THE ROLE OF COURTS IN PROTECTING CONGRESS'S POWER OF THE PURSE

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Abstract

In response to states' challenge to President Biden's student loan forgiveness program, the Supreme Court held that it could review whether the program was statutorily authorized and then scrutinized whether Congress approved this specific massive spending initiative. This article explores how consistent application of this precedent could protect Congress's power of the purse against future presidential decisions involving major expenditures not explicitly authorized by Congress.

When the Trump Administration previously invoked budgetary transfer statutes to reallocate funds toward border wall construction, the Supreme Court questioned whether the plaintiffs could obtain a judicial remedy but never ruled on the merits. But when the Biden Administration invoked a federal student loan modification statute to cancel certain student loans, the Supreme Court established that when a presidential administration relies on a statute providing seemingly broad discretion to spend government funds in a manner never specifically authorized by Congress: (1) the President's invocation of statutory authority is reviewable, as long as a plaintiff is able to establish potential harm as a result of the spending decision, and (2) courts should carefully review whether the statute the executive branch cited explicitly authorized its program, considering the program's monetary cost and how this program compares to prior invocations of the statute. This article analyzes how courts should apply this liberal approach to justiciability and rigorous scrutiny of whether explicit statutory authorization exists when deciding whether to invalidate future presidential spending decisions that lack congressional sanction.

I. INTRODUCTION

In 2019, a dispute between President Trump and Congress over funding for border wall construction ended with Congress authorizing only a fraction of the funds requested by the President.[1] President Trump then announced he would "take Executive action" to secure additional funds above what Congress appropriated[2] and declared a national emergency to access additional funds.[3] In lawsuits that followed, a district court entered a nationwide injunction blocking the Trump Administration from using the transferred funds for border wall construction.[4] The Supreme Court stayed the injunction pending resolution of the merits because it determined the government had sufficiently shown plaintiffs had no cause of action to obtain review of the transfer of funds.[5] The Supreme Court eventually granted certiorari on the question of whether plaintiffs had a cause of action,[6] but it never rendered a decision on the merits[7] after the Biden Administration indicated it would no longer spend funds on border wall construction.[8]

In 2022, President Biden announced a student loan forgiveness plan to fulfill his campaign promise to provide student debt relief.[9] The Secretary of Education then cited the COVID-19 pandemic to invoke a statute that allowed the Secretary to waive or modify student loans in connection with a national emergency in order to cancel roughly $430 billion of federal student loan balances.[10] This time, a district court initially rejected the state plaintiffs'

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1. *See* Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html [https://perma.cc/92VB-SKMJ]; Sierra Club v. Trump, 379 F. Supp. 3d 883, 892-94 (N.D. Cal. 2019) *aff'd*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom.*, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (mem.).

2. *President Donald J. Trump's Border Security Victory*, TRUMP WHITE HOUSE ARCHIVES: FACT SHEETS (Feb. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-border-security-victory/ [https://perma.cc/7XD4-F4WK].

3. *Id.*; *see* Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019).

4. Sierra Club v. Trump, 379 F. Supp. 3d 883, 928 (N.D. Cal. 2019).

5. Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (mem.) (granting stay of injunction pending resolution of merits).

6. *See* Petition for a Writ of Certiorari at 16–17, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (No. 20-138).

7. *See* Biden v. Sierra Club, 142 S. Ct. 46, 46 (2021) (mem.).

8. Motion of the Petitioners to Hold the Briefing Schedule in Abeyance & to Remove the Case from the February 2021 Argument Calendar at 3, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (No. 20-138).

9. *Fact Sheet*: *President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, BIDEN WHITE HOUSE ARCHIVES (Aug. 24, 2022) [hereinafter *Fact Sheet: Student Loan Relief*], https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ [https://perma.cc/5ZTR-PUT7].

10. *See* Biden v. Nebraska, 600 U.S. 477, 487–88 (2023).

theory of standing,[11] but the Supreme Court held that a state had standing to challenge the debt forgiveness program based on harm to a student loan servicer created by state statute.[12] Without identifying the state plaintiff's cause of action, the Court held that the Secretary lacked statutory authority to forgive the loans given the absence of "clear congressional authorization" for the program.[13]

These two cases arose in separate presidential, reflecting the current trend of presidents increasingly instructing their Administrations to rely on seemingly broad statutory authority to access government funds and execute programs that Congress never explicitly authorized.[14] In the case the Supreme Court decided on the merits, it indicated that courts should play an active role in protecting Congress's budget priorities against unauthorized presidential spending decisions.[15]

Using the Court's student loan decision as a starting point, this article analyzes the Court's modern framework for reviewing spending disputes. In particular, the Court employed a lenient approach to determine that a challenge to executive spending was justiciable and an exacting review to determine whether the program was explicitly authorized by statute. This article then explores how court can use this precedent to review future challenges to presidential spending decisions alleged to exceed statutory

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11. Nebraska v. Biden, 636 F. Supp. 3d 991, 1002 (E.D. Mo. 2022), *cert. granted before judgment*, 143 S. Ct. 477 (2022), *rev'd and remanded*, 600 U.S. 477 (2023).

12. *See* Biden v. Nebraska, 600 U.S. at 489.

13. *See id.* at 506.

14. See *infra* Section IV.A for a discussion of the general increase in executive power. The President has generally resisted congressional checks on executive power. *See, e.g.*, *Restoring Checks on Executive Power*, CREW (Dec. 2, 2020), https://www.citizensforethics.org/reports-investigations/crew-reports/restoring-checks-on-executive-power/ [https://perma.cc/Y7GF-BQ3A]. Executive power in the realm of national security has also generally increased since September 11, 2001. *See, e.g.*, *4 Ways Presidential Power Has Changed Since 9/11*, AM. UNIV.: SCH. OF PUB. AFFS. (Sept. 8, 2016), https://www.american.edu/spa/news/presidential-power-since-sept11-09082016.cfm [https://perma.cc/T3J3-XJCY]; Madeleine Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, TIME (Sept. 11, 2021, at 07:00 ET), https://time.com/6096903/september-11-legal-history/ [https://perma.cc/9WN2-CD3U]; Russ Feingold, *It's Time to Tear Up the Executive Branch's Blank Check*, BRENNAN CTR. FOR JUST. (July 22, 2021), https://www.brennancenter.org/our-work/analysis-opinion/its-time-tear-executive-branchs-blank-check [https://perma.cc/E36F-PQVD].

15. *See* Biden v. Nebraska, 600 U.S. at 506–07. This article considers loan forgiveness a spending decision because loans incur a cost to the government, calculated at the time the loan is disbursed using the expected net cash flows over the full life of the loan. Federal Credit Reform Act of 1990, 2 U.S.C. § 661a(5)(B). Cancellation of expected loan repayments constitutes an increased cost to the government. *See* Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Hon. Richard Burr, Ranking Member, S. Comm. on Health, Educ., Lab., & Pensions, and Hon. Virginia Foxx, Ranking Member, H.R. Comm. on Educ. & Lab. 1–2 (Sept. 26, 2022) (on file with author).

authority in order to protect Congress's power of the purse. The Court has recognized that Congress retains power to shape executive action through its appropriations power even in areas where the President seemingly has exclusive authority.[16] Because spending disputes are an area in which Congress's relevant constitutional powers are relatively clear,[17] courts will not have to make any constitutional determinations between executive and legislative powers and will instead only have to decide whether Congress authorized the executive's action.[18]

Part II contextualizes the two presidential spending decisions within the constitutional separation of powers, beginning with Congress's constitutional power of the purse and its statutory delegation of certain budgetary powers to the executive branch. This section analyzes how Congress has historically crafted statutes that grant the executive branch spending flexibility to address unexpected challenges, and examines the legislative intent behind the statutes the Presidents later invoked to fund the border wall and implement student debt cancellation. This section also explores how the judiciary has traditionally reviewed challenges to executive action to better understand how this standard evolved in the border wall and student loan litigation.

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16. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 16 (2015) ("The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds." (citing U.S. CONST. art. I, § 8, cl. 1)). Note, however, that others have disputed whether Congress has exclusive power to authorize public spending. *See generally* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 (1989) (arguing that the President may constitutionally authorize the Treasury to spend public funds when Congress fails to appropriate the minimum funds necessary for him to perform his duties under Article II of the Constitution).

17. *See infra* Section II.A; U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

18. *See* McKaye Neumeister, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512, 2531 (2018). By focusing on spending disputes, this article does not discuss executive actions with budgetary implications that are challenged on other bases, like for violating individual rights. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 9–13, 18 (2020) (plurality opinion) (describing the Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for Social Security and Medicare benefits to certain childhood arrivals). The Court explained in reviewing the recission of DACA that these benefits were "an interest 'courts often are called upon to protect.'" *Id.* at 19 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)). Although legal challenges against presidential spending programs are typically brought against the administrative agency officials responsible for carrying out the President's plan, *see* Biden v. Nebraska, 600 U.S. at 506–07, this article specifically focuses on decisions made at the President's direction. As Justice Scalia once noted, parties can obtain review of the President's actions through a suit against the executive officers enforcing the President's directive. Franklin v. Massachusetts, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part). For a discussion about bringing claims directly against the President, see Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743, 1744–81 (2019).

Part III analyzes the litigation surrounding the two presidential programs. In the border wall litigation, lower courts entered a nationwide injunction that the Supreme Court stayed in an order that expressed doubts about whether plaintiffs had a cause of action.[19] In the student loan forgiveness litigation, the Supreme Court allowed a coalition of states to challenge the executive branch's program, then invalidated the executive action because such a massive spending program was not clearly authorized by statute.[20]

Part IV re-contextualizes these decisions within the modern separation of powers landscape. Today, separation of powers expresses a set of ideals against the backdrop of an increasingly powerful President directing administrative action, deepening partisan gridlock that hampers Congress's ability to check executive power in increasingly contentious spending disagreements between the President and Congress, and courts assuming a more prominent role in resolving those disputes. The Court's student loan decision exemplifies both its increased willingness to find challenges to executive action justiciable and its insistence on explicit congressional authorization for expansive executive spending.

Part V envisions how courts can consistently apply this lenient approach to justiciability and strict requirement of explicit authorization to protect Congress's power of the purse against presidential spending decisions made without congressional authorization.

II. CONTEXTUALIZING THE EXECUTIVE ACTIONS

Part II explains why these two executive actions are comparable by situating them within the historical roles of the legislative, executive, and judicial branches in shaping government spending, laying the groundwork for a subsequent analysis of the modern judicial role.

A. Congress's Power of the Purse

The congressional spending power was implicated in both President Trump's transfer of funds appropriated for other purposes to border wall construction and President Biden's cancellation of certain student loan repayment obligations. This section discusses the constitutional foundation of Congress's spending power and how it is exercised today through appropriations legislation including the laws invoked by Presidents Trump and Biden.

19. Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (mem.).
20. *See* Biden v. Nebraska, 600 U.S. at 483.

1. Constitutional Framework

Separation of powers has been justified to increase government accountability and prevent tyranny while still allowing the government to function.[21] Under the separation of powers laid out in the United States Constitution, the legislature is responsible for making laws, so legislators are accountable to their voters based on the laws they enact; the executive branch wields the executive power, which includes the power and responsibility to faithfully execute those laws; and the judiciary adjudicates disputes, which also allows courts to ensure that elected representatives follow this structure.[22] John Locke—whose works played a large role in providing a theoretical justification for the Constitution[23]—defended placing legislative authority in a large representative assembly because those members would then have to live by the laws they enacted.[24]

As James Madison explained in *The Federalist No. 48*, "the legislative department alone has access to the pockets of the people."[25] The Supreme Court and numerous scholars have found Congress's "power of the purse" to be "express through the application of several [constitutional] provisions."[26] Congress's Article I, Section 8 enumerated powers include the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by this Constitution in the Government of the United States."[27] The

21. *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 524–26 (2015); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 6–7 (6th ed. 2014); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732 (1996); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984).

22. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103, 131 (1980); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 12–13 (1994).

23. *E.g.*, Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 458 (1991).

24. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 348 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1988) (1690) (justifying the legislative power to "collective bodies of men," "by which means every single person became subject equally with other the meanest men, to those laws, which he himself, as part of the legislative, had established; nor could any one, by his own authority, avoid the force of the law").

