Opinion, The Republicans' Uncertainty Strategy*, *N.Y. Times* (June 29, 2017), <https://www.nytimes.com/2017/06/29/opinion/trump-care-mcconnell-obamacare.html> (on file with the *Columbia Law Review*) (arguing that risk corridors disappropriation led to a "decline in trust" that "caused health insurers to rethink their relationships with their increasingly erratic federal partner . . . [and thus to] demand[] higher premiums to account for the greater risk").

This disappropriation premium makes it costlier—and therefore harder—to privatize federal government functions.<sup>230</sup> Whereas New Deal programs such as Social Security often involved congressional mandates for certain sums paid directly to individuals by the agency, newer programs such as Medicare Part D and many states' Medicaid expansions involve the government contracting with third parties, such as insurers, who in turn provide the service or benefit to eligible participants.<sup>231</sup> Even the most dogged opponents of privatization would presumably prefer to limit the practice through more direct and efficient means that do not carry collateral impacts on beneficiaries, states, the legislative process, and the separation of powers, so this Article treats the disappropriation premium as a “cost.”<sup>232</sup>

Finally, and importantly, the disparate impact of disappropriation is not only problematic if and when a disappropriation happens. Large businesses are more likely to be able to “self-insure” against the risk of disappropriation because that risk is relatively small to them, permitting them to operate on thin margins in setting bids or determining their costs of participation. A small business for which the impact of missed payments would be an existential threat must take greater—and therefore costlier—precautions,<sup>233</sup> which poses a competitive disadvantage when bidding (or bearing costs) against larger players in the program.

3. *Impeded Cooperative Federalism.* — The probability of disappropriation is a unique impediment to states considering participating in permanent but temporarily funded cooperative federalism programs, for two reasons. First, most states' constitutions mandate a balanced budget every year, leaving the state little ability to manage a funding shortfall in

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230. *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 741 (Fed. Cir. 2018) (Newman, J., dissenting from denial of petition for rehearing en banc) (“The government’s access to private sector products and services is undermined if non-payment is readily achieved after performance by the private sector.”).

231. See Medicare Part D, Medicare Interactive, <https://www.medicareinteractive.org/get-answers/medicare-basics/medicare-coverage-overview/medicare-part-d> [<https://perma.cc/7BVX-9FVX>] (last visited Sept. 10, 2019) (“Part D is provided only through private insurance companies that have contracts with the federal government—it is never provided directly by the government (unlike Original Medicare).”); see also Jost, *supra* note 3, at 139–61 (describing and arguing against efforts to privatize healthcare entitlement programs).

232. See generally Jon D. Michaels, *Constitutional Coup: Privatization’s Threat to the American Republic* (2017) (describing and problematizing privatization trends).

233. See Megan Doyle, *Late Payments Continue to Cause Cash Flow Problems for SMEs*, *Am. Express*, <https://www.americanexpress.com/us/foreign-exchange/articles/late-payments-causes-cash-flow-problems-for-smes/> [<https://perma.cc/D2E3-LK7D>] (last visited Sept. 10, 2019) (noting that small and midsize enterprises (SMEs) are particularly susceptible to cash flow problems “because their smaller size means they’re often unable to absorb the costs of late payments”).

the event of disappropriation.<sup>234</sup> Second, unlike federal–private partnerships (which tend to involve “bids” that can include a disappropriation premium), cooperative federalism programs generally entail the government offering states a single take-it-or-leave-it offer.<sup>235</sup>

The ACA’s Basic Health Program illustrates this challenge. While ordinarily the ACA’s federal payments run to beneficiaries (in the case of premium tax credits) and insurers (in the case of cost-sharing reductions), the statute gave states the option of intervening to operate their own subsidized insurance programs, integrated with Medicaid, in a cooperative arrangement known as the “Basic Health Program.”<sup>236</sup> New York and Minnesota were the only states to take up this option and run such programs, thereby commingling their state budgets with the federal ACA payments for premiums and cost-sharing reductions.<sup>237</sup> Other states’ caution proved prudent when the cost-sharing reductions disappropriation threatened to reduce both states’ Basic Health Program payments by millions.<sup>238</sup>

### C. *The Threat of Disappropriation and the Balance of Powers*

Regardless of whether disappropriation actually occurs, and distinct from the probability that disappropriation will occur, Congress’s threat of disappropriation itself has important consequences for the balance of powers. It can reduce entrenchment of ordinary legislation, preserve congressional influence over the executive’s implementation of permanent programs, and recalibrate leverage within Congress between leadership and the rank and file.

1. *Threat Reduces but Does Not Eliminate Entrenchment.* — By funding a permanent legislative commitment only temporarily, Congress reduces—but does not eliminate—the entrenchment of the underlying legislative commitment. Dissonance thereby offers a previously unexplored middle ground between permanent and temporary legislation.

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234. See David A. Super, Rethinking Fiscal Federalism, 118 Harv. L. Rev. 2544, 2605–06 (2005) (describing the history of states’ “balanced budget requirement[s] and the related limitations on public debt”).

235. See Gluck & Huberfeld, *supra* note 155, at 1731 (describing cooperative federalism programs in the ACA); Eloise Pasachoff, Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off, 124 Yale L.J. 248, 297–99 (2014) [hereinafter Pasachoff, Agency Enforcement] (describing cooperative federalism programs involving payments to states, especially for education).

236. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1331, 124 Stat. 119, 199–203 (2010) (codified at 42 U.S.C. § 18051 (2012)).

237. Katie Keith, New York and Minnesota Sue over Loss of Basic Health Program Funding, Health Aff. (Jan. 27, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180127.691558/full/> [<https://perma.cc/TCU8-QGQ9>].

238. *Id.* (describing the threatened reduction and an accompanying lawsuit).

“Entrenchment” refers to the stickiness of a law—that is, the extent to which a policy, once implemented, is resistant to change over time even if a majority wants to change it.<sup>239</sup> Constitutions, for example, tend to be firmly entrenched. Usually, once a constitution is ratified, even a significant majority cannot alter the policies it sets forth.<sup>240</sup>

Entrenchment is a controversial subject in constitutional and administrative law. Its downsides include allowing the “dead hand” of a previous legislature to bind the future, exacerbating intergenerational externalities and undermining majoritarianism.<sup>241</sup> But its benefits include the ability of durable government policy to foster reliance and investment.<sup>242</sup>

The voluminous debate about the desirability of entrenchment encompasses not just constitutional provisions but ordinary legislation as well.<sup>243</sup> This recognizes that “vetogates”—obstacles to the implementation of new legislation including the committee system, the political and opportunity costs of calendaring votes in Congress, the filibuster in the Senate, the differing makeup of the House and Senate, and the presidential veto<sup>244</sup>—significantly entrench even ordinary legislation in the United States against amendment or repeal by an unsupportive majority.<sup>245</sup>

The downsides of entrenchment have led scholars and jurists to propose and explore a variety of legislative mechanisms to reduce entrenchment, including temporary constitutions, temporary legislation that sunsets at a certain date unless reenacted or extended, and judicial

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239. Cf. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *Yale L.J.* 400, 408 (2015) (“At the most general level, ‘entrenchment’ means that political change has been made more difficult than it otherwise would (or should) be.”).

240. See Ozan O. Varol, *Temporary Constitutions*, 102 *Calif. L. Rev.* 409, 417 (2014) (noting that “[u]nder the default rule, a constitution lasts in perpetuity”).

241. See *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 64 (D. Mass. 1997) (describing the classic observation that “it is a great deal more difficult for Congress to correct flawed statutes than it is to enact them in the first place”); Guido Calabresi, *A Common Law for the Age of Statutes* 2, 70, 102 (1982) [hereinafter Calabresi, *Common Law*] (“The nominal advantages of direct responsiveness to popular majoritarian desires are manifest and have frequently been analyzed.”); Levinson & Sachs, *supra* note 239, at 408–12 (collecting and summarizing sources, and noting that entrenchment concerns are not raised when a policy persists because it earns popular support through success).

242. See Levinson & Sachs, *supra* note 239, at 468 (discussing reliance and related arguments in favor of entrenchment).

243. *Id.* at 479 & n.305 (collecting sources relating to this debate).

244. William N. Eskridge Jr., *Vetogates and American Public Law*, 31 *J.L. Econ. & Org.* 756, 756–61 (2012); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 *Geo. L.J.* 705, 707 (1992).

245. Levinson & Sachs, *supra* note 239, at 420–21 (discussing the filibuster and other vetogates).



intervention to prevent statutory obsolescence.<sup>246</sup> Critics, however, complain that sunsets undermine reliance on the laws that Congress enacts, among other issues.<sup>247</sup>

The possibility of a permanent commitment that is temporarily funded—and the prevalence of this mechanism in the structure of the modern welfare state—has not previously been addressed in the debate surrounding entrenchment and temporary legislation. This mechanism may offer the in-between option that some scholars have concluded is needed between temporary and permanent legislation.<sup>248</sup> The fact of temporary funding requires affirmative congressional action for such a program to continue to operate, even while the commitment, whether legal or subjective, creates significant pressure in favor of such action.

The threat of disappropriation reduces the entrenchment of permanent but temporarily funded commitments vis-à-vis permanent legislation. Such programs require subsequent affirmative congressional action in order to function as intended.<sup>249</sup> A bare majority—or even a minority in the Senate willing to filibuster—can significantly disrupt a permanent but temporarily funded program. Alternatively, if such a program were permanently funded, it could be altered only by new legislation garnering the support of the House and, thanks again to the filibuster, a super-majority in the Senate.<sup>250</sup>

At the same time, the permanent commitment increases de facto entrenchment of permanent but temporarily funded commitments vis-à-vis temporary legislation. A disappropriated legislative commitment is not

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246. See Calabresi, *Common Law*, supra note 241, at 2 (recommending courts intervene “to keep anachronistic laws from governing us”); Theodore J. Lowi, *The End of Liberalism* 309–10 (2d ed. 1979) (proposing a “Tenure-of-Statutes Act” that would “set[] a Jeffersonian limit of from five to ten years on the life of every enabling act”); Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 *Admin. L. Rev.* 511, 520 (1976) (reporting that Justice Douglas proposed a ten-year sunset on all legislation); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 *Yale L.J.* 1395, 1408 n.43 (1975) (reporting “folklore,” according to which Justice Black “suggested that every statute creating a new agency should limit its life to 14 years”); Gersen, supra note 201, at 266 (noting that, in certain situations, “a strong presumption in favor of temporary legislation may be justified”).

247. Cf. Levinson & Sachs, supra note 239, at 468 (noting, in the context of entrenchment generally, that “the risks of locking in bad decisions must be weighed against the rewards of precommitting to good decisions that might otherwise be sacrificed on account of short-term interest or political pathologies”).

248. Cf. David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 *Ga. L. Rev.* 407, 415–16 (2006) (describing the need for commitments that neither fall short of nor exceed “what is necessary to ensure the government’s ability to make persuasive commitments”); Levinson & Sachs, supra note 239, at 467 (concluding that “[p]robably the best answer is some of both” entrenchment and majoritarian rule).

249. See supra section II.A (providing examples of several such actions and how various programs did not work as intended when those actions were not taken).

250. See generally Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181 (1997) (describing the Senate filibuster and analyzing its effects).

automatically repealed when its funding expires, unlike temporary legislation.<sup>251</sup> Rather, the underlying legislative commitment stays on the books, bringing potentially adverse consequences discussed above, including undermining the rule of law; frustrating recipients who might have relied on the program's permanence; creating the possibility of a damages remedy ordered in court; and risking political repercussions, as the expressive function of the permanent commitment supports a narrative that the political branches have failed to enact funding they were supposed to enact, rather than merely allowed a temporary policy to expire.<sup>252</sup> These consequences associated with disappropriation are deterrents that push Congress to maintain a program even if a majority of members disapproves of the underlying legislative commitment.