25. THE FEDERALIST NO. 48, at 174 (James Madison) (Clinton Rossiter ed., 2003).

26. JAMES V. SATURNO, CONG. RSCH. SERV., R46240, INTRODUCTION TO THE FEDERAL BUDGET PROCESS 1 (2023).

27. U.S. CONST. art. I, § 8, cls. 1, 18. The Supreme Court has interpreted these clauses to provide Congress with authority to appropriate funds and ensure that appropriated funds are properly spent. Sabri v. United States, 541 U.S. 600, 605 (2004).

Supreme Court has determined that this "Spending Clause" allowed Congress to "set the terms on which it disburses federal funds."[28] To fund the spending that it authorizes, Congress also has the power "[t]o borrow Money on the credit of the United States."[29] Article IV's property clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[30] which the Supreme Court has interpreted to mean that the "[p]ower to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution."[31] Article I, Section 9 of the Constitution also includes what is often referred to as an "appropriations clause," which states that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[32] The Supreme Court recently clarified its longstanding "straightforward reading" of the appropriations clause to forbid the use of money otherwise destined for the Treasury unless it has been appropriated by an act of Congress.[33]

2. Appropriations Process

In line with the Constitution's instruction that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,"[34] Congress enacts appropriations legislation annually through its lawmaking process.[35] These appropriations can be either annual or permanent, with Congress generally exercising more control over agency functions dependent on annual appropriations.[36] While the Constitution establishes the procedures

28. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 216 (2022).

29. U.S. CONST. art. I, § 8, cl. 2. Others have interpreted this power to require Congress to "explicitly authorize the borrowing that its spending and taxing laws implicitly require." Neil H. Buchanan & Michael C. Dorf, *Borrowing by Any Other Name: Why Presidential "Spending Cuts" Would Still Exceed the Debt Ceiling*, 114 COLUM. L. REV. SIDEBAR 44, 49 (2014), https://www.columbialawreview.org/wp-content/uploads/2016/05/Buchanan-Dorf-Columbia-Law-Review-Sidebar-44.pdf [https://perma.cc/YKW9-MYHG].

30. U.S. CONST. art. IV, § 3, cl. 2.

31. Royal Indem. Co. v. United States, 313 U.S. 289, 294 (1941); *see* Warren v. United States, 234 F.3d 1331, 1338 (D.C. Cir. 2000) ("[T]he Government cannot abandon property without congressional authorization." (citing *Royal Indem. Co.*, 313 U.S. at 294)).

32. *E.g.*, Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990) (quoting U.S. CONST. art. I, § 9, cl. 7). Others have attributed Congress's "power of the purse" to the appropriations clause. *E.g.*, Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1344 (1988); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 725 & n.41 (2012).

33. Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416, 425–26 (2024).

34. U.S. CONST. art. I, § 9, cl. 7.

35. SATURNO, *supra* note 26.

36. *See* Matthew B. Lawrence, *Congress's Domain: Appropriations, Time, and* Chevron, 70 DUKE L.J. 1057, 1060 (2021).

for the enactment of laws which requires both bicameralism and presentment to (and generally approval by) the President,[37] the Court recently explained that the appropriations clause requires no more than "a law that authorizes the disbursement of specified funds for identified purposes."[38]

One form of government spending Congress has authorized is direct loans (government disbursement of funds to borrowers under contracts requiring repayment) and loan guarantees (government commitments to repay debt obligations to third-party lenders if borrowers default).[39] As relevant here, one such program is the Higher Education Act of 1965,[40] which currently allows the federal government to partner with over 5,500 higher-education institutions to disburse loan funds to students with a variety of repayment options.[41] The Federal Credit Reform Act of 1990 (FCRA) requires the Department of Education to estimate the lifetime costs of each year's new Direct Loans for inclusion in the President's budget.[42] Under the FCRA, the cost of a direct loan to the government is calculated at the time when the loan is disbursed, and the cost of a loan modification (whether from new legislation or the exercise of administrative discretion) is the difference in the expected cost of the loan because of the modification.[43] The FCRA provides appropriations to pay for the costs associated with all government direct loan obligations or loan guarantee commitments,[44] and individual student loan programs also receive appropriations for the sums necessary to make loans to all eligible students.[45]

In addition to authorizing government spending, Congress has used its legislative powers to limit unauthorized spending. The Miscellaneous Receipts statute, first enacted in 1849, requires government officials receiving

37. *See* U.S. CONST. art. I, § 7, cl. 2. If the President does not approve the law, it can still become law if two-thirds of both the House and the Senate decide to override the President's veto. *Id.*

38. *Consumer Fin. Prot. Bureau*, 601 U.S. at 438.

39. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2025, at 186 (2024); *see, e.g.*, *id.* at 59–61, 63 (describing federal credit programs like direct student loans, water resources project loans, and transportation infrastructure project loans).

40. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.).

41. *See* OFF. OF MGMT. & BUDGET, *supra* note 39, at 60.

42. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105365, STUDENT LOANS: EDUCATION HAS INCREASED FEDERAL COST ESTIMATES OF DIRECT LOANS BY BILLIONS DUE TO PROGRAMMATIC AND OTHER CHANGES 6 (2022).

43. 2 U.S.C. § 661a(5)(B), (D).

44. 2 U.S.C. § 661d(a).

45. *See, e.g.*, 20 U.S.C. § 1087a(a) (appropriating monies for loans to all eligible students under the William D. Ford Federal Direct Loan Program).

money for the government to deposit the money in the Treasury.[46] In 1870, Congress began prohibiting executive departments from spending in a fiscal year any amount in excess of that year's appropriations or from committing the government to pay money in the future in excess of appropriations.[47] Today's Anti-Deficiency Act prescribes both civil and criminal penalties when agency officers or employees make or authorize expenditures in excess of appropriations.[48] The act has generally served its intended purpose of "preventing agencies from overspending or . . . spending [funds] in unauthorized ways."[49]

B. Presidential Spending Authority

Presidents Trump and Biden both promised to deliver voters their challenged policies before they were elected.[50] When the Presidents were unable to obtain legislative authorization for their desired policies,[51] they

46. Act of Mar. 3, 1849, ch. 110, 9 Stat. 398 (codified as amended at 31 U.S.C. § 3302(b) (1982)). Kate Stith described the Miscellaneous Receipts statute and the Anti-Deficiency Act as framework statutes that ensure that the executive branch generally deposited all funds received by the United States into the public treasury and did not spend or obligate public funds except in the amounts appropriated by Congress. Stith, *supra* note 32, at 1364.

47. LOUIS FISHER, PRESIDENTIAL SPENDING POWER 232 (1975).

48. 31 U.S.C. §§ 1341(a)(1)(A), 1349, 1350; *see* Eloise Pasachoff, *Modernizing the Power of the Purse Statutes*, 92 GEO. WASH. L. REV. 359, 366–67 (2024).

49. Pasachoff, *supra* note 48, at 368.

50. As candidates on the campaign trail, Donald Trump promised to build a wall along the southern border, *e.g.*, C-SPAN, *Campaign 2016: Donald Trump Presidential Campaign Announcement*, at 47:45 (C-SPAN, June 16, 2015), https://www.c-span.org/video/?326473-1/donald-trump-presidential-campaign-announcement [https://perma.cc/2XS4-YYTE], and Joe Biden promised to cancel a minimum of $10,000 of student debt per borrower, *e.g.*, Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, MEDIUM (Apr. 9, 2020), https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322 [https://perma.cc/TR5J-U7SV].

51. After taking office in 2017, President Trump sought $2.6 billion for "tactical infrastructure and border security technology" in Fiscal Year 2018. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS: FISCAL YEAR 2018, at 18 (2017). And in December 2018, he requested $5.7 billion for border wall construction. Nicholas Fandos, Sheryl Gay Stolberg & Peter Baker, *Trump Signs Bill Reopening Government for 3 Weeks in Surprise Retreat from Wall*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/us/politics/trump-shutdown-deal.html [https://perma.cc/6TLZ-L3SY]. In January 2021, before he was even sworn into office, President-elect Biden announced he would ask Congress to immediately cancel $10,000 in student debt for all borrowers. Annie Nova, *Biden Will Call on Congress to Forgive $10,000 in Student Debt for All Borrowers*, CNBC (Jan. 8, 2021, at 18:25 ET), https://www.cnbc.com/2021/01/08/student-loan-forgiveness-could-be-more-likely-but-challenges-remain-.html [https://perma.cc/M7FM-DWFJ]. In February 2021, the House Financial Services Committee heard testimony in support of debt cancellation, and the President

looked to statutes that they claimed provided the executive branch with broad discretion.[52] This section discusses the executive branch's spending authority as authorized by Congress and exemplified in the statutes the Presidents invoked for border wall funding and student loan forgiveness.

Although the Constitution does not provide the executive branch with explicit spending powers,[53] Congress has enacted laws to give the executive branch a role in the budget process.[54] This begins with the annual budget process, as since 1921 Congress has set forth a process for the President to formulate and submit annual budget proposals to Congress.[55] Although Congress retains full power to increase or reduce the President's estimates, giving each house an annual opportunity to voice its priorities and complaints in the budget process,[56] the President plays an important role in shaping the legislative agenda with initial responsibility for developing the budget.[57]

Congress has also provided the executive branch with discretionary powers related to the use of public funds.[58] After a dispute arose in 1793 between Thomas Jefferson and Alexander Hamilton regarding the proprietary of the executive transferring government funds to different uses than those

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signaled that he would look to Congress to send a bill on debt forgiveness to his desk. *See* Allison Pecorin, *Congressional Democrats Propose up to $50,000 in Debt Cancelation, Biden Not Sold*, ABC NEWS (Feb. 4, 2021, at 18:49 ET), https://abcnews.go.com/Politics/congressional-democrats-propose-50000-debt-cancelation-biden-sold/story?id=75682608 [https://perma.cc/M7FM-DWFJ].

52. *See, e.g.*, Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019); Biden v. Nebraska, 600 U.S. 477, 487–88 (2023).

53. Article II creates the presidency and establishes the President's powers and obligations, including the responsibility that the President "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §§ 1–3.

54. *See* Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C. (2018)).

55. *Id.* at §§ 201–205, 42 Stat. at 20-21, *see* FISHER, *supra* note 47, at 34–35.

56. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 45 (2017). As Chafetz explains, the Federalists pointed to congressional control over appropriations to counter Anti-Federalist fears of a tyrannical president given presidential control of the military. *Id.* at 57. But the Supreme Court has not required Congress to follow a particular format to appropriate funds, recently upholding the funding structure of the Consumer Financial Protection Bureau (CFPB) against a challenge that the CFPB's funding from the Federal Reserve instead of from annual congressional appropriations violated the appropriations clause. *See* Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416, 422–24 (2024). Justice Thomas wrote for the 7-2 majority that the CFPB's funding met the Appropriations Clause's requirement that Congress identify a source of public funds and authorize the expenditures of those funds for designated purposes because the CFPB was authorized to draw funds from the combined earnings of the Federal Reserve System, in an amount not to exceed an inflation-adjusted cap, to carry out its duties and responsibilities. *Id.* at 426, 435.

57. FISHER, *supra* note 21, at 222.

58. *See* Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1281–90 (2021).

specified in their appropriations law,[59] Congress enacted laws declaring that funds should only be used for their appropriated purpose.[60] At the same time, Congress began providing agencies with flexibility in how they spent appropriated amounts.[61]

One statutory flexibility Congress has given agencies is transfer authority,[62] an authority the Trump Administration relied on to transfer funds from the Department of Defense (DoD) to the Department of Homeland Security (DHS).[63] Transfer authority allows agencies to transfer funds within certain limitations to meet requirements that arose after the budget was enacted, much like what Hamilton had done in 1793.[64] After numerous abuses of this authority throughout the 1960s and 1970s (such as its use to fund a secret war in Laos and bombings in Cambodia),[65] Congress in 1974 prohibited DoD transfers "where the item for which funds were requested had been denied by Congress."[66]

A related agency practice is reprogramming, which the DoD relied on to shift funds toward border wall construction.[67] Reprogramming authority allows executive officials to shift funds within an appropriations account toward a different purpose.[68] During World War II, the War Department[69]

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59. *See* FISHER, *supra* note 47, at 99–100.

60. *See id.* at 101–04. Today, § 1301(a) provides that "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a).

61. *See* Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 97–114 (1995) (describing congressionally conferred spending discretion from lump-sum appropriations, reprogramming, and budget transfers).

62. *See* 10 U.S.C. § 284(a) (allowing Secretary of Defense to "provide support for counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government").