The disappropriations of the ACA's risk corridors and cost-sharing reduction programs, on the one hand, and CHIP, on the other, demonstrate how permanent but temporarily funded commitments reduce entrenchment as compared to permanent legislation but preserve it as compared to temporary legislation. The ACA subsidies were enacted in 2010 with the rest of the ACA by a temporary—indeed fleeting—legislative coalition.<sup>253</sup> The very next election saw a significant number of legislators who voted for the ACA losing elections to ACA opponents.<sup>254</sup>

The years that followed enactment of the ACA saw frequent expressions of the loss of majority legislative support for the law but also illustrated the entrenchment of ordinary legislation as congressional majorities were unable to repeal the law even with a supportive President.<sup>255</sup> But the same coalition that was unable to repeal the law was able to disappropriate the risk corridors program and the cost-sharing reductions programs and did so.<sup>256</sup> While this disrupted both programs, it did not remove the underlying commitments in the ACA, a fact which formed the basis of claims of “sabotage” and brought disruption that, in the case of

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251. See Gersen, *supra* note 201, at 261 (“[T]he default rule for temporary legislation is that legal validity terminates at the sunset date.”).

252. See *supra* sections II.A.2–.3 (discussing the narrative of ACA sabotage).

253. Mark A. Peterson, *The Ideological and Partisan Polarization of Healthcare Reform and Tax Policy*, 65 *Tax. L. Rev.* 627, 665 (2012) (noting that a Republican majority in the House of Representatives won the election in 2010, just after enactment of the ACA without bipartisan support).

254. See Paul Bedard, *Healthcare Vote Doomed 13 Democrats in 2010 Elections*, *U.S. News & World Rep.* (Apr. 12, 2011), <https://www.usnews.com/news/blogs/washington-whispers/2011/04/12/healthcare-vote-doomed-13-democrats-in-2010-elections> [<https://perma.cc/QVX5-HTBQ>].

255. 160 *Cong. Rec.* 13,667 (2014) (statement of Rep. Hoyer) (describing dozens of votes to repeal the ACA taken by the Republican-controlled House in the years after the enactment of the ACA).

256. See *supra* sections II.A.2–.3.

the cost-sharing reductions disappropriation, actually increased net overall federal expenditures.<sup>257</sup>

The CHIP disappropriation, on the other hand, reveals that the threat of disappropriation still carries some of the salutary benefits of temporary legislation. In resolving the disappropriation, the coalition that extended funding for the program used the opportunity to alter it. For example, the funding enactment also included new tweaks to the program designed to address the opioid crisis and promote access to treatment for mental health care.<sup>258</sup>

2. *Threat Can Preserve Legislative Leverage over the Executive.* — That Congress largely gives up control of national policy by delegating to administrative agencies is well known, as is the fact that Congress has few constitutional means to influence agencies once it empowers them.<sup>259</sup> Scholars have established the importance of the appropriations power as one of the means that Congress has to exert leverage over the executive branch even after delegating power to agencies.<sup>260</sup> It is a corollary that if Congress gives the executive means of supporting government without reliance on Congress (through appropriations or otherwise) or constrains its own discretion in awarding financing, then its leverage over the executive branch is greatly reduced.<sup>261</sup> As Judge Abner Mikva put it, “If ever

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257. See Joseph R. Antos & James C. Capretta, *The CSR Saga: An Appropriation that Really Would Lower Spending and an Incorrect Baseline’s Perverse Effects*, *Health Aff.* (Mar. 20, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180319.768539/full> [<https://perma.cc/6S3S-ZK9V>] (noting CBO’s projection that ending the CSR payments would increase the federal deficit by \$194 billion over ten years); *supra* note 126 and accompanying text.

258. Dylan Scott, *Congress Just Funded CHIP for a Full Decade*, *Vox* (Feb. 9, 2018), <https://www.vox.com/policy-and-politics/2018/2/7/16986440/chip-funding-10-years> [<https://perma.cc/F9UC-666C>].

259. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 *Colum. L. Rev.* 452, 508–09 (1989) (describing Congress’s general difficulty with controlling the exercise of legislative power delegated to executive branch actors); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *Yale. L.J.* 2182, 2189 n.16 (discussing sources of and limitations on congressional influence over agencies’ budgets).

260. See Kiewiet & McCubbins, *supra* note 43, at 17–18; Beermann, *supra* note 22, at 85–90 (discussing the use of appropriations riders and earmarks to influence agencies’ exercise of delegated power and providing examples); Harold H. Bruff, *The Incompatibility Principle*, 59 *Admin. L. Rev.* 225, 248–49 (2007) (“Most appropriations require yearly renewal if they are to continue. This primal fact brings the executive to Congress to seek funds just as the presence of the president’s veto brings Congress to the White House when it wishes to legislate.”); Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 *Harv. L. Rev.* 83, 108–09 (2012) (“Congress has turned to money as a means by which to rein in the federal administrative state, using appropriations riders to prohibit or delay regulatory initiatives instead of forestalling such initiatives through substantive legislation.”).

261. See, e.g., *Examining ‘Backdoor’ Spending by Federal Agencies: Hearing Before the Subcomm. on Intergovernmental Affairs of the H. Comm. on Oversight & Gov’t Affairs, 115th Cong.* (2018) (statement of James Wallner, R Street Institute) (noting that, where an “agency’s funding [does] not require congressional approval,” congressional influence is

Congress loosens its hold on [the nation's purse] or if ever the President wrests it away, then, to quote the late Senator Frank Church, 'the American Republic will go the way of Rome.'<sup>262</sup>

By making the government's ability to honor a permanent commitment dependent on temporary appropriations, Congress preserves enduring legislative influence over the executive, in four ways. First, when appropriating the funds needed to honor a commitment in a given year, Congress can add a rider prohibiting the use of those funds for a particular purpose with which Congress disagrees, influencing the *way* the executive honors the commitment.<sup>263</sup> Second and relatedly, Congress might include specific directions to an agency in such legislation.<sup>264</sup> In regard to these first two possibilities, note that appropriated entitlements in particular are funded annually in a separate omnibus enactment in which additional legislative commands and restrictions known as "general provisions" are routine.<sup>265</sup> For example, the 2005 enactment appropriating funds for Medicaid also directed the Secretary to "assign[] not more than 60 employees" to assist in AIDS programs.<sup>266</sup> Third, Congress might use the mere threat of disappropriation to force agency officials and the President to be responsive to congressional inquiries, oversight requests, calls to testify,

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diminished); Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. Rev. 487, 492 (2009) (noting that "permanent fiscal legislation limits Congress's ability to review and change priorities"); cf. Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 Geo. L.J. 519, 527 (2013) (describing how "[s]tructuring Medicare as an entitlement" meant that "[p]hysicians—not Congress in an appropriations measure—would collectively establish what the government would pay out for medical services").

262. See Mikva, *supra* note 32, at 5.

263. See, e.g., Department of Defense Appropriations Act of 1994, Pub. L. No. 103-139, 107 Stat. 1418, 1475-78 (1993) (restricting the use of funds for U.S. forces in Somalia); see also Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 45 Harv. J. Legis. 297, 311 (1998) (describing the DOD Appropriations Act as an "example of Congress using its appropriations authority to influence foreign policy").

264. See, e.g., H.R. Rep. No. 114-195, at 153 (2015) (directing, in a report accompanying appropriations for Social Security programs, the Social Security Administration to consult with the National Institutes of Health to issue revised guidelines on Huntington's disease); see also War Powers and the Effects of Unauthorized Military Engagements on Federal Spending: Hearing Before the Subcomm. on Fed. Spending Oversight & Emergency Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affairs, 115th Cong. 9-11 (2018) (statement of Christopher Anders, Deputy Director, Washington Legislative Office, American Civil Liberties Union) (describing and encouraging the use of defunding threats to influence executive action); Setting Fiscal Priorities in Health Care Funding: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 112th Cong. 11 (2011) (statement of Ernest J. Istook, Distinguished Fellow, Heritage Foundation) (same).

265. See, e.g., Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004).

266. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, § 202, 119 Stat. 2833, 2858 (2005).

and other demands.<sup>267</sup> And fourth, Congress might use that same threat to increase the cost of a presidential veto by including changes in permanent law in the same legislative package as appropriations needed to honor preexisting commitments.<sup>268</sup>

It might be objected that the President sometimes “wins” shutdowns, in the sense that the ultimate legislation reopening the government can reflect the President’s preferred policies rather than Congress’s, and that this indicates that the threat of disappropriation diminishes rather than enhances legislative power.<sup>269</sup> How the threat of disappropriation shifts the balance of powers between the executive and the legislative branches is important and may depend on the specifics of the commitment and the disappropriation.<sup>270</sup> It is therefore possible to say that in any given case the threat of disappropriation “can” preserve legislative influence, not that it necessarily does so. That said, even if in a given case the prediction that the President would “win” a shutdown leads the President to “win” the resulting legislative package rather than Congress, the threat of disappropriation in such case would still have increased the influence of the legislative process vis-à-vis the regulatory process. There may be those who prefer presidential power to congressional power but also prefer legislative governance to administrative governance.

3. *Threat Alters the Balance of Power Within Congress.* — Finally, as emphasized by Professor David Kamin, the threat of disappropriation has intrabranched impacts within Congress. The threat creates what Professor Kamin calls a “crisis event”<sup>271</sup> because the funding necessary to honor an existing commitment is automatically “must pass” legislation.<sup>272</sup> This

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267. See Chafetz, *Congress’s Constitution* (Article), *supra* note 22, at 732–35 (describing the potential for a shutdown threat to influence the executive).

268. See *id.* at 735 (“[A] Congress inclined to use the power of the purse robustly would use the appropriations power as leverage in substantive matters other than appropriations . . .”).

269. But see *id.* at 730–34 (arguing that it is incorrect to assume that a shutdown always favors the President because a shutdown “presents both opportunities and pitfalls for Congress and the President alike”).

270. See *infra* sections IV.B–C (discussing the need to account for potential separation of powers implications when assessing different funding mechanisms and reforms intended to reduce the harms of disappropriation).

271. See Kamin, *supra* note 15, at 34; see also Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 *Geo. L.J.* 619, 635–36 (2006) (describing the use of appropriations vehicles as a game of “legislative ‘chicken’” to force passage of incidental provisions); *id.* at 637 & n.78 (explaining that the use of appropriations riders “to dictate substantive policy has significantly increased in recent decades in both number and intrusiveness” (citing Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 *Duke L.J.* 456, 462–71 (1987))).

272. Kiewiet & McCubbins, *supra* note 43, at 92. Specifically, for much of the twentieth century, the threat of disappropriation had significant budgetary impacts because temporarily funded programs were sometimes “scored” as temporary, reducing their apparent cost. This impact was largely eliminated by the enactment of the Budget

changes the ordinary dynamics of the legislative process, in which votes are rare and subject to the exclusive control of party leadership.<sup>273</sup> The threat thereby creates an opportunity for blocks of legislators who do not control leadership to seek concessions in exchange for their votes.<sup>274</sup> It also recalibrates the role of the committees; by preserving a role for the Appropriations Committee even in the administration of “permanent” entitlement programs, appropriated entitlements may increase that committee’s power and, with it, the power of the parties.<sup>275</sup>

Recent history illustrates the importance of the threat of disappropriation in the timing and process of enacting legislation. Significant and highly polarized policy issues—such as immigration, for example—are continually raised and voted upon in the context of appropriations bills that are needed to honor permanent commitments. Indeed, Democrats forced votes on immigration issues during the January 2018 shutdown when food stamps and federal salaries were at risk, and again during the 2018–2019 shutdown when CHIP faced disappropriation.

#### IV. THEORETICAL IMPLICATIONS

Parts II and III demonstrated that dissonance between Congress’s power to create legislative payment commitments and its appropriations power is an underlying source of both the harms of disappropriation and an enduring sphere of majoritarian control and legislative influence. Disappropriations and dissonance are thus previously unrecognized aspects of the functional structure of the federal government that Professor Ernest Young calls the “Constitution outside the Constitution” and Professor Aziz Huq calls the “negotiated structural constitution.”<sup>276</sup> Recognizing their interaction has important implications for constitutional doctrine, the

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Enforcement Act of 1997, which required that most such commitments be “scored” as permanent spending. H.R. Rep. No. 105-217, at 995 (1997) (Conf. Rep.).