63. *The Funds Available to Address the National Emergency at Our Border*, TRUMP WHITE HOUSE ARCHIVES: FACT SHEETS (Feb. 26, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/funds-available-address-national-emergency-border/ [https://perma.cc/9FVR-T8QM].

64. Bernard T. Pitsvada, *Flexibility in Federal Budget Execution*, PUB. BUDGETING & FIN. Summer 1983, at 83, 93; *see* FISHER, *supra* note 47, at 99.

65. Raven-Hansen & Banks, *supra* note 61, at 111–12.

66. *Id.* at 112 (citing Department of Defense Appropriation Act of 1974, Pub. L. No. 93-238, § 735, 87 Stat. 1026, 1044).

67. *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, § 8005, 132 Stat. 2981, 2999 (2018) [hereinafter DoD Appropriations Act of 2019] (allowing the DoD to transfer funds as "necessary in the national interest" for "higher priority items, based on unforeseen military requirements").

68. FISHER, *supra* note 47, at 75.

69. The War and Navy Departments were eventually combined in today's Department of Defense. *See* National Security Act Amendments of 1949, Pub. L. No. 81-216, § 4, 63 Stat. 578,

initiated defense reprogramming through a "gentlemen's agreement" in which the War Department would notify the military appropriations subcommittees and obtain their approval before major shifts in funds.[70] Congress attempted to reassert control when the practice continued after the war and in nonmilitary agencies by insisting on regular reporting of reprogramming activities.[71] Today, Congress has limited DoD reprogramming requests to "higher priority items based on unforeseen military requirements" and prohibited the practice "where the item for which reprogramming is requested has been denied by Congress."[72]

Given the reality that the executive branch must sometimes act before Congress has had a chance to legislate,[73] Congress has also enacted statutes that explicitly grant the President and other executive branch officials broad powers upon the finding of an emergency.[74] Some statutes allow the government to respond to a specific national emergency: for example, the statute at issue in the student loan litigation extended executive authority granted in the aftermath of a national emergency, the September 11 attacks, to allow the executive to respond to any war or national emergency.[75] Meanwhile, the National Emergencies Act of 1976 (NEA) delegates to the President the authority to declare national emergencies that trigger

579 (amending the National Security Act of 1947 to establish the Department of Defense). However, on September 5, 2025, President Trump signed an executive order to rebrand the Department of Defense as the Department of War. Donald J. Trump, *Restoring the United States Department of War*, THE WHITE HOUSE (Sep. 5, 2025) https://www.whitehouse.gov/presidential-actions/2025/09/restoring-the-united-states-department-of-war/ [https://perma.cc/6VPW-QKHZ].

70. FISHER, *supra* note 47, at 77.

71. *Id.* at 77–80.

72. Department of Defense Appropriations Act of 1992, Pub. L. No. 102-172, § 8010, 105 Stat. 1150, 1173 (1991).

73. *See, e.g.*, FISHER, *supra* note 47, at 105. President Washington, for instance, acted without statutory authority to transfer funds appropriated for a different purpose to respond to the Whiskey Rebellion in 1794. CHAFETZ, *supra* note 56, at 59–60.

74. *See, e.g.*, Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535, 535–36 (providing that "during the recess of Congress, the President" is "authorized, on the application of the secretary of the proper department, and not otherwise, to direct, if in his opinion necessary for the public service, that a portion of the monies appropriated" for one particular branch be applied to another branch in the same department). The 1932 Economy Act, enacted in the wake of the Great Depression, cut federal spending but permitted the executive to transfer up to twelve percent of funds from one agency to another. FISHER, *supra* note 47, at 105 (citing Economy Act of 1932, Pub. L. No. 72-212, § 317, 47 Stat. 382, 411).

75. *See* Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa–1098ee) (extending coverage of the Higher Education Relief Opportunities for Students Act of 2001, which had only allowed Secretary of Education to act in response to September 11 attacks, so Secretary could respond to any war or national emergency).

emergency-response powers.[76] Upon such a declaration the executive branch can invoke over 100 statutory powers,[77] including the power to suspend statutory wage requirements for public contracts,[78] to "investigate, regulate, or prohibit ... any transactions in foreign exchange,"[79] and to authorize military construction projects both with funds already appropriated for other military construction projects[80] and with funds contributed from NATO and other countries.[81] These also include the power to "undertake military construction projects, . . . not otherwise authorized by law"[82] (a statute invoked to obtain border wall funding) and the power to "waive or modify any statutory or regulatory provision applicable to [certain federal] student financial assistance programs"[83] (the statute invoked to forgive student loans).

Without explicit congressional authorization, the President and his Administration has also sometimes declined to spend (impounded)[84] funds that Congress appropriated for a particular purpose.[85] While impoundments for cost-saving efficiencies, in response to changed circumstances, or pursuant to specific statutory authority generally have not generated controversy, impoundments as part of policymaking and priority-setting by the Administration have proven far more contentious.[86]

When agencies use their emergency powers to modify programs not reliant on annual congressional appropriations, like what the Secretary of Education did in modifying student loan programs,[87] that modification can have budgetary impacts that bypass the traditional appropriations process.[88] For example, the Secretary of Education has broad authority to modify loan terms in connection with national emergencies.[89] Because Congress sets the spending for mandatory credit assistance programs like federal student loans

76. 50 U.S.C. § 1621(a).

77. *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (July 1, 2025), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/M2C6-QYZK].

78. *See* 40 U.S.C. § 3147.

79. 50 U.S.C. § 1702(a)(1)(A)(i).

80. 10 U.S.C. § 2808(a)–(b).

81. *See* 10 U.S.C. § 2350j(e)(3)(A).

82. 10 U.S.C. § 2808(a).

83. 20 U.S.C. § 1098bb(a)(1).

84. *See generally* Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973) (describing the impoundment process).

85. *See* FISHER, *supra* note 47, at 37–41.

86. *Id.* at 148–74 (explaining that efficiency-based or statutory impoundments are typically accepted, but those driven by policy preferences challenge Congress's control over spending).

87. *See* Biden v. Nebraska, 600 U.S. 477, 487 (2023).

88. *See* John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 251–52 (2016).

89. 20 U.S.C. § 1098bb(a)(1).

based on the authorizing legislation's eligibility rules instead of appropriating a specific amount each year,[90] modifications to student loan repayment terms do not come out of the Department of Education's annual budget and can be accomplished without separate appropriations.[91] The student loan program was instead explicitly exempted from appropriations as a mandatory credit assistance program.[92] The border wall also did not require additional appropriations, as the DoD used statutes that authorized the transfer of funds "based on unforeseen military requirements" and the reprogramming of funds from previously-authorized military construction projects upon the declaration of a national emergency.[93]

C. Judicial Role

To understand what is unique about the student loan and border wall litigation, it is important to understand the role the judiciary has traditionally played in reviewing and invalidating executive spending alleged to exceed statutory authorization. Ever since the Supreme Court announced in *Marbury v. Madison*[94] that "[i]t is emphatically the province and duty of the judicial department to say what the law is," the judiciary has exercised that role to review and invalidate actions by the legislative and executive branches.[95] Today, when a court reviews a challenge to executive action, the court first

90. WENDY KISKA ET AL., CONG. BUDGET OFF., 59232, ESTIMATES OF THE COST OF FEDERAL CREDIT PROGRAMS IN 2024, at 2 (2023), https://www.cbo.gov/publication/59232 [https://perma.cc/V4MV-KA7M].

91. Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1700 (2017).

92. 2 U.S.C. § 661c(c)(1). In other legislation, Congress had made clear that student loan forgiveness was contingent on "the availability of appropriations." *E.g.*, 20 U.S.C. § 1078-11(d) (describing loan forgiveness for service in areas of national need); 20 U.S.C. § 1078-12(d)(1)(E) (describing loan repayment for civil legal assistance attorneys).

93. Sierra Club v. Trump, 379 F. Supp. 3d 883, 901–02 (N.D. Cal. 2019) (quoting DoD Appropriations Act of 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018)) (citing 10 U.S.C. § 2808) (discussing § 8005 and § 2808 as two of the statutory frameworks relied upon by the President in financing the border wall), *aff'd*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom.*, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (mem.).

94. 5 U.S. (1 Cranch) 137, 176 (1803).

95. *E.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (quoting *Marbury*, 5 U.S. (1 Cranch) at 176). Although judicial supremacy in constitutional interpretation has itself been questioned, judicial rulings have nonetheless continued to be followed in practice. *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 6 (2001). *Compare* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (arguing that "judicial review is vulnerable to attack on [multiple] fronts" including that it is "politically illegitimate, so far as democratic values are concerned"), *with* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1–2 (2d ed. 1986) (noting that *Marbury v. Madison* rests on "very vulnerable" reasoning, yet endures as the foundation of judicial review and continues to command adherence).

decides whether the challenge to the executive action is justiciable.[96] The court must then determine whether the President had power to take that action "stem[ming] either from an act of Congress or from the Constitution itself," as the Court explained in one of its first decisions exercising judicial review of an executive action.[97]

1. Justiciability

Article III provides courts with the "judicial Power of the United States,"[98] which extends to specific "Cases" and "Controversies."[99] In developing concepts of justiciability that limit the range of disputes appropriate for judicial resolution, courts have often cited to those Article III limits on judicial power.[100] As the Supreme Court has explained, "the doctrine of justiciability . . . has become a blend of constitutional requirements and policy considerations."[101] Courts historically often declined to decide cases of executive non-compliance with appropriations limitations by using justiciability doctrines.[102] Jonathan Siegel has explained that courts are less likely to invoke justiciability doctrines when they adopt a "public rights" conception of their role, in which they articulate and enforce legal norms and police the other branches of government.[103]

One such doctrine that has continued to generate confusion among courts and commentators is the concept of a justiciable cause of action.[104] As Anthony Bellia has explained, in *Marbury v. Madison* the Court found that Marbury's cause of action depended on whether the particular form of

96. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORN. L. REV. 393, 458–59 (1996) (describing how the Court adopted justiciability concepts to minimize judicial interference with the political branches).

97. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952); *see* Michael J. Turner, *Fade to Black: The Formalization of Jackson's* Youngstown *Taxonomy by* Hamdan *and* Medellin, 58 AM. U. L. REV. 665, 666–67 (2009); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 156–57 (2002).

98. U.S. CONST. art. III, § 1.

99. *Id.* § 2.

100. 13 WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 3529 (3d ed. Supp. 2025).

101. Flast v. Cohen, 392 U.S. 83, 97 (1968).

102. *See* Stith, *supra* note 32, at 1387; Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 128 (1996) (noting the paucity of separation-of-powers caselaw because "the issues often do not give rise to cases or controversies that can be resolved by the courts").

103. *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 77–78 (2007).

104. *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 778 (2004); John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849, 850–51 (2015).

proceeding he invoked afforded a remedy.[105] Throughout the first half of the nineteenth century, courts continued to require plaintiffs to choose the correct form of proceeding and meet all of its requirements.[106] But while a plaintiff needed a cause of action to get into a court of law, courts of equity were much more flexible.[107] When Congress, through the Rules Enabling Act,[108] authorized the Supreme Court to prescribe uniform rules of procedure for the federal courts, the resulting Federal Rules of Civil Procedure merged law and equity and abolished the traditional forms of action.[109] Although the Federal Rules purposefully omitted the term "cause of action," the concept remains relevant today to questions of federal jurisdiction, implied rights of action (whether the federal court may afford a plaintiff a remedy for violation of the Constitution or a federal regulatory scheme), and standing.[110]

A court today must still determine whether a plaintiff has a legal entitlement to sue based on the alleged violation.[111] The Court has created tests for implying rights of action under statutes that do not expressly provide rights of action as a matter of statutory interpretation.[112] The Court has also recognized an "ability to sue to enjoin unconstitutional actions by state and federal officers" that "is the creation of courts of equity."[113] Although the Court once presumed justiciable constitutional rights could be enforced through the courts in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,"[114] the Court now generally only allows actions for damages where explicitly authorized by Congress—while maintaining flexibility in granting injunctive relief.[115]

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105. Bellia, *supra* note 104, at 787–88. At that time, most states adopted the common law of England, *id.* at 784, which included a number of different forms of actions—each with its own modes of pleading, process, and judgment, F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 2–4 (A.H. Chaytor & W.J. Whittaker eds., 1936).

106. Bellia, *supra* note 104, at 789; *see also* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1770 (2022) (explaining that a cause of action under common law required plaintiffs to "sue under various writs" and meet specific requirements for their form of action to succeed).