273. See Sarah A. Binder & Frances E. Lee, Making Deals in Congress, *in* Solutions to Political Polarization in America 240, 253 (Nathaniel Persily ed., 2015) (“Congress rarely acts in the absence of a deadline.”); Roberts & Chemerinsky, *supra* note 201, at 1815–16 (noting that appropriations bills tend to take priority over other legislation on the floor of House and Senate); George K. Yin, Legislative Gridlock and Nonpartisan Staff, 88 *Notre Dame L. Rev.* 2287, 2288 & n.4 (2013) (“[I]ncreased party influence in Congress (and the greater centralization of power that often accompanies it) has generally operated in the past to counter the decentralizing effect of the committee system . . .”).

274. See Binder & Lee, *supra* note 273, at 247–50 (discussing interparty negotiations and the factors that determine whether coalition leaders “try to include the minority”).

275. See Kiewiet & McCubbins, *supra* note 43, at 13–14 (concluding that parties maintain influence through Appropriations Committees).

276. See Ernest A. Young, The Constitution Outside the Constitution, 117 *Yale L.J.* 408, 411 (2007) (“[M]uch—perhaps even *most*—of the ‘constitutional’ work in our legal system is in fact done by legal norms existing outside what we traditionally think of as ‘the Constitution.’”); see also generally Huq, *supra* note 44 (describing the negotiated entitlements afforded to institutions—in addition to individuals—under the Constitution).

separation of powers, the funding structure for new payment commitments, and efforts to reduce the harms of disappropriation.

A. *Disappropriation Is Destructive and Can Be Unfair*

Before turning to more abstract implications, it bears emphasizing that disappropriation has clear downsides described in section III.A. Depending on how one weighs these downsides against various collateral consequences of efforts to prevent disappropriation—especially separation of powers consequences—a reasonable reader might conclude that disappropriation should be avoided at all costs. Disappropriations of either legal or subjective payment commitments harm recipients by frustrating their reliance. Both can also be unfair, as the harm of frustrated reliance tends to be costliest for the least financially secure recipients and the mitigating effect of a potential damages remedy tends to be most valuable to the most financially secure recipients. And disappropriations of legal commitments harm the rule of law, a “con” that no “pro” may be able to outweigh.

B. *Congress Alters the Balance of Powers by Creating Payment Commitments that Depend on Future Appropriations*

Turning from the real-world harms of disappropriation to structural constitutional questions complicates the narrative. The insight that Congress reduces entrenchment and can preserve its influence over the executive through creating permanent—but temporarily funded—commitments makes dissonance a mechanism by which Congress alters the balance of powers by creating a risk of disappropriation. This raises a constitutional question and a statutory question.

The constitutional question is, of course, whether dissonance between legislative commitments and appropriations is constitutional. This question may seem most pressing to those who see disappropriation as an example of an emergent feature of the structural constitution that adversely impacts third parties (federal employees, states, and residents),<sup>277</sup> or as an additional example of constitutional “hardball” that benefits the political parties asymmetrically.<sup>278</sup> The Supreme Court is

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277. Professor Huq’s proposed constitutional test hinges in significant part on whether constitutional improvisations impact third parties adversely. See Huq, *supra* note 44, at 1666 (identifying two “normative constraints” on bargaining between institutions over their entitlements, based primarily on third-party effects and institutional internalities). While Huq develops that test in the context of his study of bilateral, negotiated constitutional innovation—and dissonance is arguably a unilateral congressional creation—the bases for his test are not entirely limited to bilateral changes and may be instructive in considering any structural improvisation by an institution.

278. Cf. Fishkin & Pozen, *Asymmetric Constitutional Hardball*, *supra* note 198, at 921–22 (“A political maneuver can amount to constitutional hardball when it violates or strains constitutional conventions for partisan ends. In other words, . . . when the means are seen

skeptical of efforts by one branch to aggrandize its power,<sup>279</sup> and has invalidated as unconstitutional innovative means employed by Congress to retain influence over agencies even after decades of use.<sup>280</sup> Courts could not, of course, order Congress to appropriate funds, but they could either declare any legal commitment to pay absent an appropriation invalid (when an appropriation is not made) or insist that any such commitment be read as itself impliedly appropriating necessary funds.<sup>281</sup> That said, no litigant or court has questioned the constitutionality of Congress's ability to create a permanent legislative commitment without simultaneously funding it, and both constitutional text and judicial dicta can be read to support the view that this means of preserving legislative influence is constitutional.<sup>282</sup> The remainder of this Article therefore joins courts and litigants in assuming the constitutionality of dissonance.

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as questionable and qualm-producing because they disrupt an especially respected . . . interbranch or interparty practice, now we are talking about constitutional hardball.” (emphasis omitted) (footnote omitted)).

279. *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (noting that the Court has “many times” acknowledged that the Framers “built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other” (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

280. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 715–16, 736 (1986) (holding that the role of the Comptroller General in the sequestration scheme was unconstitutional); *INS v. Chadha*, 462 U.S. 919, 921–22 (1982) (holding that the one-house legislative veto was unconstitutional).

281. In the nineteenth century, courts and the Comptroller of the Treasury sometimes found that legislative commands to pay were “implied appropriations” that did not require additional express language to make an appropriation. See, e.g., *Appropriation*, 6 Comp. Dec. 514, 517 (1899–1900) (“[W]hen Congress directs the Treasurer to pay a specified sum to a person designated, it is intended that he shall make such payment . . . such direction must be construed to imply a direction to the Secretary of the Treasury to draw a warrant therefor.”). A vigorous implied appropriation doctrine would prevent disappropriations of legal commitments by automatically inferring an appropriation from any sufficiently mandatory legislative command to pay, but it would also eradicate the threat of such disappropriation as a tool of congressional influence in the same stroke. Congress abrogated the implied appropriation doctrine, however, when it enacted in 1902 a law that dictates that “no Act of Congress shall be construed to make an appropriation . . . unless such Act shall, in specific terms, declare an appropriation to be made.” Act of July 1, 1902, Pub. L. No. 57-217, 32 Stat. 552, 560 (codified at 31 U.S.C. § 1301(d) (2012)). In the years following enactment of that law, the executive construed it as not applying retroactively to statutes enacted prior to 1902 and not applying to statutes impliedly appropriating funds from sources other than the general fund. See H.R. Doc. No. 62-854, at 1–5, 62–63 (1912) (recommending, with President Taft’s endorsement, the aforementioned construction of the statute). Thus, if courts were to find dissonance unconstitutional, one possible remedy would be to declare the 1902 Act unconstitutional to the extent it abrogates the implied appropriation doctrine, and so insist on reading any sufficiently mandatory command to pay to make an “appropriation” that satisfies the Appropriations Clause.

282. See U.S. Const. art. I, § 8, cl. 12 (empowering Congress to raise armies permanently but limiting funding for those armies to two-year increments); *Hart’s Adm’r v. United States*, 16 Ct. Cl. 459, 484 (1880) (noting that Congress is accountable for exercising the



As for the statutory question, imagine you are a presidential candidate formulating the funding structure for a new federal program like “Medicare-for-all.”<sup>283</sup> How do you fund it? By annual appropriation (like Medicaid),<sup>284</sup> semiannual enactment (like CHIP),<sup>285</sup> or payroll taxes (like Medicare)?<sup>286</sup> Perhaps a third-party mandate (like the cost-sharing reductions in the ACA)<sup>287</sup> or tax credit (like the ACA’s premium supports)?<sup>288</sup> Or do you leave (or make) its funding unclear, in both describing the new entitlement and drafting the legislation to enact it?

This Article has explained how the choice of which purse power to use to support a legislative commitment largely determines both the risk of disappropriation and the existence and extent of enduring congressional control over the administration and development of a program.<sup>289</sup> Its exploration of the interaction between disappropriation, dissonance, and the balance of powers also offers a theoretical starting place for a comparative analysis of purse powers for funding new commitments, though a full such analysis is beyond this Article’s scope.

For example, the contrast between the tribal contract support disappropriation and the risk corridors disappropriation illustrates that, under current law, structuring a payment commitment to feature some form of “contract” between the government and the recipient promotes the

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appropriations power “only to the people”), *aff’d sub nom. Hart v. United States*, 118 U.S. 62 (1886).

283. See *Where 2020 Democrats Stand on Medicare-For-All*, Wash. Post, <https://www.washingtonpost.com/graphics/politics/policy-2020/medicare-for-all/> (on file with the *Columbia Law Review*) (last updated Sept. 20, 2019) (describing different “Medicare-for-all” proposals).

284. See *Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs., Justification of Estimates for Appropriations Committees 1* (2018), <https://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/Downloads/FY2019-CJ-Final.pdf> [<https://perma.cc/3LQ7-Q59A>].

285. See *supra* section II.A.4.

286. See *supra* note 71 and accompanying text.

287. See *supra* section II.A.3.

288. See *supra* section II.A.3.

289. The literature comparing tax expenditures to ordinary payments could benefit from consideration of the separation of powers and other structural implications of funding-mechanism choice discussed in section III.C.3. See, e.g., John R. Brooks, *Quasi-Public Spending*, 104 *Geo. L.J.* 1057, 1110 (2016) (considering the implications of funding-mechanism for public accountability, likelihood of enactment, taxes, and size of the public sector); see also Leonard E. Burman & Marvin Phaup, *Tax Expenditures, the Size and Efficiency of Government, and Implications for Budget Reform*, 26 *Tax Pol’y & Econ.* 93, 93–95 (2012) (discussing how the characterization of tax expenditures as “tax cuts” rather than “spending” has negative externalities on governance). Professor John Harrison’s insightful discussion of how constitutionalizing Social Security benefit payments in particular could entrench the program against shortfalls illustrates the value of incorporating such considerations. See Harrison, *supra* note 71, at 407–15.

durability of the commitment.<sup>290</sup> This distinction disadvantages “gratuitous” payment programs relative to those that entail some form of commercial exchange because such an exchange is a prerequisite for a contract claim.<sup>291</sup> Drafters hoping to promote the durability of any new program should therefore consider incorporating such an exchange.

Furthermore, the cost-sharing reductions disappropriation reveals the tremendous durability and unique separation of powers impacts of cross-subsidies that require a third party (such as a state or corporate entity) to provide a financial benefit to recipients in lieu of the federal government providing such benefits directly. Because the ACA’s cost-sharing reductions subsidy operated *through* insurers, there was no question whether insureds would continue to receive the benefit when the program was disappropriated—just whether insurers would be compensated for providing the benefit.<sup>292</sup>

C. *Reducing the Harms of Disappropriation Can Mean Reducing Legislative Power*

An important corollary of the insight that dissonance not only creates a risk of disappropriation but also alters the balance of powers is that efforts to reduce the harms of disappropriation may inadvertently reduce (or increase) legislative power. It is therefore important to take such potential interference into account in assessing efforts to reduce the harms of disappropriation. This lesson is illustrated by—and has important implications for—proposals to prevent shutdowns by financially penalizing legislators, as well as other proposals related to legislation and appropriations.<sup>293</sup>

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290. See *United States v. Larionoff*, 431 U.S. 864, 879 (1977) (finding that payment commitments made in return for services already performed appear in a “different constitutional light” from those made for future services); *Perry v. United States*, 294 U.S. 330, 351 (1935) (suggesting that Congress is constitutionally unable to break a commitment to pay unless Congress reserved a “right of amendment”); *Lynch v. United States*, 292 U.S. 571, 577 (1934) (suggesting that “gratuities” such as pensions and compensation do not involve a “vested right” and so “may be redistributed or withdrawn at any time in the discretion of Congress”). Compare *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012) (awarding damages—despite a disappropriation—based on the conclusion that the commitment amounted to a “contract”), with *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1329–31 (Fed. Cir. 2018) (distinguishing *Ramah* on the ground that the risk corridors program did not amount to a “contract”).

291. See Steven W. Feldman, *Government Contract Guidebook* § 22:5 (4th ed. 2018) (defining a contract claim).

292. See 42 U.S.C. § 18082 (2012) (mandating that insurers reduce cost sharing for eligible insureds).

293. John McGinnis and Michael Rappaport’s argument that annual appropriations legislation poses a “compelling case” for a super-majority rule—and so should be harder to enact than ordinary substantive legislation—illustrates a somewhat different corollary of this insight, namely, that making it more difficult to create dissonance tends to increase executive power. John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority*

Prior scholarship has expressed support for legislative proposals along the lines of the Stop STUPIDITY Act<sup>294</sup> that would prevent shutdowns by, *inter alia*, financially penalizing legislators when they happen.<sup>295</sup> Professors David Gamage and David Louk propose such a reform as a way to motivate Congress to maintain government funding.<sup>296</sup> And Kamin endorses this proposal, suggesting that in addition to withholding legislator salaries, the salaries of their staff be withheld as well.<sup>297</sup>

These treatments focus exclusively on the intra-branch implications of such a penalty default rule.<sup>298</sup> But such a rule would also impact the balance of powers, shifting power in favor of the executive and past Congresses at the expense of current and future Congresses. It would favor the executive in two ways. First, by making it more personally costly for legislators to affect a disappropriation, such a penalty would predictably reduce the credibility of Congress's threat of disappropriation.<sup>299</sup> Second, a penalty directed at legislative salaries written into law could have an expressive effect. It could signal to voters that—as judged by those who enacted the penalty—the responsibility for funding the government lies with legislators, and so the blame for any shutdown should likewise lie with legislators. While such political implications are of course unpredictable, it is not difficult at all to imagine a President seeking to place the blame for a shutdown at the feet of legislators by pointing out early and often that the legislators' (and perhaps their staffs') pay was being docked as a penalty for their failing to fund the government: "They are the ones being punished because the shutdown is their fault!"

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Rules: Three Views of the Capitol, 85 *Tex. L. Rev.* 1115, 1137–40 (2007). McGinnis and Rappaport do not acknowledge that annual appropriations are often necessary to honor permanent legal commitments, and so they do not appreciate that their proposal would effectively prevent Congress from creating permanent—but temporarily funded—commitments, including those underlying the modern welfare state listed in section II.A. That impact, and not the dilution of special-interest effects McGinnis and Rappaport discuss, may well be determinative for the wisdom of their super-majority proposal as applied to annual appropriations necessary to fund legislative commitments.

294. Stop the Shutdowns Transferring Unnecessary Pain and Inflicting Damage in the Coming Years Act, S. 198, 116th Cong. (2019).

295. Regardless of their merit in the specific context of shutdowns or disappropriations, altering the pay of government officials generally raises constitutional considerations that are beyond the scope of this Article. For a discussion of these considerations, see Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 *Colum. L. Rev.* 501 (2002).

296. Louk & Gamage, *supra* note 15, at 255.

297. See Kamin, *supra* note 15, at 60 ("Perhaps pay could be withheld not just from members of Congress, but also from key staffers . . .").

298. See *id.* at 59–60 (noting that the cost of such a rule is "limited to members of Congress"); Louk & Gamage, *supra* note 15, at 236–55 (discussing the implications of a penalty default rule and other default budget policies).

299. Cf. Pasachoff, *Agency Enforcement*, *supra* note 235, at 254–55 (discussing the difficulty for federal agencies of utilizing complete spending cutoffs to penalize state noncompliance in major cooperative federalism programs).

Such a penalty would also increase entrenchment—favoring past Congresses—by reducing both the probability of disappropriation and the credibility of the threat of disappropriation. As discussed above, a “shut-down” is not a unitary phenomena: Shutdowns so far have involved the disappropriation of a variety of commitments.<sup>300</sup> The entrenchment of each commitment (whether legal, budgetary, or functional), given the benefit of a penalty default rule, would be increased—for better or worse, depending on one’s view of the particular program and of entrenchment.<sup>301</sup>

To be sure, these additional considerations are not necessarily objections to the proposal to penalize legislators and their staffs for shutdowns, nor are they dispositive even as objections. A person who preferred both greater executive power and greater entrenchment of government commitments would view them as significant new arguments in favor of such a penalty. In order to fully assess the wisdom of such a proposal to reduce the harms of disappropriation, however, it is essential to consider upstream impacts on the balance of powers.

D. *Reducing Uncertainty and Private Information Prevents Disappropriation Without Significantly Interfering with the Balance of Powers*

As the prior two sections have noted, the desirability of rules regulating disappropriation and dissonance depends on one’s priors about the weight of “real world” destruction and unfairness, entrenchment, executive versus legislative power, privatization, and federalism. Nevertheless, the theoretical understanding of the interactions between disappropriation, dissonance, and the balance of powers developed in Parts II and III reveal an important category of rules that are objectively desirable because they reduce the harms of disappropriation *without* interfering with the balance of powers. Section IV.D.1 explains that rules that preserve Congress’s threat of disappropriation—but reduce the likelihood that this threat actually materializes—mitigate the costs associated with actual disappropriations, but do not significantly interfere with the balance of powers. They promote durability (the likelihood that a policy will stay in place and so its capacity to engender reliance) but not entrenchment (the difficulty of changing policy for a majority that wishes to do so). Section IV.D.2 explains why courts should seek rules that reduce the harms of disappropriation. Section IV.D.3 identifies rules that do so by reducing the risk of inter- or intra-branch bargaining failure, namely, rules that reduce uncertainty and private information. Such rules should therefore be favored in the regulation and adjudication of disappropriation.

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300. See *supra* section II.A.5.

301. See *supra* section III.C.1 (presenting opposing sides in entrenchment debate).

1. *Desirability of Durability Without Entrenchment.* — Rules that preserve the threat of disappropriation while minimizing its likelihood are desirable from multiple perspectives because they minimize the real-world negative consequences of disappropriation (they promote durability) while minimizing the entrenchment and loss of legislative power ordinarily associated with major delegations. The primary arguable benefits associated with dissonance—preserving majoritarian control and legislative influence—depend largely on the existence and credibility of the threat of disappropriation, not its actual likelihood.<sup>302</sup> The biggest and most direct costs of disappropriation, on the other hand—for privatization, federalism, beneficiaries, and the rule of law—depend on either disappropriation actually materializing or the probability that a disappropriation will really materialize.<sup>303</sup>

The nuclear analogy is again helpful, though this time the analogy is to nuclear war rather than nuclear power. There has been a threat of nuclear conflict between Russia and the United States since Russia obtained the bomb, and theorists believe this threat has profoundly influenced the relationship between the two powers.<sup>304</sup> Yet by all accounts, the probability of a conflict reached its peak decades ago during the Cuban Missile Crisis.<sup>305</sup> Partly as a result, inherently costly precautionary measures thought prudent when the probability of nuclear conflict with Russia seemed high in the 1960s and 1970s—such as forcing people to participate in terrifying nuclear raid drills<sup>306</sup>—are today thought unnecessary.<sup>307</sup>

This distinction between probability and threat tracks the distinction between the durability of a program and the entrenchment of a program. While durability is generally thought of as desirable, it is also often thought of as in conflict with entrenchment, which is itself controversial.<sup>308</sup> But it is possible to promote durability without increasing entrenchment because the interests that durability seeks to promote depend on probabilities,

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302. Cf. Kamin, *supra* note 15, at 61 (noting that “in some cases, the *threat* of crisis may be better than the alternative of none” for forcing legislative bargaining (emphasis added)).

303. There are surely those who would like to eliminate or restrict existing federal payment programs. See Jost, *supra* note 3, at 138–83 (describing efforts targeted at Medicaid and Medicare). But disappropriation does not eliminate commitments; it leaves them in place while creating a host of legal and practical complications by making it impossible for the government to comply with those commitments. See *supra* section II.A.

304. See Thérèse Delpech, *Nuclear Deterrence in the 21st Century: Lessons from the Cold War for a New Era of Strategic Piracy* 35–37 (2012) (discussing the long-term effects of mutually assured destruction on U.S.–Russia relations).

305. See *id.* at 21–22 (suggesting measures to avoid a “contemporary version of the Cuban missile crisis”).

306. See Tracy C. Davis, *Stages of Emergency: Cold War Nuclear Civil Defense* 167 (2007) (describing the emotional toll on townspeople of conducting drills).

307. See *id.* at 5 (“The identified perils have changed since the end of the Cold War, and there are more sophisticated tools for monitoring them . . .”).

308. See *supra* notes 239–247 and accompanying text (discussing entrenchment).

while the interests that entrenchment seeks to promote depend on capabilities.<sup>309</sup> Rules regulating disappropriation that take advantage of this distinction are broadly desirable because they preserve Congress's ability to threaten to disrupt funding for a commitment (and all the balance of powers implications that come with it) while reducing the likelihood that it will actually do so (thereby minimizing the risk of harms associated with actual disappropriations and the probability of disappropriation).

2. *Consistency with Judicial Principles of Noninterference and Mitigation.* — Promoting the stability of federal commitments without significantly interfering with the balance of powers—such as by reducing the likelihood of disappropriation without undermining Congress's ability to create dissonance or the credibility of its threat of disappropriation—is a particularly important goal from the standpoint of the judicial branch. Many courts endeavor to avoid interference with the balance of powers,<sup>310</sup> and the basis for doing so is even stronger when it comes to the purse in light of Hamilton's admonition that “[t]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”<sup>311</sup>

3. *Uncertainty and Private Information as Causes of Bargaining Failure.* — The insight that it is broadly desirable to reduce the likelihood of disappropriation, if it can be done while preserving Congress's ability to create dissonance and the credibility of its threat of disappropriation, motivates a nuts-and-bolts inquiry: How?

Many factors that predictably influence the probability of disappropriation also predictably impact the threat of disappropriation. For example, a commitment funded by a permanent, indefinite appropriation plainly can be disappropriated only via an affirmative legislative enactment. This makes for a low likelihood of disappropriation but also a near nonexistent congressional threat of disappropriation.

That said, bargaining failure is a factor that predictably influences the probability of disappropriation more so than the credibility of the threat. Bargaining failure about funding for a commitment by definition causes a

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309. Cf. Michael D. Gilbert, Entrenchment, Incrementalism, and Constitutional Collapse, 103 Va. L. Rev. 631, 635 (2017) (“Striking that balance [between stability and responsiveness] correctly requires understanding how entrenchment works—how exactly this or that degree of entrenchment affects stability and responsiveness. We do not presently understand it.”).

310. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”); *In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163–64 (2d Cir. 2001) (“[S]eparation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch . . .”).

311. *The Federalist* No. 78, at 392 (Alexander Hamilton) (New Am. Library 1961).

temporary or permanent disappropriation,<sup>312</sup> but preventing bargaining failure does not undermine Congress's threat of disappropriation. Therefore, rules that prevent failed or mistaken negotiations about whether or how to fund a commitment predictably will reduce the probability of disappropriation but not interfere with the balance of powers.

Negotiation and bargaining literature points to two factors that tend to increase the risk of failed negotiations within Congress or between Congress and the President. These are uncertainty and private information (or secrecy). Uncertainty surrounding the impact of legislative action or inaction tends to reduce the likelihood of compromise because it exacerbates behavioral biases and makes identifying compromises harder.<sup>313</sup> And private information—information held by only one party to the negotiation—causes bargaining failure when it permits parties to use threatening failure to attempt to signal strength which, in turn, increases the actual risk of failure.<sup>314</sup>

The actual disappropriations discussed in Part II lend credence to the theoretical prediction that uncertainty and private information about consequences increase the likelihood of disappropriation by causing bargaining failure. Congress's oversight report on cost-sharing reductions indicates that officials within the Obama Administration actually informed

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312. See generally John B. Gilmour, *Political Theater or Bargaining Failure: Why Presidents Veto*, 41 *Presidential Stud. Q.* 471 (2011) (discussing bargaining failure in the legislative process).

313. See Binder & Lee, *supra* note 273, at 59 (noting that before “members and their staffs can . . . see a pathway to possible solutions” they must “understand the causes and dimensions of a policy problem”); Chase Foster, Jane Mansbridge & Cathie Jo Martin, *Negotiation Myopia*, *in* *Negotiating Agreement in Politics*, *supra* note 273, at 73, 77 (noting that self-serving bias is a significant cause of legislators' failing to strike a mutually-beneficial bargain, and such bias “is strongest where there is ambiguity . . . [about] the relevant facts”); Benjamin L. Snowden, Note, *Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts*, 13 *N.Y.U. Envtl. L.J.* 134, 195 (2005) (noting the “problems of bargaining dynamics that arise when political bodies acting on behalf of multiple constituencies come to the table in an atmosphere of great legal and factual uncertainty”). In addition to bargaining failure in the legislative process, the connection between uncertainty and bargaining failure in litigation—where such uncertainty prevents settlement and leads to trial—has also been discussed in a rich series of law review articles building on Robert H. Mnookin's and Lewis Kornhauser's classic article, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950 (1979). See Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 *J.L. Econ. & Org.* 490, 490 (2006) (“[U]ncertainty and asymmetric information . . . have been invoked to explain bargaining impasse . . .”); see also *id.* at 490–91 (collecting additional sources).