107. *E.g.*, Bray & Miller, *supra* note 106, at 1764.

108. Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077).

109. *See* Bellia, *supra* note 104, at 778, 792–94, 797.

110. *Id.* at 778, 799.

111. Bray & Miller, *supra* note 106, at 1772.

112. *See* Bellia, *supra* note 104, at 838–51; Bray & Miller, *supra* note 106, at 1764.

113. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015).

114. Davis v. Passman, 442 U.S. 228, 242 (1979) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

115. John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 2–3 (2013); *see, e.g.*, Hernandez v. Mesa, 589 U.S. 93, 99–100 (2020) (describing how courts once "routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated" and based on Constitution itself, but later realized that courts risked arrogating legislative power by recognizing implied claims for damages); Ziglar v. Abbasi, 582 U.S. 120, 135 (2017).

One statutory mechanism Congress has created for judicial review of government action is the Administrative Procedure Act (APA). The APA created a right for judicial review[116] of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy."[117] It requires the reviewing court to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[118]

Before the APA was enacted, plaintiffs challenged government action by bringing an action for nonstatutory review against the government official who took the allegedly wrongful action.[119] Nonstatutory review remains available today against state[120] and federal officials[121] whose actions violate the federal Constitution.[122] Even as the Court held in 2015 that the Supremacy Clause does not create an implied cause of action, it acknowledged a "long history of judicial review of illegal executive action" based on a "judge-made remedy" in courts of equity that allowed litigants to "sue to enjoin unconstitutional actions by state and federal officers."[123] The Court explained that Congress could implicitly displace this equitable relief traditionally available to enforce federal law by providing a statutory method of enforcing the law.[124] In another case in which the Court held that the APA did not permit claims against the President,[125] Justice Scalia noted in his partial concurrence that review of the legality of the President's actions could ordinarily still be obtained in a suit against the officers who attempted to enforce the President's directive.[126] As evidence of this, he cited *Youngstown Sheet & Tube Co. v. Sawyer*,[127] in which the Court invalidated President Truman's order directing the Secretary of Commerce to seize the nation's steel mills because this seizure was not within the President's constitutional powers in an action against brought against the Secretary of Commerce,[128] and *Panama Refining*

116. 5 U.S.C. § 702.

117. *Id.* § 704.

118. *Id.* § 706(2)(A), (C).

119. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1623 (1997).

120. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 159–60, 167 (1908).

121. *See generally* Schneider v. Smith, 390 U.S. 17 (1968) (holding that a Coast Guard regulation, promulgated under executive authority, that compelled disclosure of past political associations was unconstitutional and enjoining Navy officials from enforcing it).

122. Siegel, *supra* note 119, at 1624.

123. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015).

124. *Id.* at 329.

125. Franklin v. Massachusetts, 505 U.S. 788, 796, 800–01 (1992).

126. *Id.* at 828 (Scalia, J., concurring in part).

127. 343 U.S. 579 (1952).

128. *See id.* at 581–89.

Co. v. Ryan,[129] in which the Court invalidated President Roosevelt's order prohibiting excess petroleum trade because the law authorizing the President's action represented an unconstitutional delegation in an action brought against the Secretary of the Interior.[130]

The standing doctrine's limitation on a court's ability to review suits not specifically authorized by Congress functions similarly to how the absence of a cause of action restricted judicial relief prior to the merger of law and equity in federal courts.[131] The Court has described this doctrine as part of Article III's limitation of the judicial power to justiciable "Cases" and "Controversies," so "a plaintiff raising only a general grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."[132] Standing doctrine developed in the twentieth century with the growth of the administrative state and public interest litigation,[133] and courts today require a plaintiff to establish Article III standing by showing "(i) that [the plaintiff] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[134] As Thomas Schmidt has explained, the standing doctrine is a judge-fashioned structure of rules drawing from Article III that aims to situate and limit the judiciary's power in relation to other government powers.[135]

The Supreme Court has explained that its "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," as "'the law of Art. III standing is built on a single basic idea—the idea of separation of powers.'"[136] Before he joined the Court, then-Judge Scalia defended standing as a tool to limit courts to the

129. 293 U.S. 388 (1935).

130. *Id.* at 388, 433.

131. *See* Bellia, *supra* note 104, at 827–29.

132. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 573–74 (1992).

133. *See generally* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (explaining that constitutional standing, as presently understood, was fashioned in the twentieth century with significant contributions from Justices Brandeis and Frankfurter); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988) (attributing modern standing law to administrative expansion and litigation seeking to enforce public values).

134. TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021).

135. Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WIS. L. REV. 1, 6 (2024).

136. Raines v. Byrd, 521 U.S. 811, 819–20 (1997) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

"undemocratic role of protecting individuals and minorities against impositions of the majority," while leaving generalized grievances about governmental action or inaction that violated the Constitution and laws to be appropriately addressed through the political process.[137]

Gillian Metzger has described a particular "marginalization of appropriations in public law doctrine," which, in the area of standing, is reflected in the challenges litigants face in establishing the particularized injury and causality necessary to challenge government uses of funds without claiming a personal right to the funds.[138] This is in part because of Article III's requirement of particularized injury and causality, which requires a plaintiff to show "not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[139] In addition to Article III requirements, the Court has imposed prudential standing limitations,[140] including a "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches" and a "requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[141]

The Court has separately applied a zone of interests test to bar plaintiffs who cannot show that their claimed interest in the litigation is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[142] This test applies whether the plaintiff brings her claims under the APA[143], directly under the statute,[144] or pursuant to the Constitution.[145] Although the Court has recognized that this zone of interests test "is not meant to be especially demanding,"[146] defendants regularly attempt to show and sometimes succeed in showing that a plaintiff's

137. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983).

138. Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1103, 1110 (2021).

139. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

140. Warth v. Seldin, 422 U.S. 490, 498–500 (1975).

141. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

142. Ass'n of Data Processing Serv. Orgs., v. Camp, 397 U.S. 150, 153 (1970).

143. *See* 5 U.S.C. § 702.

144. Bennett v. Spear, 520 U.S. 154, 163–64 (1997).

145. *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153; *see, e.g.*, Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320 n.3 (1977) (quoting *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153) (allowing stock exchanges to allege violation of the Commerce Clause because their asserted right to engage in interstate commerce free of discriminatory taxes was within the zone of interests protected by the Commerce Clause and therefore rejecting defendant's argument that the complaint failed to state a cause of action).

146. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012) (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

claimed injury is not an injury Congress sought to protect in enacting the particular statute and is therefore not within its zone of interests.[147] This may prove especially true when the violation is related to the federal budget because budget measures protect government funds to which plaintiffs often do not have a claim.[148]

This section discussed several principles the Court has used to avoid merits-based assessments of executive actions that are relevant to the two focal cases of this article.[149] As Metzger explained, declining to judicially review appropriations actions allows the President to claim greater control without judicial intervention to enforce Congress's statutory appropriations requirements.[150]

2. Merits

Because the Constitution provides relatively less detailed guidance on the scope of presidential powers compared to legislative powers, courts have developed different approaches to determine whether an executive action allegedly taken without congressional authorization is in fact unlawful. In *Youngstown*, Justice Black held that the President's seizure was unlawful because it was not expressly authorized by any statute, as the government conceded, and nothing in Article II could reasonably be read to grant that

147. *See, e.g.*, Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 526–28 (1991) (holding that postal workers' more limited employment opportunities as the result of the Postal Service's suspension of private express statutes that had afforded it a statutory monopoly in the international remailing market were not within the zone of interests of the private express statutes because Congress enacted those statutes to ensure that postal services were provided to all areas of the nation); INS v. Legalization Assistance Project of L.A. Cnty. Fed'n of Lab., 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers) (expressing a belief that legal aid organizations were outside the zone of interests sought to be protected by the Immigration Reform and Control Act because that act was intended to protect the interests of undocumented aliens and not organizations).

148. *See, e.g.*, Petition for a Writ of Certiorari, *supra* note 6, at 18–22 (arguing that plaintiffs did not fall within the zone of interests of § 8005 because that section did not require consideration of environmental interests and instead only protected Congress's interests in appropriations process).

149. This section did not discuss other doctrines the Court has also used to avoid review because they were not mentioned in either case and have generally been inconsistently applied. For example, the Court has on occasion applied a political questions doctrine, which has been so inconsistently applied "as to suggest that there is no political question doctrine at all, but only a number of discrete questions that have been characterized as political." WRIGHT & MILLER, *supra* note 100, § 3534. The Court has also declined to review whether the President properly invoked statutory powers, instead only reviewing whether he properly exercised those powers within statutory bounds. Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1172–73 (2009).

150. Metzger, *supra* note 138, at 1104–05.

broad authority.[151] In his concurrence, Justice Jackson did not mandate explicit authorization from the Constitution or Congress and instead formulated a three-part test for assessing presidential power, because "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[152] Within his framework, (1) when the President "acts pursuant to an express or implied authorization of Congress," his action is generally only unconstitutional if the federal government itself lacks that authority; (2) when the President "acts in absence of either a congressional grant or denial of authority," the amount of power he may exercise "is likely to depend on the imperatives of events and contemporary imponderables"; and (3) when the President "takes measures incompatible with the expressed or implied will of Congress," this action "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[153] In this third category, courts "can sustain the President only by holding that [his action] is within his domain and beyond control by Congress."[154] Because the government conceded that Congress had not authorized the President's actions, Justice Jackson did not explain how to determine whether Congress had provided express or implied authorization.[155] Justice Frankfurter's concurrence explained, however, that although the "powers of the President are not as particularized as are those of Congress," "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," could also be treated as a "gloss" on the executive power vested in the President by Article II.[156]

Since then, the Court has continued to cite Justice Jackson's concurrence when determining the extent of presidential power. Under this framework, the Court rejected the President's claimed authority to unilaterally order compliance with a non-self-executing treaty because his power was at its lowest ebb given that the treaty required statutory authorization to become effective and Congress had not enacted such legislation.[157] The Court also rejected executive authority to establish military tribunals that deviated from the standards set by statute.[158] However, the Court upheld the President's

151. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–87 (1952).

152. *Id.* at 635 (Jackson, J., concurring).

153. *Id.* at 637–38.

154. *Id.* at 640.

155. *Id.* at 638.

156. *Id.* at 610–11 (Frankfurter, J., concurring).

157. Medellin v. Texas, 552 U.S. 491, 527 (2008)

158. Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006); *see also id.* at 639 (Kennedy, J., concurring in part) ("While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action—a case within Justice Jackson's third category, not the second or first.").

recognition of a foreign country, even though this violated a statutory command such that his power was at "its lowest ebb," because the recognition power resided in the President alone.[159] The Court has also occasionally cited to Justice Frankfurter's concurrence to recognize greater executive powers than those explicitly described in the Constitution based on the "historical gloss on the 'executive Power' vested in Article II of the Constitution," including a presidential power to act in foreign relations,[160] an expansive interpretation of his recess appointments power to include vacancies that occur before a Senate recess,[161] and a presidential authority to select Article III judges to perform extrajudicial duties on administrative commissions.[162]

When assessing presidential authority under the *Youngstown* framework, then, a court must determine if the President's action was statutorily authorized or stemmed from constitutional powers.[163] The scope of the President's constitutional powers may be interpreted using historical precedent,[164] but unless the President has conclusive and preclusive power over the matter, the court must also consider Congress's stance on the issue.[165] If Congress has provided neither explicit nor implicit authorization, a "zone of twilight" exists where situational urgency and congressional acquiescence may implicitly justify the President's action.[166]

The Court's decisions on executive versus legislative powers have sometimes affected Congress's spending power without any reference to it. For example, in the NEA, Congress included a provision that permitted either the President or Congress, by concurrent resolution without presidential involvement, to terminate any national emergency declaration.[167] However, in *INS v. Chadha*,[168] the Supreme Court held that a statutory provision which allowed either House of Congress to veto executive actions violated the separation of powers, without mentioning Congress's spending powers.[169] In

159. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10, 28–30 (2015) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

160. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting *Youngstown*, 343 U.S. at 610–11 (Jackson, J., concurring).

161. *See* NLRB v. Canning, 573 U.S. 513, 549 (2014) (citing *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)).

162. *See* Mistretta v. United States, 488 U.S. 361, 400–01 (1989) (citing *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)).

163. *Youngstown*, 343 U.S. at 585 (majority opinion).

164. *Id.* at 610–11 (Frankfurter, J., concurring).

165. *Id.* at 637–38 (Jackson, J., concurring).

166. *Id.* at 637.

167. 50 U.S.C. § 1622(a).

168. 462 U.S. 919 (1983).

169. *See id.* at 923, 959. *But see id.* at 971 (White, J., dissenting) (explaining how the legislative veto had "resolved the problem posed by Presidential claims of inherent power to impound appropriations").

direct response to *Chadha*, Congress in 1985 modified the NEA so while the President can still terminate national emergencies, Congress can now only terminate emergencies by joint resolutions, which require presidential approval.[170] The President thus now retains substantial unilateral powers when he decides to declare an emergency, because such decisions can only be overridden by a veto-proof majority in both houses.[171]

While *Chadha* had not specifically involved spending, the Court subsequently also invalidated as unconstitutional a Line Item Veto Act that allowed the President to cancel specific spending items.[172] In doing so, the Court only focused on the Constitution's bicameralism and presentment requirements without addressing the prior battles over presidential impoundments and concerns over Congress's lack of budget discipline which motivated Congress to authorize presidential line-item vetoes of budget bills passed by Congress.[173] Given that the Line Item Veto Act provided that a President's identification of a line item for cancellation only became effective when Congress received notice from the President and a majority vote of both houses was sufficient to enact a disapproval bill nullifying the cancellation,[174] the Court might have considered the Act an exercise of Congress's power of the purse to give the President another role in the budget process. While the Court in invalidating the legislative veto and the Line Item Veto effectively invalidated spending schemes enacted by Congress, the Court never mentioned Congress's spending powers or suggested its decisions in any way limited these powers.[175]

The Court also did not mention Congress's appropriations power when it enjoined a presidential impoundment for violating the statute requiring expenditure.[176] When potential grant recipients challenged President Nixon's instructions that the Environmental Protection Agency not disburse all funds Congress had allocated in the Clean Water Act, the Court considered the

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170. Samuel Weitzman, *Back to Good: Restoring the National Emergencies Act*, 54 COLUM. J.L. & SOC. PROBS. 365, 402 (2021).

171. *See* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1023–68 (2004) (discussing the departure from normal standards and constitutional protections after September 11 attacks). In 2023, the House and Senate both introduced bills that would limit the President's emergency powers by automatically terminating presidential national emergency declarations after 30 days unless Congress passed a joint resolution approving the declaration, but the bills were never put to a vote in either chamber. *See* Limiting Emergency Powers Act of 2023, H.R. 121, 118th Cong. § 2(a)(1) (2023); Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act, S. 1912, 118th Cong. § 202(a)(1)–(2) (2023).

172. Clinton v. City of New York, 524 U.S. 417, 448–49 (1998).

173. *See* Metzger, *supra* note 138, at 1112–13.

174. *Clinton*, 524 U.S. at 436–37.

175. *See id.* at 448–49; INS v. Chadha, 462 U.S. 919, 959 (1983).

176. *See* FISHER, *supra* note 21, at 223.

statute's language and its legislative history and affirmed that the Administration was required to allot the full sums authorized to be appropriated.[177]

Metzger noted that the Court generally has not paid much attention to Congress's power of the purse in determining the scope of congressional and presidential powers.[178] But parties explicitly raised this power when they challenged President Trump's transfer of funds appropriated for other purposes to border wall construction and President Biden's cancellation of certain student loan repayment obligations. The next section describes those spending decisions and the ensuing litigation.

III. JUDICIAL REVIEW OF THE EXECUTIVE ACTIONS

When the Trump and Biden Administrations attempted to use government funds in a manner contemplated but ultimately not specifically authorized by Congress, states and other parties opposed to these policies sought judicial intervention.[179] The challenges to President Trump's funding diversion for border wall construction and President Biden's student loan forgiveness program both ended up before the Supreme Court.[180] In both cases, the Court granted certiorari on questions of justiciability and whether these presidential actions exceeded statutory authority, although it ultimately only decided one of the cases on its merits.[181]

A. Border Wall Litigation

1. Underlying Dispute[182]

A dispute between President Trump and Congress over the Trump Administration's request for border wall funding resulted in the longest ever

177. Train v. City of New York, 420 U.S. 35, 43–49 (1975).

178. Metzger, *supra* note 138, at 1111–12.

179. *See infra* Sections III.A–III.B.

180. *See infra* Sections III.A–III.B.

181. *See infra* Section III.C.

182. This paper includes a limited discussion of both disputes, but more extensive discussions are available elsewhere. *See generally* Linda Sheryl Greene, *Up Against the Wall: Congressional Retention of the Spending Power in Times of "Emergency,"* 51 LOY. U. CHI. L.J. 431 (2019) (discussing the border wall dispute); James M. Truett, *Congress, Tear Down This Educational Wall: The Biden Administration's Unconstitutional Student Loan Cancellation Plans & Congress's Responsibility to Address the Root Cause of the Student Loan Crisis*, 84 LA. L. REV. 625 (2024) (discussing the loan forgiveness dispute).

partial government shutdown,[183] which ended with Congress appropriating less money than President Trump had requested.[184] Even as he signed the appropriations act into law, President Trump identified how his Administration could access billions in additional funding to build the border wall once he declared a national emergency,[185] which he promptly did.[186] Congress then passed a bipartisan joint resolution terminating the President's emergency declaration,[187] but the President vetoed the joint resolution,[188] and Congress failed to override his veto.[189]

DHS then requested funds from the DoD under 10 U.S.C § 284, a statute which allowed the DoD to "provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government."[190] To fund this transfer, the Secretary of Defense invoked § 8005 of the DoD Appropriations Act of 2019, a provision of the appropriations law that allowed the DoD to transfer funds as "necessary in the national interest" for "higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress."[191]

In addition to the drug interdiction funds, the Secretary of Defense announced that he would authorize eleven border barrier construction projects[192] by diverting funds from 128 military construction projects pursuant

183. Mihir Zaveri, Guilbert Gates & Karen Zraick, *A List of the Longest Government Shutdowns in U.S. History*, N.Y. TIMES (Oct. 1, 2023), https://www.nytimes.com/2023/09/30/us/politics/previous-government-shutdowns.html [https://perma.cc/LDN8-2GDM]; *see also President Donald J. Trump Calls on Congress to Secure our Border and Protect the American People*, TRUMP WHITE HOUSE ARCHIVES (Jan. 8, 2019) [hereinafter *Trump Border Wall Funding Request*], https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-calls-congress-secure-borders-protect-american-people/ [https://perma.cc/KZB6-CV9T] (outlining President Trump's funding requests to Congress).

184. *Compare Trump Border Wall Funding Request*, *supra* note 183 (discussing the President's requested funding for the border wall), *with* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230(a), 133 Stat. 13, 28 (outlining the actual appropriations for Fiscal Year 2019).

185. *President Donald J. Trump's Border Security Victory*, *supra* note 2.

186. Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019).

187. H.R.J. Res. 46, 116th Cong. (2019).

188. Donald J. Trump, *Veto Message to the House of Representatives for H.J. Res. 46*, TRUMP WHITE HOUSE ARCHIVES: STATEMENTS & RELEASES (Mar. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/ [https://perma.cc/TE3U-8CYR].

189. *See* 165 CONG. REC. H2814–15 (daily ed. Mar. 26, 2019).

190. 10 U.S.C. § 284(a).

191. DoD Appropriations Act of 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).

192. California v. Trump, 407 F. Supp. 3d 869, 880 (N.D. Cal. 2019), *vacated and remanded sub nom.*, *Biden v. Sierra Club*, 142 S. Ct. 56 (2021) (mem.).

to emergency transfer powers.[193] 10 U.S.C. § 2808 allowed the Secretary of Defense to undertake unauthorized military construction projects when the President declared a national emergency by using funds already appropriated for military construction that became available because the project for which the funds were appropriated had been canceled or had lower costs than had been anticipated.[194]

2. Justiciability

Various lower courts found that different groups of plaintiffs had standing to challenge the President's repurposing of appropriated funds under § 8005 and § 2808[195] to build the border wall. The litigation moved most quickly in the Northern District of California, which entered a nationwide injunction in response to claims brought by public interest organizations and by a coalition of states, so this section will primarily focus on that litigation.[196] In those lawsuits, the plaintiffs brought claims for ultra vires action, violation of the separation of powers, violation of the appropriations clause, and violations of the APA, Presentment Clause, and National Environmental Policy Act.[197]

The district court held that the public interest groups had standing and enjoined the DoD from using funds reprogrammed under § 8005 to complete border construction.[198] The government then sought a stay pending appeal in which it argued that § 8005 did not include a cause of action for private

193. *Id.* at 879, 881.

194. 10 U.S.C. § 2808.

195. These two sections together will hereinafter be collectively referred to as the "Defense Appropriations Acts."

196. *See generally* Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (granting preliminary injunction against Trump Administration's diversion of defense funds for border wall construction), *aff'd*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom.*, *Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (mem.). Other states and public interest groups also brought lawsuits which did not proceed as quickly and therefore are not discussed in this article. *See e.g.*, Notice of Changes in Funding for Barrier Projects Undertaken Pursuant to 10 U.S.C. § 2808 in Fiscal Year 2019 at 2, Washington v. Trump, 441 F. Supp. 3d 1101 (W.D. Wash. 2020) (No. 19-cv-010502) (notifying court of changes in funding for border barrier projects on same date government appealed district court's grant of summary judgment); Order Vacating & Remanding, Washington v. Trump, No. 20-35371, 2022 LX 1838 (9th Cir. Jan. 21, 2022) (remanding appeal to district court in light of Biden v. Sierra Club, 142 S. Ct. 56 (2021)); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11 (D.D.C 2020) (denying defendants' motion to dismiss less than a month before Biden Administration notified the court of changes in funding for border barrier projects).

197. Complaint for Declaratory & Injunctive Relief ¶¶ 109–52, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-cv-00892); First Amended Complaint for Declaratory & Injunctive Relief ¶¶ 139–90, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-cv-00892); First Amended Complaint for Declaratory & Injunctive Relief ¶¶ 363–99, California v. Trump, 963 F.3d 926 (9th Cir. 2020) (No. 19-cv-00872).

198. Sierra Club v. Trump, 379 F. Supp. 3d at 905–07.

enforcement, and the plaintiffs' claimed injuries fell outside any zone of interests protected by § 8005.[199] The Supreme Court stayed the injunction pending disposition of the merits because the Court found "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with § 8005."[200] On the merits, the Ninth Circuit held that the public interest organizations and states had standing and could challenge the § 8005 transfers, notwithstanding the Supreme Court's doubts in its stay order.[201] When the DoD later identified specific military projects from which to divert funds under § 2808, the Ninth Circuit again held that the public interest organizations and the two states had standing to challenge this reprogramming of funds.[202]

3. Merits

In the public interest groups' lawsuit, the Northern District of California enjoined the DoD's § 8005 transfer of funds to DHS because Congress had denied DHS's request for more funds, so it determined that the DoD's transfer violated § 8005's terms.[203] The Ninth Circuit affirmed.[204] With respect to the military construction funds under § 2808, the district court also concluded that Defendants' conduct violated the standards set by § 2808,[205] and the Ninth Circuit again affirmed.[206]

When the border wall litigation reached the Supreme Court on the merits, the Court granted certiorari on the questions of whether the plaintiffs had a cognizable cause of action to obtain review of the DoD's compliance with the Defense Appropriations Acts and whether the DoD violated those statutes.[207]

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199. Defendants' Emergency Motion Under Circuit Rule 27-3 for Stay Pending Appeal at 1–2, 23, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-16102).

200. Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (mem.). Justices Ginsburg, Sotomayor, and Kagan dissented, and Justice Breyer concurred in part and dissented in part from grant of the stay. *Id.* at 1–2.

201. Sierra Club v. Trump, 963 F.3d 874, 883–91 (9th Cir. 2020), *vacated and remanded sub nom.*, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (mem.); California v. Trump, 963 F.3d 926, 935, 942 (9th Cir. 2020).

202. Sierra Club v. Trump, 977 F.3d 853, 865–76 (9th Cir. 2020), *vacated and remanded sub nom.*, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (mem.).

203. Sierra Club v. Trump, 379 F. Supp. 3d at 913; Sierra Club v. Trump, No. 19-cv-00892, 2019 WL 2715422, at *3 (N.D. Cal. June 28, 2019).