314. E.g., Lucian A. Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 *RAND J. Econ.* 404, 405 (1984) (“[I]nformational asymmetry might be an important reason for parties' failure to settle.”); Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 *J. Legal Analysis* 1, 17 (2003) (“[B]reakdowns tend to be driven by private information about a dispute . . .”); see also Bar-Gill, *supra* note 313, at 490 (collecting sources on the role of private information in bargaining failure); Sean P. Sullivan, *Why Wait to Settle? An Experimental Test of the Asymmetric-Information Hypothesis*, 59 *J.L. & Econ.* 497, 499 (2016) (same).

legislative staffers not to fund the cost-sharing reductions program with an annual appropriation because the Administration determined that a separate permanent, indefinite appropriation already funded the payments.<sup>315</sup> From this standpoint, the district court's eventual conclusion that the appropriation in question was not available represented an unexpected turn of events.<sup>316</sup> Had the Administration or Congress accurately predicted developments in litigation, it is fair to assume they would not have consciously declined to fund the cost-sharing reductions. They presumably would instead have sought a legislative deal that included funding for the program, and the disappropriation would never have happened.

Finally, every shutdown is a bargaining failure. All involved claim to want the government funded, treat the shutdown as an adverse event, and simply blame the other side's obstinance. In every such case, moreover, the "pie" to be distributed between the parties through bargaining would have been larger had they come to an agreement in advance of the shutdown and thereby prevented associated adverse consequences. One challenge in the case of shutdowns is simply that political actors may misjudge the likelihood that they will be blamed for a shutdown, optimistically assuming the other side will take the blame and so insisting on favorable terms. Another challenge is the access to private information that the executive possesses regarding the consequences of a shutdown due to the power of the executive to mitigate the adverse consequences of disappropriation by wielding its commitment power.

Reducing uncertainty about the potential disappropriation-related consequences associated with any particular legislative action or inaction would not leave the balance of powers wholly untouched. Uncertainty allows legislators to avoid political accountability for the consequences of legislative action, which legislators often seek to do.<sup>317</sup> This is one reason legislators sometimes favor intentionally ambiguous text and often prefer to delegate to agencies rather than regulate directly.<sup>318</sup> Reducing uncertainty would limit legislators' ability to engage in intentional ambiguity, both reducing the range of potential legislative deals and reducing Congress's ability to shift blame for the ultimate consequences of disappropriation to the executive branch (when forced to halt a program) and the judicial branch (when asked to halt an ongoing program due to lack of funds or order damages in the aftermath of a disappropriation).

Thus, reducing uncertainty does entail some potential balance of powers impacts. These impacts are not concerning in the way that reforms

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315. Joint CSR Report, *supra* note 137, at 44–48.

316. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 188 (D.D.C. 2016).

317. *Cf. Kiewiet & McCubbins*, *supra* note 43, at 25 (describing how bureaucrats "maximize the size of their budgets" by withholding information from lawmakers exercising oversight).

318. *Id.* at 2 ("[D]elegation facilitates the avoidance of blame . . .").



foreclosing dissonance or undermining Congress's threat of disappropriation are, however. Preventing Congress from using ambiguity to delegate to courts the power to disappropriate would vindicate rather than undermine the Framers' concern that responsibility for appropriations should rest with Congress, not the courts.<sup>319</sup> Moreover, the impacts of limiting intentional ambiguity related to disappropriation are marginal and do not directly or predictably limit the core, arguable benefits of dissonance—reducing entrenchment, preserving executive influence, and recalibrating power within Congress.

In short, reducing uncertainty and private information about the consequences of disappropriation will predictably reduce the risk of failure in bargaining to fund a commitment and so reduce the likelihood of disappropriation, without significantly interfering with the balance of powers. These considerations can serve as guideposts for the design of framework rules regulating disappropriation and for courts adjudicating controversies that arise from disappropriation.

## V. JUDICIAL APPLICATIONS

This Part addresses the role of courts in disappropriation controversies. Whereas courts are directly involved *after* a disappropriation (or in *media res*), their decisions and the rules they articulate have upstream (*ex ante*) impacts on the decisions of Congress, the executive, and third parties relevant to the interaction between dissonance, disappropriation, and the balance of powers.<sup>320</sup> Section V.A explains that judicial involvement in disappropriation controversies has been problematic so far because courts have generated uncertainty that creates the risk of inadvertent disappropriation and have afforded incomplete relief. This conclusion has broader implications for framework rules and the design of new commitments along the lines discussed in Part IV. Section V.B, however, focuses on the pressing question of how courts can improve the judicial role within the constraints of current law.

### A. *Judicial Involvement in Disappropriation Controversies Has Been Problematic*

1. *Ex Post Judicial Review Creates Uncertainty and a Risk of Accidental Disappropriation.* — The judiciary's judgment on disputed questions cannot be sought in the middle of a legislative negotiation but may only be learned after the fact as relevant to a case or controversy.<sup>321</sup> This adds

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319. See *supra* note 311 and accompanying text.

320. See generally Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970) (pioneering the *ex ante* approach to the evaluation of legal rules).

321. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (“[N]o justiciable controversy is presented when . . . the parties are asking for an advisory opinion . . .”).

to the uncertainty surrounding disappropriation (and so increases its likelihood as discussed in section IV.D) in two ways. First, courts may come to disagree with the executive or legislature about whether any particular enactment (or failure to enact) accomplishes a disappropriation. Second, if courts conclude that a disappropriation has taken place, they may nonetheless eventually come to award frustrated recipients damages payable from the Judgment Fund appropriation.<sup>322</sup>

Judicial involvement creates the possibility of an accidental disappropriation, that is, a case in which Congress and the President both believe during negotiations over appropriations legislation that they are enacting or have enacted funds for a commitment only to later be surprised by a judicial determination holding that the commitment has been disappropriated. That possibility is a worst-case scenario associated with dissonance between the legislative power to commit and the appropriations power because it does not increase either legislative leverage over the executive or majoritarian control but does bring the real-world harms of disappropriation (as well as blame upon the judiciary).

Accidental disappropriation is not just a hypothetical. Hundreds of democratic legislators led by Speaker Nancy Pelosi argued, in the context of the cost-sharing reductions disappropriation, that that is precisely what had happened in that case—that the executive and Congress decided not to enact an appropriation based on their determination (later rejected by the district court) that available appropriations could fund the program.<sup>323</sup> Subsequent oversight by Republicans supported this version of events.<sup>324</sup> On this account, the years of litigation, controversy, costs, and harm to those left unable to afford insurance that followed were pure waste caused by the failure to predict how courts would view the question.

2. *Judicial Damages Remedies Afford Incomplete Relief.* — The permanent indefinite Judgment Fund appropriation for court-ordered damages (and Department of Justice settlements) provides a vehicle by which courts can award damages that can lawfully be paid despite a commitment's disappropriation.<sup>325</sup> (Without such an appropriation, the Appropriations Clause would prevent the executive from expending funds to honor a

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322. See, e.g., *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 198 (2012) (noting the availability of the Judgment Fund to honor judicial orders); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1240–42 (D.N.M. 2016) (approving \$940 million settlement to be paid to tribes); see also *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 52 (2019) (“[J]udgments of this court are payable from the Judgment Fund . . .”).

323. Brief of Amici Curiae of Members of Congress in Support of Defendants' Motion for Summary Judgment at 25, *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016) (No. 1:14-cv-01967-RMC), 2015 WL 10376844 (“[E]veryone in Congress understood at the time the law was enacted and in every year since[] [that] the cost-sharing reductions . . . were to be paid out of . . . 31 U.S.C. § 1324.”).

324. Joint CSR Report, *supra* note 137, at 41.

325. 31 U.S.C. § 1304 (2012).

disappropriated commitment even in the face of a court order to do so.)<sup>326</sup> In order to tap into this fund, a frustrated recipient must persuade a court to convert a legal commitment to pay into a court order to pay, which courts usually do only if they read the commitment to be accompanied by a “right to relief.”<sup>327</sup>

It is a mistake to equate a court order of payment from the Judgment Fund with funding for a commitment. Even when courts have ultimately awarded a damage remedy, it has proven an extremely limited protection against the adverse consequences of disappropriation. Awards have come, if at all, many days late and many dollars short. In *Ramah* the ultimately successful tribes waited decades for their payments, which were reduced by a significant percentage by the cost of attorney’s fees.<sup>328</sup> The risk corridors cases were unsuccessful in the Federal Circuit and have taken years to wind their way through the courts. And any final relief ordering damages in the cost-sharing reduction cases, too, will come years after the payments were first due, at the earliest.<sup>329</sup> Insurers have gone out of business and set their premiums in the intervening years as a consequence of the disappropriations—those consequences will not be undone should the courts ultimately award damages.<sup>330</sup>

#### B. *Resolving Open Legal Questions to Prevent Disappropriation*

The downsides of judicial involvement in disappropriation controversies should influence future consideration by Congress, scholars, or courts of the questions raised in Part IV about the allocation of constitutional authorities vis-à-vis the executive and legislative commitment powers, the design of framework rules and new federal programs involving legislative commitments, and the appropriate role of the courts vel non in

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326. *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) (noting that courts cannot order a payment of funds that are not appropriated, or create an appropriation).

327. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473–76 (2003) (finding that the Tucker Act should be read to create a “right of recovery in damages,” and therefore that the government was liable to tribes); *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988) (discussing scenarios in which a statute might be read to provide both a “right and a remedy”); *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (“For decades the Supreme Court has applied what is known as the *Mitchell* test: a statute or regulation is money-mandating for jurisdictional purposes if it ‘can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties [it] impose[s].’” (quoting *United States v. Mitchell*, 463 U.S. 206, 217 (1983))).

328. See *supra* note 107 and accompanying text (describing the settlement).

329. See *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 53 (2019) (ordering payment of damages from missed payments in 2017, subject to appeal to the Federal Circuit).

330. See *supra* notes 146–152 and accompanying text (describing the consequences of a cost-sharing reductions disappropriation).

adjudicating disappropriation controversies.<sup>331</sup> For the foreseeable future, however, courts will have no choice but to continue to play the significant role in disappropriation controversies that current law assigns to them. Sections V.B.1, V.B.2, and V.B.3 discuss changes that courts have discretion to make under current law in how they interpret, adjudicate, and remedy disappropriation that would further the goals of reducing the harms of disappropriation while minimizing interference with the balance of powers developed in Part IV.

1. *Courts Should Adopt an Interpretive Presumption Against Disappropriation of Unambiguous Legal Commitments.* — In any disputed disappropriation case, a key question is whether disappropriation has occurred, that is, whether Congress has appropriated funds needed to honor the commitment. Resolution of that question depends on whether the underlying commitment is “legal” and, if it is, on the text of the commitment, the text of any potentially available appropriation, the existence of other indicia of congressional intent, and the interpretive canons, if any, employed by the reviewing court.

In addressing previous disappropriations, scholars, courts, and the executive have endorsed widely divergent interpretive approaches. The court in *House v. Burwell* read the “purpose statute,” 31 U.S.C. § 1301(d), to compel courts to apply a pro-disappropriation interpretive presumption, that is, a presumption that ambiguities in existing appropriations be read against finding funding available even for preexisting legal commitments.<sup>332</sup> Professor Bagley has also read the purpose statute to require such a “clear-statement rule.”<sup>333</sup> The Department of Justice, for its part, has advocated that courts determining whether disappropriation has taken place afford agencies “[t]he deference accorded to federal agencies under background principles of administrative law.”<sup>334</sup> And the Comptroller General does not seem to employ any particular interpretive presumption when confronted with the question of whether an appropriation is available to honor a preexisting legislative commitment.<sup>335</sup>

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331. On the difficult judgments that go into the wisdom, timing, and nature of judicial review, see Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 *Harv. L. Rev.* 1285, 1322–27 (2014).

332. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 188 (D.D.C. 2016) (holding that a statute could not be read as ambiguous in light of the command of 31 U.S.C. § 1301(d) that “[a] law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made”).

333. Bagley, *Legal Limits and Implementation*, supra note 200, at 1733 & n.124.

334. Defendants’ Memorandum in Support of Their Motion for Summary Judgment at 25, *Burwell*, 185 F. Supp. 3d 165 (No. 1:14-Cv-01967-RMC), 2015 WL 9316243. But cf. Sohoni, supra note 34, at 1715–24 (concluding that values served by *Chevron* deference are not furthered by such deference in the creation of entitlements).

335. See GAO Risk Corridors Opinion Letter, supra note 117, at 3–4 (applying ordinary interpretive approaches in determining the availability of appropriation for risk corridors payments, while not professing to apply any particular interpretive presumption); see also

a. *Courts' Discretion to Choose an Interpretive Approach in Determining Whether Ambiguous Appropriations Are Available to Honor Legal Commitments.*—Judge Rosemary Collyer's and Professor Bagley's reading of the purpose statute as compelling courts to read ambiguous appropriations statutes as unavailable to satisfy legal commitments is highly debatable. Their reading of the statute's text is not the only or even the most straightforward one, and that reading is also contradicted by Comptroller General precedent. Moreover, the opposite presumption—that appropriations should be read as permitting the government to honor a legal commitment if they will bear such a reading—is itself legally supportable. Therefore, courts have discretion (and are arguably compelled) to adopt such an anti-disappropriation presumption.

The reading of the purpose statute as compelling courts to apply a pro-disappropriation presumption is based on confusion between the question of whether a law “makes” an appropriation (which is subject to a rule of strict construction) and the question of what purposes an appropriation is available to fund (which is not). Section 1301(d) of 31 U.S.C. provides that “[a] law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made .”<sup>336</sup> By its terms, this provision applies to the question of whether a law “make[s]” an appropriation, not whether the appropriation made by a law is available for any particular purpose such as to fund a legislative commitment. That question is governed by section 1301(a) of 31 U.S.C., which confirms that the “making” of an appropriation is a different question than the availability of an appropriation, providing that “[a]ppropriations shall be applied only to the objects for which they *were* made.”<sup>337</sup> The purpose statute thereby makes clear Congress's view that a law must include specific language (and usually a designation of a source of funds) to make an “appropriation.”<sup>338</sup> It thus prohibits appropriations by implication, requiring that the resulting appropriation is available only for any objects it lists. It need not be read to mandate a rule of strict construction in interpreting the listed objects.

Moreover, as just mentioned, the Comptroller General considers questions about whether an appropriation is available for a particular

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LTV Aerospace Corp., 55 Comp. Gen. 307, 317 (1975) (“In construing appropriation acts, we have consistently applied . . . traditional statutory interpretation principles so as to give effect to the intent of Congress.”); U.S. Emps.' Comp. Comm'n, 19 Comp. Gen. 61, 61 (1939) (finding that a “literal interpretation” of appropriation enactment “should be avoided” when inconsistent with other statutory provisions).

336. 31 U.S.C. § 1301(d) (2012).

337. *Id.* § 1301(a) (emphasis added).

338. U.S. Gov't Accountability Office, GAO-16-464SP, Principles of Federal Appropriations Law, ch. 2, at 23 (4th ed. 2016) [hereinafter GAO Red Book, Fourth Edition] (noting that section 1301(d) requires that “the making of an appropriation must be expressly stated”); cf. *supra* note 281 and accompanying text (discussing the role of the purpose statute in making disappropriation possible).

purpose de novo using ordinary statutory interpretation principles,<sup>339</sup> a practice that would make no sense (and be unlawful) if a presumption against availability were compelled by law. The Comptroller General has never read the purpose statute to create an interpretive presumption governing availability and has refuted the idea that the purpose statute creates such a rule of strict construction.<sup>340</sup> And the Comptroller General has developed several interpretive principles under which, for policy or other reasons, it will *infer* that an appropriation is available for a particular purpose not technically within the language the appropriation uses to describe its purposes.<sup>341</sup>

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339. See GAO Red Book, Third Edition, *supra* note 22, ch. 4, at 9 (“Where does one look to find the authorized purposes of an appropriation? The first place, of course, is the appropriation act itself and its legislative history . . . . [I]t may also be necessary to consult . . . the underlying program or organic legislation, together with their legislative histories.”); see also Dep’t of Agriculture, B-125309, 1955 WL 2175, at \*1–2 (Comp. Gen. Dec. 6, 1955) (looking to the purpose and history of legislation in determining the availability of an appropriation).

340. See GAO Risk Corridors Opinion Letter, *supra* note 117, at 4 (“[W]e do not read the purpose statute to require that every item or expenditure be specified in an appropriations act.”). The district court cited one comptroller general opinion as having read the purpose statute to create a rule of strict construction, but that opinion did not address the question of whether an appropriation was available for a particular purpose, let alone whether an appropriation was available to fund an independent legislative commitment to pay. Remission to Guam and Virgin Islands of Estimates of Moneys to Be Collected for Taxes, Duties and Fees, B-114808, 1979 WL 12213, at \*4 (Comp. Gen. Aug. 7, 1979) (concluding that statutory provisions did not “establish permanent indefinite appropriations”). The same is true of the two comptroller general opinions cited by Professor Bagley. See Architect of the Capital, B-303961, 2004 WL 2793171, at \*1–7 (Comp. Gen. Dec. 6, 2004) (deciding whether the Anti-Deficiency Act prohibited payment of benefits to temporary employees in light of a statutory provision authorizing such payments “notwithstanding any other provision of law”); Ernest F. Hollings, Chairman, Subcomm. on Commerce, Justice, State, the Judiciary Comm. on Appropriations, U.S. Senate, B-227658, 1987 WL 102883 at \*3 (Comp. Gen. Aug. 7, 1987) (describing 50 Comp. Gen. 863 (1971) as holding that “authorizing legislation, standing alone, cannot make available expired unobligated balances”). Professor Bagley also cites *Stitzel-Weller Distillery v. Wickard*, 118 F.2d 19, 24 (D.C. Cir. 1941). That strange case employs confusing language in citing 31 U.S.C. § 1301(d), which leaves unclear whether the court understood the question as concerning (a) whether an appropriation had been made or (b) the scope of an existing appropriation. Were the latter reading so clear as to amount to a holding, it would provide precedential support for the pro-disappropriation clear statement rule from the D.C. Circuit. Compare *Stitzel-Weller Distillery*, 118 F.2d at 23 (describing the plaintiff in the case as arguing that a particular appropriations enactment “conferred upon” the government the power to make a particular disbursement), with *id.* at 23–24 & n.4 (“[T]he Act does not confer this authority, for there is certainly nothing in . . . the Act which can be said specifically to declare the purpose of Congress to appropriate the sum in issue . . . ; and without such ‘specific’ appropriation, there can be no withdrawal of the money.” (emphases added) (quoting Act of June 30, 1906, Pub. L. No. 59-383, § 9, 34 Stat. 697, 764)). The Court in *Stitzel-Weller* gave no indication that it had considered how the predecessor to section 1301(d) should be interpreted, or even if the provision raised an interpretive question, and the case has never been cited by a court interpreting section 1301(d).

341. E.g., *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 370 F.3d 1214, 1221–22 (D.C. Cir. 2004) (faulting agency for failing to consider that although expenditure

Indeed, there is a reasonable legal argument that courts should apply the opposite interpretive presumption, favoring the availability of appropriations necessary to honor clear legal commitments. This argument is based in the canon against implied repeals, one of the most firmly established canons in modern law.<sup>342</sup> While the conclusion that the government must break a legal commitment because no appropriation is available to honor it is different than the conclusion that the legal commitment has been repealed,<sup>343</sup> the rationales for the presumption apply to disappropriation as well—especially disappropriation of mandatory legal commitments.<sup>344</sup>

The first and original rationale for the presumption was a majoritarian concern that, when faced with statutory ambiguity, courts should favor the interpretation that gives effect to the legislatively expressed will of Congress.<sup>345</sup> When the will of Congress is known, “[t]he courts are not at

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was not “expressly authorized in an appropriations act” it was “implicitly authorized” by that act (quoting *Maj. Gen. Anton Stephan, Commanding Officer, D.C. Militia*, 6 *Comp. Gen.* 619, 621 (1927)); *GAO Red Book, Third Edition*, supra note 22, ch. 4, at 20 (claiming that the “necessary expense” doctrine reads appropriations as available for certain expenditures “by implication”); see also *id.*, ch. 4, at 14 (describing a principle of appropriations law that preexisting appropriations are read to be available by implications for newly enacted duties).

342. See *Branch v. Smith*, 538 U.S. 254, 273 (2003) (“We have repeatedly stated . . . that absent ‘a clearly expressed congressional intention,’ ‘repeals by implication are not favored.’” (citations omitted) (first quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974); then quoting *Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm’n*, 393 U.S. 186, 193 (1968)); Karen Petroski, *Rethorizing the Presumption Against Implied Repeals*, 92 *Calif. L. Rev.* 487, 511 (2008) (describing the Supreme Court’s application of the presumption as a “virtual rule against implied repeals”).

343. See *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1325 (Fed. Cir. 2018) (stating that disappropriation creates the “fiscal limbo of an account due but not payable” (internal quotation marks omitted) (quoting *United States v. Will*, 449 U.S. 200, 224 (1980)); *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016) (stating that “congressionally imposed mandates . . . trump discretionary [agency] decisions”); *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1056 (10th Cir. 2011) (stating that disappropriation creates a “contradiction” of law that the government must violate); *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 182 (D.D.C. 2016) (holding that disappropriation was “a failure to appropriate, not a failure in drafting”).

344. The first-mentioned rationale for applying the presumption against repeals by implication as an anti-disappropriation presumption only applies to commitments associated with statutory mandates that form “obligations” within the meaning of governing statutes. See, e.g., 31 U.S.C. § 1501(a) (requiring that “obligations” of the U.S. government be supported by documentary evidence); *Status of Impounded Food Stamp Program Appropriations*, 54 *Comp. Gen.* 962, 1975 WL 11732, at \*1–6 (1975) (discussing obligations). But the others apply to other forms of commitments as well. See *GAO Red Book, Third Edition*, supra note 22, ch. 7, at 45 (discussing obligations); cf. supra notes 54–58 and accompanying text (describing senses of “entitlement” and use of the word commitment).

345. *Dr. Foster’s Case* (1614) 77 Eng. Rep. 1222, 1232 (KB) (Coke, J.) (“[A]s Acts . . . are established with such gravity, wisdom and universal consent of the whole realm . . . they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act . . . be abrogated.”).

liberty to pick and choose among congressional enactments.”<sup>346</sup> An anti-disappropriation presumption reconciles ambiguous appropriations—those for which the traditional tools of interpretation do not make clear the appropriating Congress’s will—with the will of the committing Congress as expressed in a clear underlying permanent legislative commitment. When such an interpretation is possible, a court frustrates the known legislative will as expressed in the underlying commitment by interpreting the ambiguous appropriation as unavailable to honor it.

The second primary rationale for the presumption against repeals by implication is also implicated by disappropriation. This second rationale is an empirical assumption about legislative behavior and omniscience, namely, that “laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subjects.”<sup>347</sup> Therefore, “it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable.”<sup>348</sup> This means assuming that Congress enacts appropriations provisions with full awareness of any legal commitments to pay in need of funding, in which case it follows that Congress would speak clearly if it intended to frustrate those underlying commitments.

b. *An Anti-Disappropriation Presumption Would Reduce the Likelihood of Disappropriation and Prevent Blame Shifting to the Judiciary.* — Given the choice of interpretive approach, courts should favor a presumption against disappropriation rather than deference to the executive or an anti-disappropriation presumption because doing so will tend to reduce the likelihood of disappropriation without interfering with the inter- and intra-branch tugs of war that produce dissonance and disappropriation.<sup>349</sup> In short, courts should presume when interpreting ambiguous appropriations that Congress always pays its debts.<sup>350</sup> A clear statement rule will make it easier for Congress or the executive to predict how the judiciary would read any particular legislative enactment,<sup>351</sup> thereby reducing uncertainty and reducing the risk of accidental disappropriation. But it will not

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346. *Mancari*, 417 U.S. at 551.