204. Sierra Club v. Trump, 963 F.3d at 886–87.

205. California v. Trump, 407 F. Supp. 3d 869, 885–99 (N.D. Cal. 2019), *vacated and remanded sub nom.*, *Biden v. Sierra Club*, 142 S. Ct. 56 (2021) (mem.).

206. Sierra Club v. Trump, 977 F.3d at 883.

207. Petition for a Writ of Certiorari, *supra* note 6, at I, (seeking review of "[w]hether respondents have a cognizable cause of action to obtain review of the Acting Secretary's compliance with Section 8005's proviso in transferring funds internally between DoD

It vacated the lower-court judgments when the Biden Administration indicated it would no longer spend the diverted funds on border wall construction.[208]

B. Student Loan Debt Litigation

1. The Underlying Dispute

The Higher Education Act of 1965 specifies the terms and conditions attached to federal student loans, including interest rates, loan fees, repayment plans, and the consequences of default.[209] The statutory framework also provides various programs for federal student loan borrowers to postpone, defer, or reduce their repayment obligations[210] and to obtain forgiveness of their federal loan debt.[211]

In response to the September 11, 2001 attacks, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001,[212] which provided the Secretary of Education with "specific waiver authority to respond to conditions in the national emergency" caused by the September 11 attacks.[213] The Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) extended the coverage of the 2001 statute to include any war or national emergency, not just the September 11 attacks.[214] The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected

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appropriations accounts" and "[w]hether the Acting Secretary exceeded his statutory authority under Section 8005 in making the transfers at issue").

208. *See* Motion of the Petitioners to Hold the Briefing Schedule in Abeyance & to Remove the Case from the February 2021 Argument Calendar, *supra* note 8.

209. *See* 20 U.S.C. § 1077 (eligibility of student borrowers and terms of federally insured loans); *id.* § 1080 (defaults under the federal loan insurance program); *id.* § 1087e (terms and conditions of direct loans); *id.* § 1087dd (terms of Perkins loans).

210. *See, e.g.*, 20 U.S.C. §§ 1098e(b), 1087e(d)(1), 1078(b)(9)(A)(v) (authorizing income-driven and income-contingent repayment plans that can reduce borrowers' monthly payment obligations).

211. *See, e.g.*, 20 U.S.C. § 1087j (cancellation for full-time teachers); *id.* § 1078-10 (forgiveness for full-time teachers); *id.* § 1078-11 (forgiveness for individuals working in designated "areas of national need"); *id.* § 1087e(h); *id.* § 1087(c)(1) (forgiveness of loan obligations where school engages in misconduct, provides false certification of eligibility, or closes); 34 C.F.R. § 685.219 (Public Service Loan Forgiveness).

212. Biden v. Nebraska, 600 U.S. 477, 485 (2023).

213. Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386 (2002).

214. *See* 20 U.S.C. § 1098bb(a)(1).

individuals."[215] An "affected individual" includes any individual who is affected by "a national emergency declared by the President."[216]

In March 2020, President Trump declared the COVID-19 pandemic a national emergency, and the Secretary of Education then invoked the HEROES Act to pause the accrual of interest and repayment for at least 60 days on all federally held student loans as of March 13, 2020.[217] On March 27, 2020, Congress directed the Secretary to extend these policies until October 1, 2020 under the Coronavirus Aid, Relief, and Economic Security Act.[218] When that authorization expired, the Secretaries of Education in each of the Trump and Biden Administrations invoked the HEROES Act on multiple occasions to continue the student loan payment and interest pause through December 31, 2022.[219] As of April 2022, the payment pause was estimated to have cost the federal government $102 billion.[220]

As a presidential candidate, Joe Biden promised student debt relief.[221] On August 24, 2022, President Biden announced a student debt relief plan to

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215. *Id.* § 1098bb(a)(2)(A).

216. *Id.* § 1098ee(2)(d), (4).

217. *See* OFF. OF POSTSECONDARY EDUC., U.S. DEPT. OF EDUC., UPDATED GUIDANCE FOR INTERRUPTIONS OF STUDY RELATED TO CORONAVIRUS (COVID-19) (2020), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-04-03/updated-guidance-interruptions-study-related-coronavirus-covid-19 [https://perma.cc/V3SD-5HAH].

218. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404 (2020).

219. *See, e.g.*, Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic, 85 Fed. Reg. 49585, 49585 (Aug. 8, 2020) (extending pause until December 31, 2020); *Statement by President Joe Biden Extending the Pause on Student Loan Repayment*, BIDEN WHITE HOUSE ARCHIVES: STATEMENTS & RELEASES (Aug. 6, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/08/06/statement-by-president-joe-biden-extending-the-pause-on-student-loan-repayment/ [https://perma.cc/W97V-JZ5M]; Press Release, U.S. Dep't of Educ., Biden-Harris Administration Extends Student Loan Pause Through May 1, 2022 (Dec. 22, 2021), https://web.archive.org/web/20211222174130/https://www.ed.gov/news/press-releases/biden-harris-administration-extends-student-loan-pause-through-may-1-2022 [https://perma.cc/D69B-T7WX]; Press Release, U.S. Dep't of Educ., Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment (Aug. 24, 2022), https://web.archive.org/web/20220824154547/https://www.ed.gov/news/press-releases/biden-harris-administration-announces-final-student-loan-pause-extension-through-december-31-and-targeted-debt-cancellation-smooth-transition-repayment [https://perma.cc/QL24-G8VB].

220. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105365, STUDENT LOANS: EDUCATION HAS INCREASED FEDERAL COST ESTIMATES OF DIRECT LOANS BY BILLIONS DUE TO PROGRAMMATIC AND OTHER CHANGES 14 (2022).

221. Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, MEDIUM (Apr. 9, 2020), https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322 [https://perma.cc/TR5J-U7SV].

address the financial harms of the pandemic, which included up to $20,000 in debt cancellation for Pell Grant recipients with loans held by the Department of Education, and up to $10,000 in debt cancellation to non-Pell Grant recipients.[222] Although Congress had previously considered student loan relief legislation, it had never enacted a broad student loan forgiveness program.[223] About a month later, six states sued the President, the Secretary of Education, and the United States Department of Education challenging the student debt relief plan.[224]

2. Justiciability

Six state plaintiffs attempted to establish standing based on harm to the Missouri Higher Education Loan Authority (MOHELA), a nonprofit entity established by statute as "a public instrumentality and body corporate" of the State of Missouri[225] with capacity to "sue and be sued."[226] Missouri contended that MOHELA suffered from ongoing financial harms as a servicer for federally held student loans,[227] and this harmed Missouri's sovereign and semi-sovereign interests because interference with MOHELA's performance impaired its ability to perform "an essential public function" for the state.[228] The government disputed both that MOHELA had suffered a harm that entitled it to challenge the government's debt cancellation plan and that any state plaintiff could rely on harm to MOHELA to establish standing.[229]

222. *Fact Sheet: Student Loan Relief*, *supra* note 9.

223. *See* Biden v. Nebraska, 600 U.S. 477, 503 (2023) (citing Mark Kantrowitz, *Year in Review: Student Loan Forgiveness Legislation*, FORBES (Dec. 24, 2020), https://www.forbes.com/sites/markkantrowitz/2020/12/24/year-in-review-student-loan-forgiveness-legislation/ [https://perma.cc/G6X2-65NR]).

224. Nebraska v. Biden, 636 F. Supp. 3d 991, 995 (E.D. Mo. 2022), *cert. granted before judgment*, 143 S. Ct. 477 (2022), *rev'd and remanded*, 600 U.S. 477 (2023). Two student loan borrowers who did not qualify for the maximum relief available under the plan also challenged the plan based on the Department of Education's purported failure to observe proper procedures in adopting the plan. Dep't of Educ. v. Brown, 600 U.S. 551, 556 (2023). Because the Court only needed to order relief once and did so in *Nebraska v. Biden*, the Court's standing holding in *Department of Education v. Brown* did not have any practical impact and is not discussed any further.

225. Complaint ¶ 93, Nebraska v. Biden, 636 F. Supp. 3d 991 (E.D. Mo. 2022) (No. 22-cv-01040) [hereinafter Nebraska v. Biden Complaint] (quoting Mo. Ann. Stat. §173.360 (West 2025)). The states offered numerous different theories of harm, but this harm to MOHELA ultimately convinced the Court that Missouri had standing. *See* Biden v. Nebraska, 600 U.S. at 494.

226. Mo. Ann. Stat. § 173.385.1(3).

227. Nebraska v. Biden Complaint, *supra* note 225, ¶¶ 103–11.

228. *Id.* at ¶¶ 134–35.

229. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction at 11–16, Nebraska v. Biden, 636 F. Supp. 3d 991 (E.D. Mo. 2022) (No. 22-cv-01040).

Although the district court rejected Missouri's theory of standing,[230] the Supreme Court concluded that because the Secretary's plan harmed MOHELA, it directly injured Missouri, which therefore had standing.[231] The Court found that the Secretary's plan would cost MOHELA approximately "$44 million a year in fees that it otherwise would have earned,"[232] and Missouri had standing based on this harm to MOHELA because MOHELA was created by Missouri and used its profits to help fund education in Missouri.[233] While the district court focused on Missouri's lack of obligation to pay any debt that MOHELA incurred,[234] the Supreme Court instead focused on how MOHELA's lost revenues would impair its ability to aid Missouri.[235] In dissent, Justice Kagan (writing for herself and Justices Sotomayor and Jackson) disagreed with the majority's standing analysis because the six states were "classical ideological plaintiffs" with "no personal stake in the Secretary's loan forgiveness plan."[236]

In their complaint, the six states brought claims for violation of the separation of powers and violations of the APA for exceeding statutory authority and the Constitution and for arbitrary and capricious agency action.[237] The Supreme Court did not address which cause of action allowed plaintiffs to challenge the Secretary of Education's loan cancellation plan.[238] The government defendants challenged the viability of the APA claim because the state plaintiffs did not meet the zone-of-interests test, questioned the viability of the separation of powers claim given the availability of an APA claim, and argued that the action was not arbitrary and capricious under the APA's deferential standard.[239] By never mentioning the plaintiffs' cause of action, the Court never engaged with whether they fell within the zone of interests of the HEROES Act and instead immediately proceeded to consider whether "the plan exceeded the Secretary's statutory authority."[240] And though the dissent faulted the majority for acting "as though it is an arbiter of political and policy disputes, rather than of cases and controversies,"[241] it also did not question whether the plaintiffs had a cause of action.[242] Perhaps this

230. Nebraska v. Biden, 636 F. Supp. 3d at 999–1000.
231. Biden v. Nebraska, 600 U.S. at 489.
232. *Id.* at 490.
233. See *id.* at 489–94.
234. Nebraska v. Biden, 636 F. Supp. 3d at 999.
235. Biden v. Nebraska, 600 U.S. at 490–91.
236. *Id.* at 523 (Kagan, J., dissenting).
237. Nebraska v. Biden Complaint, *supra* note 225, ¶¶ 142–71.
238. *See* Biden v. Nebraska, 600 U.S. at 489–94.
239. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 229, at 16, 20 n.4, 35–39.
240. Biden v. Nebraska, 600 U.S. at 488.
241. *Id*. at 523 (Kagan, J., dissenting).
242. *See id.* at 522–550.

failure to mention the cause of action in itself was unremarkable, but by doing so the Court never grappled with whether plaintiffs had a legal entitlement to sue, or whether they fell within the limitations of any particular right to judicial relief.[243]

3. Merits

On the merits, the Court concluded that the HEROES Act did not grant the Secretary the authority to cancel student loan debt.[244] In reaching this conclusion, the Court used dictionaries and precedent to interpret the Secretary's authority under the HEROES Act to "modify" applicable statutory or regulatory provisions and concluded that this language did not allow such "basic and fundamental changes in the scheme."[245] It also concluded that the Secretary's program was not an exercise of his statutory authority to "waive" or "waive or modify" any applicable statutory or regulatory provision because the Secretary had not identified any provision he was actually waiving or modifying, given that no provision established an obligation on the part of student borrowers to pay back the government.[246]

As part of its statutory interpretation, the Court also considered the Secretary's prior invocations of the HEROES Act and the enormity of this new program to conclude that it was "highly unlikely that Congress" authorized such a sweeping program based on the Secretary's authority to "modify" the program.[247] The Court also rejected the Secretary's interpretation based on congressional purpose, as the "economic and political significance" of the Secretary's action triggered analysis under the "major questions doctrine."[248] The Court concluded that the Secretary was attempting to enact a program that Congress had chosen not to enact, as evidenced by loan forgiveness bills and other student loan legislation Congress recently considered but never enacted, which the Court contrasted with the unanimity with which Congress had enacted the HEROES Act in 2003.[249] It then explained that "'[a] decision of such magnitude and consequence' on a matter of 'earnest and profound debate across the country'" could only be made by Congress itself or "pursuant to a clear delegation" from Congress, and such a program was more properly in the wheelhouse of the House and Senate

243. *See supra* Section II.C.1. *See generally* Bray & Miller, *supra* note 106, at 1770–72 (discussing the origin and different meanings of the term "cause of action").