347. *Bowen v. Lease*, 5 Hill 221, 226 (N.Y. Sup. Ct. 1843).

348. *Id.*; see also *Rutherford v. Greene’s Heirs*, 15 U.S. (2 Wheat.) 196, 203 (1817) (Marshall, C.J.) (“Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt.”).

349. See *supra* section IV.D.2 (explaining that principles of noninterference and mitigation support courts favoring such approaches).

350. Cf. *Martin*, *supra* note 196, at 684 (“A Lannister always paid his debts.”).

351. See *Finley v. United States*, 490 U.S. 545, 556 (1989) (“What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”); Richard M. Re, *Clarity Doctrines*, 86 U. Chi. L. Rev. 1497, 1516–21 (2019) (noting that a primary justification of clear statement rules is to increase the predictability of judicial decisions).



prevent a legislative coalition that wants to disappropriate (or appropriate) from achieving that objective.

Deference to the executive is undesirable for essentially these same reasons, but with a twist. In addition to adding uncertainty about the impact of any given legislative enactment, deference gives the executive access to private information it would otherwise not have had, namely, information about how it will interpret a commitment or appropriation in practice. That increased access to private information, as with increased uncertainty, will tend to heighten the risk of bargaining failure that produces disappropriation.<sup>352</sup> Moreover, importing deference into interpreting appropriations can hardly be said to avoid interference with coordinate branches; it directly favors the executive, blurring the lines of political accountability and upending the maxim that “absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.”<sup>353</sup>

Finally, an anti-disappropriation presumption—a presumption that an ambiguous appropriation needed to honor a commitment is available to do so—is preferable to a pro-disappropriation presumption for two reasons. First, the former avoids the possibility of a worst-case scenario accidental disappropriation but the latter does not.<sup>354</sup> Try though Congress might, ambiguities in legislation are inevitable. A presumption that favors disappropriation will turn these ambiguities into systemic disruption that carries no benefit.<sup>355</sup> Second, a presumption against disruption will prevent Congress from using intentional ambiguity to delegate to courts the power to disappropriate and, by so doing, shift blame for disappropriation from Congress to the courts. A pro-disappropriation presumption would do the opposite.

2. *Civil Servants Are a Potential Alternative to Congress to Enforce Disappropriation.* — A common theme in disappropriation controversies has been congressional concern about unlawful executive refusals to halt disappropriated programs. In the risk corridors and cost-sharing reductions disappropriations, members of Congress alleged that the executive was doing this by expending money without an appropriation.<sup>356</sup> In the 2018–2019 shutdown, members of Congress alleged that the

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352. See *supra* notes 312–319 and accompanying text (explaining that uncertainty and private information produce bargaining failure).

353. *Hart’s Case*, 16 Ct. Cl. 459, 484 (1880).

354. See *supra* section V.A.1 (noting that *ex post* judicial review has introduced uncertainty and a risk of accidental disappropriation).

355. See *supra* section V.A.1.

356. See *supra* sections II.A.2–.3.

executive was maintaining programs, such as the processing of tax refunds, by using its commitment power in violation of the Anti-Deficiency Act.<sup>357</sup>

In *House v. Burwell*, the district court endorsed the House's argument that it had standing as an entity to enforce disappropriation against executive resistance on the theory that the executive would otherwise have no reason to respect the legislative appropriations power, given the prohibition on taxpayer standing.<sup>358</sup> Critics of the district court's decision have focused on the important doctrinal question of whether existing precedent forecloses this enforcement mechanism.<sup>359</sup>

Enforcement of disappropriation against executive resistance—or even simple refusal to appropriate new funds, whether or not necessary to honor a commitment<sup>360</sup>—is an important question. But legislative standing is a counterproductive and incomplete enforcement mechanism, especially when compared to the more promising means of empowering civil servants. Courts should therefore hesitate to stretch to permit legislative standing to enforce disappropriation, whether because doing so would be unwise or because the viability of alternative legislative enforcement mechanisms itself counsels against judicial involvement.<sup>361</sup>

a. *Legislative Standing Is a Counterproductive and Incomplete Means of Enforcement.* — Viewed in light of the interaction between the powers of the purse developed in this Article, legislative standing is problematic for four reasons. First and foremost is the problem discussed above, that ex post judicial intervention creates the very real risk of a worst-case scenario accidental disappropriation, inevitably adding uncertainty about the effects of potential legislative action or inaction.<sup>362</sup>

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357. See Warner Letter, *supra* note 189, at 2 (questioning the Internal Revenue Service's recall of furloughed employees to process tax refunds during the 2018–2019 shutdown).

358. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76–77 (D.D.C. 2015); cf. *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (“A taxpayer will have standing . . . when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.”).

359. See Michael Sant’Ambrogio, *Legislative Exhaustion*, 58 *Wm. & Mary L. Rev.* 1253, 1267–70 (2017) (describing debates about the scope of the holding in *Raines v. Byrd*, 521 U.S. 811 (1997), which denied individual members of Congress standing to challenge the Line Item Veto Act).

360. Cf. Tessa Berenson, *The 4 Legal Challenges Facing Trump’s Emergency Declaration*, *Time* (Feb. 19, 2019), <http://time.com/5532449/donald-trump-emergency-declaration-lawsuits/> [<https://perma.cc/7TDY-ZYW6>] (describing the potential for legislative suits to challenge President Trump’s effort to build a border wall using reprogrammed funds).

361. See generally Sant’Ambrogio, *supra* note 359, at 1314–33 (developing a “legislative exhaustion” principle that would dictate judicial refusal to grant legislators standing when the legislative branch has failed to utilize available nonjudicial means to obtain relief).

362. See *supra* section V.A.1.

Second, legislative standing only offers a way to police executive expenditures. Even the district court that held the House had standing to challenge violations of the Appropriations Clause in *House v. Burwell* held that precedent foreclosed legislative standing to challenge statutory (as opposed to constitutional) violations.<sup>363</sup> But as Part II explained, expenditure is just one power of the purse. Shutdowns have seen the executive returning to the use of the executive commitment power as a means of mitigating disappropriation, employing staff and running programs into arrears despite the absence of appropriations.<sup>364</sup> Legislative standing to enforce the Appropriations Clause does nothing to police this form of executive resistance to disappropriation, because, if unlawful, it violates the Anti-Deficiency Act that Congress enacted in the nineteenth century to reign in executive commitments,<sup>365</sup> not the Appropriations Clause.

Third, the threat of a legislative lawsuit has little if any deterrent effect because there is no penalty associated with a successful legislative suit (other than being ordered to halt) and the likelihood of enforcement is very small (because it requires a majority vote from a house of Congress, and then a sympathetic court).<sup>366</sup> From the executive's perspective under a realpolitik frame, why not attempt an impermissible expenditure or commitment even if there is only a small probability of success, when the "losing" scenario (being ordered to halt) is the same as the outcome of not making the attempt?

Last, legislative standing circumvents enforcement by the Comptroller General. The Comptroller General routinely issues nonbinding but politically influential determinations regarding the lawfulness of potential executive expenditures or commitments, as it did in the risk corridors case.<sup>367</sup> But the GAO's rules prevent the Comptroller General from weighing in on the availability of an appropriation that is in litigation, so legislative standing short-circuits this alternative route.<sup>368</sup>

*b. Civil Servants Are Well Positioned to Enforce Compliance with Legal Limits.* — As in other domains, civil servants can and do play an influential role in enforcing executive compliance with legal limits relating to

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363. *House*, 130 F. Supp. 3d at 75–76.

364. See *supra* notes 188–195 and accompanying text.

365. 31 U.S.C. § 1341(a)(1) (2012); see also *supra* notes 50–52 and accompanying text (introducing the Anti-Deficiency Act).

366. See *House*, 130 F. Supp. 3d at 71 n.21 (noting that an institutional injury in fact inures to an "institution" and not smaller groups (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015))); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169, 170 (1968) (explaining that the deterrence effect of law depends in part on the likelihood of enforcement and magnitude of sanction).

367. GAO Risk Corridors Opinion Letter, *supra* note 117, at 1.

368. GAO Red Book, Fourth Edition, *supra* note 338, ch. 1, at 16.

disappropriation, reflecting the “internal separation of powers.”<sup>369</sup> Civil servants can police unlawful executive commitments, not just unlawful expenditures. Indeed, the Anti-Deficiency Act gives them a strong reason to do so, prohibiting both executive expenditures and commitments in advance of appropriations and including criminal penalties for staff or officials who violate it.<sup>370</sup> The law is subject to a five-year statute of limitations, so no official or staff member can count on the current President or their Attorney General insulating against subsequent suits for violating the Anti-Deficiency Act.<sup>371</sup> Moreover, because they can be consulted while the executive and legislative branches are still negotiating over a legislative enactment (or inaction), their support for (or concern about) a particular expenditure or commitment can be assessed with certainty *ex ante*, so enforcing through civil servants reduces the risk of accidental disappropriation.<sup>372</sup>

Although the primary enforcement role of civil servants operates *ex ante*, courts can empower them by being more willing to find such lawsuits brought in the event of executive resistance justiciable *ex post*. When, despite the Anti-Deficiency Act, federal employees are forced to work during a shutdown due to the executive’s use of its commitment power to mitigate the consequences of shutdowns, and in a way they believe is unlawful, standing is straightforward: The employees are injured by being forced to work.<sup>373</sup> While shutdowns to date have been too short to resolve such suits,<sup>374</sup> there is a reasonable argument that such suits are “capable of repetition yet evading review.”<sup>375</sup> Moreover, courts could consider suits by federal employees involved in potentially unlawful expenditures on the

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369. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *Colum. L. Rev.* 515, 540–47 (2015) (describing civil servants’ role of promoting agency compliance with legal norms). For additional background information on the role of civil servants, see generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2331–35 (2006).

370. 31 U.S.C. § 1341(a)(1) (prohibition); *id.* § 1350 (criminal fines and up to two years’ imprisonment).

371. See 18 U.S.C. § 3282(a) (2012) (setting a generally applicable five-year statute of limitations for federal crimes).

372. On the particular role of fiscal disbursement officers, see GAO Red Book, Third Edition, *supra* note 22, ch. 9, at 14–15.

373. See, e.g., *Nat’l Treasury Emps. Union v. United States*, No. 19-50 (RJL), 2019 WL 266381, at \*1–2 (D.D.C. Jan. 18, 2019) (explaining why the court can hear the plaintiffs’ claims).

374. See *supra* note 195 and accompanying text.

375. The “capable of repetition yet evading review” exception to mootness “applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Every prior shutdown has been too short to fully litigate the executive’s interpretation of the Anti-Deficiency Act exceptions, and shutdowns seem bound to recur. See *supra* section II.B.

basis of the Hobson's choice facing such employees between violating the Anti-Deficiency Act or insubordination.<sup>376</sup> Finally, abstaining from stretching to find legislative standing for Congress to enforce disappropriation may facilitate development of such alternative—and more effective—enforcement mechanisms, as there is a risk that legislative suits “may impede the formation of new conventions that would better discipline executive lawbreaking.”<sup>377</sup>

3. *Expedited Declaratory Relief when the Executive's Claim of Disappropriation Is Disputed.* — The second iteration of the cost-sharing reductions disappropriation saw an allegation that the executive was refusing to honor a commitment despite the existence of a valid appropriation, raising the question of enforcement of commitments against disputed executive claims of disappropriation. In *California v. Trump*, eighteen states sought a lightning-fast resumption of cost-sharing reduction payments, seeking a nationwide preliminary injunction requiring the Secretary to resume the payments temporarily while they sought final resolution of the controversy.<sup>378</sup> Ten days later, the district court held that the preliminary injunction factors did not support their request because it was not convinced that resuming payments at that point would do more good than harm.<sup>379</sup>

At first glance, the speed of an emergency motion for a nationwide injunction may seem desirable in contrast to the too-little-too-late damages pursued in other cases because of the speed at which it could forestall the harm done to disappointed recipients when the executive erroneously claims disappropriation. On closer inspection, however, there are two difficulties that counsel against this approach.

First, as a legal matter, there is a strong argument that nationwide preliminary injunctive relief forcing the government to expend funds it believes are not appropriated is unconstitutional. A preliminary injunction rests on a determination of the “likelihood” of success on the merits and so does not entail a determination by a court that funds are or are not appropriated.<sup>380</sup> Thus, such relief raises the possibility that a court might order an entitlement program or other commitment to continue on an emergency basis during a proceeding based on its initial conclusion that

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376. See *Crane v. Napolitano*, 920 F. Supp. 2d 724, 738–40 (N.D. Tex. 2013) (holding that ICE agents had standing because they feared that, by implementing the Deferred Action for Childhood Arrivals program, they would be complicit in violating a federal statute).

377. Bagley, *Legal Limits and Implementation*, *supra* note 200, at 1751.

378. See 267 F. Supp. 3d 1119, 1126 (N.D. Cal. 2018) (describing the lawsuits and their claims).

379. See *id.* at 1133–34 (explaining why the decision to terminate CSR payments will not harm the majority of exchange insurance buyers).

380. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24–25 (2008) (presenting factors for granting a preliminary injunction).

there is a “likelihood” that the program is appropriated, only to later conclude it was not. Funds in that case would have flowed from the Treasury for months or more despite the legal unavailability of an appropriation by all accounts.<sup>381</sup> It is difficult to see how such a possibility can be squared with the Appropriations Clause or persistent judicial holdings that courts have no power to order payments absent an appropriation.<sup>382</sup>

Second, the temporary nature of preliminary relief only prolongs uncertainty about the operation of a program. Imagine a family depending on the government honoring its payment commitments for health care coverage. Such a family could not “bank” on a *temporary* court order resuming payment; rather, to really rely on a judicial order of payment, that order would need to be final, and all appeals exhausted.<sup>383</sup> And the greater the lingering confusion about whether Congress must actually act in order to honor a commitment, the greater the likelihood that Congress will fail to act.<sup>384</sup>

There is nonetheless something courts could do to reduce the uncertainty associated with any claim that the executive has wrongly concluded that a program is disappropriated. Courts could consider claims of unlawful executive disappropriation in the context of expedited motions for summary judgment in an Administrative Procedure Act action for declaratory relief, with the opening motion filed by plaintiffs simultaneously with the complaint.<sup>385</sup> Because such an action would merely seek a

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381. The Judgment Fund appropriation would not be available in such a case as a backstop because that appropriation is available only for “final” judgments, among other limitations. 31 U.S.C. § 1304(a) (2012); see also *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1128 (Fed. Cir. 2004) (elaborating on the definition of a final judgment); *McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983) (explaining the statutory meaning of a final judgment); Paul M. Trueger, B-165766, 1969 WL 4540, at \*1 (Comp. Gen. Jan. 17, 1979) (concluding that the Judgment Fund was not available for intermediate payments to a second tier contractor).

382. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424–25 (1990) (explaining that “[m]oney may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute”); *Keepseagle v. Perdue*, 856 F.3d 1039, 1060 (D.C. Cir. 2017) (Brown, J., dissenting) (“[N]either Congress nor the Executive can agree to waive the Appropriations Clause.” (quoting *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991))), cert. denied sub nom. *Mandan v. Perdue*, 138 S. Ct. 1326 (2018) (mem.); see also supra note 38 (collecting sources).

383. E.g., *Nat’l Assoc. of Ins. Comm’rs*, supra note 122, at 10 (precluding insurers from treating expected payment as an asset in light of risk corridors disappropriation).

384. See supra notes 313–313 and accompanying text (explaining how uncertainty and private information produce bargaining failure).

385. See 5 U.S.C. § 706 (2012); 28 U.S.C. § 2201 (2012); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209–11 (1988) (permitting a prospective order requiring payment of Medicare reimbursements as required by statute in an APA case); *Texas v. United States*, 340 F. Supp. 3d 579, 592, 619 (N.D. Tex. 2018) (converting an emergency motion for nationwide preliminary injunction into a motion for summary judgment, and issuing declaratory relief); Samuel Bray, *The Myth of the Mild Declaratory Judgment*, 63 *Duke L.J.* 1091, 1093–94 (2014) (contrasting injunctive and declaratory relief generally).

declaration on a disputed question of law—whether or not Congress funded the program—such a motion could quickly and finally be resolved without the administrative record.<sup>386</sup>

4. *In Considering Damages Claims, Courts Mindful of Upstream Impacts Should Favor Approaches that Avoid Interference and Promote Predictability.* — Finally, in some cases Congress may clearly fail to appropriate funds necessary to honor an arguable legal commitment to pay and either the executive or the judiciary will bring payments to a halt. In such a case, frustrated recipients can be expected to call upon courts requesting an order of damages payable from the permanent indefinite Judgment Fund appropriation. This is arguably what happened in the contract support costs case and is arguably what is, at this writing, still happening in the risk corridors disappropriation case.

Courts confronting such cases have faced three categories of interrelated but distinct questions. First, was the original enactment really a legal commitment to pay? Second, if so, did Congress merely fail to appropriate the necessary funds (disappropriate the commitment), or did it simultaneously repeal, perhaps by implication, the underlying commitment? Third, if the original enactment was a legal commitment to pay and the appropriations enactment (or lack of enactment) did not repeal that commitment, is it a “money mandating” statute that empowers the courts to hear the case and order damages (or does another such statute apply)?

Answering these questions as to any particular case is beyond this Article’s scope. This Article’s study of disappropriation nonetheless offers guidance. For the reasons explained above, in adjudicating disappropriation controversies, courts should seek to minimize interference with the political branches and reduce uncertainty surrounding the potential impacts of future disappropriations. These goals pull attention away from the ex post question of the availability of damages in any particular case. As discussed above, while damages do partially compensate frustrated recipients ex post, they can exacerbate the unfairness of disappropriation and fall far short of making recipients whole. Ultimately, courts may deem balancing these considerations as up to Congress. Regardless, the goals of minimizing interference and reducing uncertainty require focus on how the *way* courts adjudicate damages claims in materialized disappropriation controversies may influence the legislative and executive branches in making decisions about potential future disappropriations. From this upstream, ex ante perspective, courts should ask, “How would a particular judicial approach to resolving the damages question in the case at bar impact the functioning of the political branches or the likelihood and severity of a potential future disappropriation of one of the scores of existing appropriated entitlements?”

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386. See, e.g., *Adirondack Med. Ctr. v. Sebelius*, 891 F. Supp. 2d 36, 44–45 (D.D.C. 2012) (resolving a purely statutory APA claim without an administrative record).

Asking this question produces concrete insights. For example, the goal of minimizing interference with the political branches weighs against considering the scorekeeping treatment of particular commitments or appropriations enactments in the legislative and budget processes in resolving damages claims. Scorekeeping serves an essential informational function in the federal budget process, and its goal is to accurately assess the anticipated revenues and liability of the federal government.<sup>387</sup> If courts weigh scorekeepers' treatment of legislation as a liability *vel non* as relevant to the availability of damages in one case, then when assessing potential future disappropriations, scorekeepers and policymakers in the legislative and executive branches may believe that the scorekeepers' judgments could become self-fulfilling.<sup>388</sup> This creates the risk of unnecessarily inserting considerations other than accuracy—in particular, the goal of either increasing or decreasing the likelihood of a future damages award—into the process by which scorekeepers form those judgments.

As another example, the goal of reducing uncertainty about the potential impacts of disappropriation weighs against considering legislative history or obscure patterns perceived in the steps of the legislative process in assessing damages claims—as the Federal Circuit and Court of Federal Claims have done.<sup>389</sup> Considering such extratextual indicia of meaning tends to make the availability of a damages award less predictable *ex ante* (especially when legislation is first proposed and drafted, before legislative history even exists) and so tends to increase the risk of disappropriation and decrease recipients' ability to predict and rely on their expectation of a damages award.

Relatedly, the goal of reducing uncertainty also weighs against the approach adopted by the Supreme Court in *Ramah*, in which the application of a clear-statement rule hinged on whether a legislative commitment entailed a “contract.”<sup>390</sup> The Court's rationale for this rule—to permit

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387. See Allen Schick, *The Federal Budget: Politics, Policy, and Process* 154–55 (3d ed. 2007) (explaining how the federal government uses scorekeeping).

388. See *id.* at 63 (noting that scorekeepers “ha[ve] a strong interest in upholding the integrity of the budget process, but [cannot] avoid some entanglement in the politics of budgeting”).

389. See *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1320–22 (Fed. Cir. 2018) (describing Congress's reliance on an excerpt from a CBO report); *id.* at 1323 (determining that the “central issue” in determining whether disappropriation also precludes right to relief is “Congress's intent”); *id.* at 1327 (looking to the fact that riders were enacted in response to GAO opinion as an indication of congressional intent to preclude right to relief); *id.* at 1328 (“[T]he question is what intent was communicated . . . .”); *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 50 (2019) (finding that “the congressional inaction in this case may be interpreted . . . as a decision not to suspend or terminate” entitlement to damages award).

390. See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (endorsing the view that “the Anti-Deficiency Act's requirements ‘apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government.’” (quoting *Dougherty ex rel Slavens v. United States*, 18 Ct. Cl. 496, 503 (1883))).



contractors to rely on government commitments without having continually to scrutinize legislation and administrative activity to make sure that funding remains available<sup>391</sup>—applies with equal force to any recipient of a commitment from the government. Moreover, limiting the applicability of clear-statement rules for deciding the availability of a damages remedy in the aftermath of disappropriation based on fact-dependent questions—such as whether a “contract” was formed—forces plaintiffs to attempt to make out factually and procedurally intensive contract claims in order to obtain the benefit of such interpretive approaches.<sup>392</sup> This makes damages-award litigation longer, more involved, and less predictable than it would otherwise be, exacerbating the disparate impact of disappropriation on small businesses and individuals.<sup>393</sup>

To take as an example one of the scores of appropriated entitlements susceptible to the risk of future disappropriation, Medicaid beneficiaries are no better situated to monitor legislative enactments and agency expenditures to prepare in advance for disappropriation than are government contractors. And Medicaid beneficiaries are no better able to manage a surprise halt in the program, of course. In the absence of some expressed congressional intent to favor a particular type of commitment, or a justification for doing so that is related to the destructive and unfair consequences of disappropriation, courts applying clear-statement rules favoring damages in the aftermath of disappropriation should not favor or disfavor particular forms of commitments. They should especially not do so in ways that slow down and reduce the predictability of *all* disappropriation damages cases and thereby exacerbate the harms of disappropriation.

#### CONCLUSION

ACA “sabotage,” the record-breaking 2018–2019 shutdown, and other recent headline-grabbing bureaucratic controversies are manifestations of the same emergent legal phenomenon, namely, congressional failure to appropriate funds necessary to honor a commitment in permanent legislation. Such “disappropriations” are only one probabilistic consequence of the fact that Congress has enacted scores of entitlements and other commitments in permanent law that are dependent for their operation upon periodic temporary appropriations. The resulting dissonance between Congress’s legislative power (exercised permanently) and its appropriations power (exercised temporarily) not only creates a risk of disappropriation but also preserves an enduring sphere of legislative influence and majoritarian control.

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391. *Id.* at 193–94 (describing the Government’s obligation to pay the contract support costs).

392. See, e.g., *Moda*, 892 F.3d at 1329–30 (rejecting the plaintiff’s contract claim on the basis that the government did not intend to enter into a contract).

393. See *supra* section III.B.2 (describing disparate impact).

The interaction between dissonance, disappropriation, and the balance of powers has broad theoretical implications: It raises or reconceptualizes constitutional questions, warrants new considerations for the design of legislative commitments, and provides reason for caution about scholarly proposals to prevent shutdowns by financially penalizing legislators. This interaction also has concrete applications for courts called upon to adjudicate disappropriation controversies. Although many ways of reducing the harms of disappropriation also interfere with the balance of powers, preventing disappropriation by reducing the likelihood of bargaining failure does not. Courts should endeavor to do so by favoring judicial approaches that reduce uncertainty and private information about the effects of potential disappropriations. In practice this means courts should adopt an interpretive presumption against disappropriation, empower civil servants rather than Congress to enforce disappropriation, reject nationwide preliminary injunctions in favor of final declaratory relief, and adjudicate requests for damages in the aftermath of disappropriation in ways that minimize *ex ante* uncertainty and interference with the political branches.