244. *See* Biden v. Nebraska, 600 U.S. at 494.

245. *Id.* at 494–96.

246. *Id.* at 497–98.

247. *Id.* at 496.

248. *See id.* at 502–03.

249. *See id*. at 503–04.

Committees on Appropriations.[250] In response to the Secretary's argument that this case should be treated differently because the government was conferring benefits instead of creating burdens on individual rights, the Court cited to the appropriations clause as "[a]mong Congress's most important authorities" and rejected the possibility that "separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations."[251]

C. Comparison of the Litigation Surrounding the Two Spending Decisions

As discussed above, the two presidential spending decisions were not only made in similar contexts but also faced legal challenges with similar theories for relief. In both cases, the plaintiffs invoked separation of powers and APA causes of action based on a violation of statutory authority and the Constitution against both the President and agency heads, and they argued that the President's action was ultra vires.[252] In both cases, the defendants argued that the plaintiffs could not establish standing because they could not trace their claimed injury to the challenged executive action.[253] The defendants also challenged whether the plaintiffs could bring a separation of powers claim, and whether the plaintiffs fell within the zone of interests of the relevant statutes.[254]

Notwithstanding these challenges, various courts found the plaintiffs had standing and proceeded to the merits, where they considered whether the executive's action exceeded statutory authority by considering how the statute had previously been invoked and the economic impact of the President's

250. *Id.* at 504.

251. *Id.* at 505.

252. *Compare* Complaint for Declaratory & Injunctive Relief ¶¶ 295–300, 307–19, California v. Trump, No. 20-cv-01563 (N.D. Cal. Mar. 3, 2020) (bringing claims for separation of powers, ultra vires action, and violation of the APA in violating the Constitution and exceeding statutory authority), *with* Nebraska v. Biden Complaint, *supra* note 225, ¶¶ 142–58 (bringing claims for separation of powers, and violation of the APA in exceeding statutory authority and violating the Constitution, and describing the loan cancellation plan as an ultra vires action).

253. *See* Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 13–14, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-cv-00892); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 229, at 11–12.

254. *See* Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 253, at 12–13. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 229, at 16, 20 n.4.

present invocation.[255] In both cases, various courts[256] and commentators[257] reasoned that the President's actions should have been more explicitly authorized by Congress.

However, it was only in the student loan litigation that the Supreme Court reached the merits and invalidated the executive action.[258] The next section explains the importance of the Court's decision in light of the evolving roles of Congress, the President, and the Court.

IV. RECONTEXTUALIZING THE EXECUTIVE ACTIONS

Part II provided a constitutional and statutory backdrop for federal government spending decisions. Part III described the litigation surrounding two recent presidential spending decisions. This section discusses how the roles of the three branches have evolved in recent years, with special focus on the new judicial role protecting Congress's power of the purse.

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255. *E.g.*, Biden v. Nebraska, 600 U.S. at 494, 501–502 (finding standing and describing the "economic and political significance" of the loan forgiveness plan); Sierra Club v. Trump, 977 F.3d 853, 876, 887 (9th Cir. 2020) (finding standing and explaining that under defendants' statutory interpretation, they "would be free to divert billions of dollars from projects funded by congressional appropriations to projects of their own choosing"), *vacated sub nom.*, Biden v. Sierra Club, 142 S. Ct. 56 (2021). After the border wall litigation and before the student loan decision, the Court explained that the "major questions doctrine 'label[]'" applied to "cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." West Virginia v. EPA, 597 U.S. 697, 721, 724 (2022).

256. *See* Sierra Club v. Trump, 963 F.3d 874, 889 (9th Cir. 2020) ("Where plaintiffs, like Sierra Club, establish that they satisfy the requirements of Article III standing, they may invoke separation of powers constraints, like the Appropriations Clause, to challenge agency spending in excess of its delegated authority."), *vacated sub nom.*, Biden v. Sierra Club, 142 S. Ct. 46 (2021); Biden v. Nebraska, 600 U.S. at 504 (describing how student loan program was "in the 'wheelhouse' of the House and Senate Committees on Appropriations").

257. *See, e.g.*, Eliza Buergenthal, *Private Enforcement of Appropriations Power: A Call to the Judiciary to Accept Ultra Vires Claims for Holding the Government Accountable*, 51 PUB. CONT. L.J. 439, 461–462 (2022); Howell Jackson & Colin Mark, *Executive Authority to Forgive Student Loans Is Not So Simple*, REGUL. REV. (Apr. 19, 2021), https://www.theregreview.org/2021/04/19/jackson-mark-executive-authority-forgive-student-loans-not-simple [https://perma.cc/J4R8-MRRH] (discussing how student loan forgiveness might run afoul of the appropriations clause and the property clause); *cf.* Memorandum from Reed D. Rubinstein, Principal Deputy Gen. Couns., Off. of the Gen. Couns., U.S. Dep't of Educ., to Betsy DeVos, Sec'y of Educ., U.S. Dep't of Educ. 1 (Jan. 12, 2021) (determining that the Secretary of Education "does not have the statutory authority to cancel, compromise, discharge, or forgive, on a blanket or mass basis, principal balances of student loans, and/or to materially modify the repayment amounts or terms thereof").

258. *See supra* Sections III.A–III.B.

A. Today's Separation of Powers Concerns

Years before he mentioned the Defense Appropriations Acts or declared a national emergency, President Trump announced his plans to build the wall.[259] President Biden likewise announced his plans to cancel student loan debt on the campaign trail without referring to the HEROES Act or a national emergency.[260] When the Presidents entered office and failed to convince Congress to enact legislation explicitly authorizing their plans, the Presidents then looked to other statutes seemingly providing broad executive discretion to achieve their policy goals.[261] The language of the Defense Appropriations Acts and the HEROES Act arguably could be read to authorize expansive executive discretion, and similarly broad language can be found in many other statutes that give the President expansive powers during a national emergency.[262]

1. Executive Spending Decisions

The Presidents' expansive readings of statutory delegations were not isolated incidents. As an amicus brief in the student loan litigation noted: "In recent decades, Presidents of both parties have increasingly resorted to loose constructions of congressional appropriations laws to justify spending without congressional action—even when Congress has explicitly rejected the very spending in question."[263] A Brennan Center running list of national emergencies declared since the NEA went into effect in September 1976 shows that of the eighty-nine national emergencies declared from September 1976 to April 2025, around fifty-nine (about two-thirds) were declared in the second half of that period, and thirty-two (over one-third) in the Trump or Biden Administrations.[264] Fifty-one (more than half) are still in effect

259. *See, e.g.*, Rupert Neate, *Donald Trump Announces US Presidential Run with Eccentric Speech*, GUARDIAN (June 16, 2015), https://www.theguardian.com/us-news/2015/jun/16/donald-trump-announces-run-president [https://perma.cc/HDB2-Q2GV].

260. *See, e.g.*, Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, MEDIUM (Apr. 9, 2020), https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322 [https://perma.cc/TR5J-U7SV].

261. *See supra* Section II.B.

262. *See supra* Section II.B; Patrick A. Thronson, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 753 (2013) (discussing executive branch's vast powers when president declares a state of emergency).

263. Brief for Michael W. McConnell et al. as Amici Curiae in Support of Respondents at 5, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506).

264. *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (July 23, 2025), https://www.brennancenter.org/our-work/research-reports/

today.[265] In today's partisan environment, members of the President's party can typically be counted on to block any overrides of their vetoes.[266] This is what happened with border wall funding, as only eleven Republicans in each chamber joined Democrats in a joint resolution terminating President Trump's emergency declaration,[267] insufficient numbers to overcome the President's veto.[268] Congress has also failed to build the bipartisan momentum necessary to amend the NEA to prevent executive abuse of national emergencies.[269]

In addition to the President using funds for purposes Congress did not specifically authorize, the Trump Administration has increasingly refused to use funds for their designated purpose. In President Trump's first week in office, his Administration announced a pause of United States foreign development assistance[270]; in its second week, it announced a pause of all federal funding.[271] Although the Supreme Court had previously upheld Congress's funding structure giving the Consumer Financial Protection Bureau (CFPB) the amount its Director deems "'reasonably necessary to carry out' [the Bureau's] duties,"[272] shortly after Trump's election Elon Musk posted on X "Delete CFPB."[273] On February 3, 2025, the CFPB's new acting director ordered the Bureau to cease its regulatory and enforcement activities.[274]

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declared-national-emergencies-under-national-emergencies-act [https://perma.cc/U9XV-DU5Y].

265. *Id*.

266. *See, e.g.*, Jennifer Scholtes, *Senate Fails to Override Trump on Border Wall Emergency*, POLITICO (Oct. 17, 2019, at 15:13 ET), https://www.politico.com/news/2019/10/17/senate-fails-to-override-trump-on-border-wall-emergency-050266 [https://perma.cc/9BE3-5ZXW]; Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 439 (2018).

267. See H.R.J. Res. 46, 116th Cong. (2019) for the text of the joint resolution.

268. *See* Emily Cochrane, *Trump Again Vetoes Measure to End National Emergency*, N.Y. TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/us/politics/trump-veto-national-emergency.html [https://perma.cc/TZ9Y-8WT3].

269. See *supra* Section III.B for a discussion of the many emergency-response powers delegated by the NEA to the President.

270. *See* Exec. Order No. 14169, 90 Fed. Reg. 8619, 8619 (Jan. 20, 2025).

271. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMORANDUM M-25-13, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES 2 (2025).

272. Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 422, 424 (2024) (quoting 12 U.S.C. § 5497(a)(1)).

273. Tony Romm, *Elon Musk Wants to 'Delete' Federal Financial Watchdog as 'DOGE' Begins Work*, WASH. POST (Nov. 27, 2024), http://washingtonpost.com/business/2024/11/27/elon-musk-delete-cfpb-doge/ [https://perma.cc/4QYH-AXAF].

274. *See* Tony Romm, *CFPB Halts Work After Trump Appoints Bessent as Acting Head*, WASH. POST (Feb. 3, 2025), https://www.washingtonpost.com/business/2025/02/03/trump-cfpb-bessent-halt/ [https://perma.cc/3SJN-TU6B].

2. Legal Challenges to Executive Spending

Various parties have challenged these executive spending decisions in court. For example, various local jurisdictions challenged President Trump's executive order during his first Administration to withhold federal funding from "sanctuary city" jurisdictions that refused to cooperate with federal efforts to detain and deport undocumented immigrations as a violation of the separation of powers and Congress's power of the purse.[275] Ruling on challenges by cities and counties that feared a loss of funds as a result of the administrative pressure, the Third, Seventh, and Ninth Circuits held that the conditioning of federal funds was unlawful: it violated the separation of powers by attempting to usurp Congress's spending power,[276] and it constituted an action unauthorized by statute.[277] During the Biden Administration, the Texas General Land Office, the State of Texas, and the State of Missouri challenged the Biden Administration's decision to divert funds appropriated for border wall construction to other purposes as a "violation of . . . separation of powers and certain express constitutional provisions, statutory violations of appropriations and other related statutes, and [a] violation of the [APA]."[278] The Southern District of Texas held that the Biden Administration's use of the funds for wall repair violated the APA because it did not comply with the appropriations act, a decision the Biden Administration did not appeal further.[279]

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275. *See, e.g.*, City & County of San Francisco v. Trump, 897 F.3d 1225, 1225, 1231–32 (9th Cir. 2018).

276. *See id.* at 1234–36.

277. *See* City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276, 279 (3d Cir. 2019); City of Chicago v. Sessions, 888 F.3d 272, 276–77 (7th Cir. 2018).

278. *See* Tex. Gen. Land Off. v. Biden, 619 F. Supp. 3d 673, 680–81, 700 (S.D. Tex. 2022), *rev'd and remanded sub nom.*, Gen. Land Off. v. Biden, 71 F.4th 264 (5th Cir. 2023). While the Southern District of Texas initially dismissed the action because the state of Texas had improperly split its claims among state executive department officials and the state of Missouri lacked standing to challenge border policy operating about a thousand miles from the state, *id.* at 718, the Fifth Circuit held that Texas' pleadings established Article III's standing requirements and reversed, Gen. Land Off. v. Biden, 71 F.4th 264, 269 (5th Cir. 2023). On remand, the district court concluded that the states—like California in earlier litigation—clearly fell within the zone of interests of appropriations acts that affected their territorial sovereignty, and because Congress had provided $1.4 billion in funding for fiscal years 2020 and 2021 specifically for construction of a southwest border barrier, the government was required to use those funds to construct new border barriers. Gen. Land Off. v. Biden, 722 F. Supp. 3d. 710, 719, 737, 745 (S.D. Tex. Mar. 8, 2024).

279. *See Gen. Land Off.*, 722 F. Supp. 3d at 743; *Gen. Land Off. v. Biden*, No. 7:21-CV-00272, No. 21-CV-00420, 2024 WL 2754118, at *1 (S.D. Tex. May 29, 2024); Ryan Autullo, *Biden Barred from Redirecting $1.4 Billion in Trump Wall Funds*, BLOOMBERG L. (Mar. 11, 2024, 13:15 ET), https://news.bloomberglaw.com/litigation/biden-barred-from-redirecting-1-4-billion-in-trump-wall-funds [https://perma.cc/P4YL-QEL6]; Press Release, Ken Paxton, Att'y

The first weeks of the second Trump Administration saw numerous lawsuits, including challenges against the pause on federal funding[280] and a challenge against an Executive Office for Immigration Review stop-work order halting funding for four programs providing legal resources to unrepresented people facing deportation.[281] As spending decisions face increasing legal challenges, courts can play a representation-reinforcing role by consistently ensuring elected officials adhere to their constitutional roles.[282] Justice Scalia wrote over thirty years ago that "when the Supreme Court . . . decides a case, not merely the outcome of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts."[283] The next section discusses the Court's current mode of analysis as exemplified in its student loan decision.

B. Today's Separation of Powers Jurisprudence

The student loan litigation shows a judicial willingness to intervene when the President seeks to spend government funds without specific congressional approval. During the border wall litigation, many scholars expressed concern about the lack of constraints against presidential exercises of delegated power.[284] The Supreme Court's student loan decision reflected two key principles that future courts should consistently apply when reviewing allegedly unauthorized presidential action to protect Congress's power of the purse: (1) a willingness to find challenges to unlawful executive action justiciable, and (2) a requirement of explicit statutory authorization, taking into account how the statute has previously been invoked, the economic scope

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Gen. of Tex., Attorney General Ken Paxton Secures Final Victory, Forcing Biden to Continue Border Wall Construction (Aug. 1, 2024), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-secures-final-victory-forcing-biden-continue-border-wall-construction [https://perma.cc/UE9Z-NUTE].

280. *See* Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, 763 F. Supp. 3d 13, 16 (D.D.C. 2025); Request for Emergency Temporary Restraining Order Under Federal Rule of Civil Procedure 65(b) at 3, New York v. Trump, 764 F. Supp. 3d 46 (D.R.I. 2025) (No. 25-cv-00039).

281. *See* Complaint for Declaratory & Injunctive Relief ¶¶ 1, 7–8, Amica Ctr. for Immigrant Rts. v. U.S. Dep't of Just., No. 25-298, 2025 WL 1852762 (D.D.C. Jan. 31, 2025).

282. *See supra* Section II.A.1.

283. Antonin Scalia*, The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

284. *See, e.g.*, Rebecca L. Brown, *Who Constrains Presidential Exercise of Delegated Powers?*, 29 WM. & MARY BILL RTS. J. 591, 609 (2021); Edward A. Fitzgerald, Sierra Club v. Trump*,* California v. Trump*: Border Wall Funding Knocked Down*, 12 ARIZ. J. ENV'T L. & POL'Y 179, 235 (2022). Writing just two years before the Supreme Court's student loan decision, Metzger described how constitutional jurisprudence on congressional delegation and separation of powers rarely engaged with the implications of appropriations. Metzger, *supra* note 138, at 1080.

of the executive's program, and whether Congress separately considered but did not authorize the specific policy. This final section discusses these principles[285] and how courts should consistently apply them when reviewing future challenges to presidential spending decisions.[286]

1. Increased Willingness to Intervene

While the Court historically used justiciability doctrines to avoid deciding separation of powers disputes, it notably did not do so in the student loan litigation or in several other recent separation of powers disputes.[287] Instead, the Court seems to have taken on a "public rights" role, articulating and enforcing legal norms against the other branches of government.[288] As Justice Sotomayor noted in dissent in a June 2024 decision limiting the types of actions the Securities and Exchange Commission could bring in administrative proceedings, today there seems to be a "trend: When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best."[289]

What are the barriers that might prevent a court from reviewing executive action? In the border wall litigation, the Court stayed a preliminary injunction after determining that the government had made a sufficient showing that the plaintiffs had no cause of action.[290] The Court never made a decision on the merits, but it had granted certiorari to review a Ninth Circuit decision that the

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285. It also addresses the border wall litigation where the Court's student loan decision seems to validate lower court reasoning, given that the Court itself never reached the merits.

286. Scholars (and indeed the Court itself) have noted how ideological preferences can distort non-ideological legal doctrines like justiciability. *See, e.g.*, Richard L. Heppner Jr., *Let the Right Ones in: The Supreme Court's Changing Approach to Justiciability*, 61 DUQ. L. REV. 79, 94 (2023) (citing Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 286–87 (2022)). This article nonetheless describes how courts should rule if they consistently apply legal doctrines.

287. *See supra* Section II.C.1; Biden v. Nebraska, 600 U.S. 477, 480, 494 (2023) (stating in the syllabus that "[t]his case implicates many of the factors present in past cases raising similar separation of powers concerns" yet deciding that plaintiffs had standing). For example, in rejecting the statutory scheme that allowed the SEC to adjudicate enforcement actions itself, the majority reasoned that a scheme that would "permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch" was the "very opposite of the separation of powers that the Constitution demands." SEC v. Jarkesy, 603 U.S. 109, 140 (2024). When it first adopted the major questions doctrine, the Court explained that it was justified by "both separation of powers principles and a practical understanding of legislative intent." West Virginia v. EPA, 597 U.S. 697, 723 (2022). In its final decision of the 2023 term, the Court held that "the separation of powers principles explicated in our precedent necessitate at least a presumptive immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility." Trump v. United States, 603 U.S. 593, 614 (2024).

288. *See* Siegel, *supra* note 103.

289. *Jarkesy*, 603 U.S. at 201 (Sotomayor, J., dissenting).

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

public interest plaintiffs could challenge the transfer of funds under the appropriations clause and the state plaintiffs could bring a challenge under the APA as "final agency action for which there is no other adequate remedy in a court."[291] The Ninth Circuit had earlier held that the public interest plaintiffs had an equitable action to enjoin unconstitutional official conduct.[292] Each of these causes of action in turn raises its own challenges for plaintiffs, but recent jurisprudence suggests none is insurmountable.

The concept of implied causes of action under the Constitution is perhaps most familiar in the context of federal claims for damages as recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[293] The Court has recently described how it once "assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose," but it now appreciates that "private rights of action to enforce federal law must be created by Congress."[294] The Court has nonetheless continued to recognize other implied rights of action to challenge government action, including under the Appointments Clause and separation-of-powers principles.[295] When the Court held that a for-cause removal restriction for the single director of an agency violated the constitutional separation of powers, Justice Thomas noted separately in his concurrence that he assumed the private plaintiffs had a legal right to obtain equitable relief against government action based on an "implied private right of action under the Constitution to seek equitable relief to 'preven[t] entities from acting unconstitutionally.'"[296]

In a recent case alleging an appropriations clause violation, the Court explained that the appropriations clause just requires Congress to identify a source of public funds and authorize the expenditure of those funds for designated purposes.[297] The Court's *CFPB* decision was not a win for the parties alleging an appropriations clause violation, but the plaintiff trade associations were able to obtain judicial review of their claim that the CFPB's funding structure violated the appropriations clause.[298] Although the case challenged the constitutionality of a statute that provided funding to the CFPB

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291. Sierra Club v. Trump, 977 F.3d 853, 876–78 (9th Cir. 2020) (quoting 5 U.S.C. § 704), *vacated sub nom.*, Biden v. Sierra Club, 142 S. Ct. 56 (2021) (mem.).

292. *See* Sierra Club v. Trump, 929 F.3d 670, 694 (9th Cir. 2019).

293. *See* 403 U.S. 388, 396–97 (1971).

294. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 334 (2020) (first quoting Ziglar v. Abbasi, 582 U.S. 120, 132 (2017); and then quoting Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)); *see* Hernandez v. Mesa, 589 U.S. 93, 101 (2020).

295. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010).

296. Collins v. Yellen, 594 U.S. 220, 256, 263 n.1 (2021) (Thomas, J., concurring) (quoting *Free Enter. Fund*, 561 U.S. at 491 n.2).

297. *See* Consumer Fin. Prot. Bureau v. Community Fin. Services Ass'n of Am., 601 U.S. 416, 424 (2024).

298. *Id.*

(as opposed to executive action), the Court seemed to generally accept that it could review whether a funding mechanism violated the appropriations clause.[299]

The challenge could alternatively have been brought as an equitable cause of action to enjoin unconstitutional actions. The Court has recognized that federal court jurisdiction over suits in equity is defined by the principles of judicial remedies devised and administered by the English Court of Chancery,[300] requiring plaintiffs to show that such equitable relief was historically available.[301] The Court has previously recognized that "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."[302] When the Court determined that the Supremacy Clause "does not create a cause of action," it also recognized the "power of federal courts of equity to enjoin unlawful executive action [which] is subject to express and implied statutory limitations."[303] In cases alleging that government officials exceeded their statutory authority, "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies."[304] The plaintiff would likely also have to show that his claimed interest fell within that statute's zone of interests.[305]

Plaintiffs can alternatively bring their claims under the APA, which provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court."[306] If the agency action is made reviewable by statute, the plaintiff must fall within the zone of interests of that statute; for all other agency action, the plaintiff must show the action is "final" and that there is no other adequate

299. *See id*.

300. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) ("[T]he 'jurisdiction' thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." (omission in original) (quoting Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 568 (1939))).

301. *E.g.*, Whole Woman's Health v. Jackson, 595 U.S. 30, 44 (2021) ("The equitable powers of federal courts are limited by historical practice.").

302. Harmon v. Brucker, 355 U.S. 579, 581–82 (1958).

303. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324–25, 327 (2015) (rejecting implied right of action under the supremacy clause where Court had "never held or even suggested that" judicial review was available under the supremacy clause); *see Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 318 ("[The judiciary's] authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." (quoting *Atlas Life Ins. Co*., 306 U.S. at 568)).

304. Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 690 (1949).

305. *See supra* Section II.C.1.

306. 5 U.S.C. § 704.

remedy.[307] Under the APA, plaintiffs can challenge agency action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law."[308]

Unauthorized executive action is generally not made reviewable by statute, so the usual barriers will be "final" action and "no other adequate remedy in a court."[309] When the Supreme Court allowed states, individuals, organizations, and local jurisdictions to challenge the Trump Administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program under the APA, it reaffirmed the "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action'" which could be "rebutted by a showing that the relevant statute 'preclude[s]' review or that the 'agency action is committed to agency discretion by law.'"[310] When the Court upheld the Biden Administration's rescission of the Migrant Protection Protocols, it accepted that the Administration's two separate memoranda announcing this decision each constituted separately reviewable final agency actions.[311] In doing so, it reaffirmed that agency actions were "final" when they "mark[ed] the 'consummation' of the agency's decisionmaking process" and resulted in "rights and obligations [being] determined."[312]

So what was the proper cause of action? The student loan decision did not give it a name, but the Court seemed to assume it had a responsibility to interpret the statute for itself when the presidential administration claimed a particular statute authorized its actions. Perhaps the Court's review was under the APA to determine whether the action was "in excess of statutory . . . authority."[313] Perhaps it was an equitable action, implied from the terms of the HEROES Act, because that statute, in addition to protecting borrowers, also affected the interests of loan servicers like MOHELA.[314] Or perhaps it was an equitable action implied from the Constitution itself?

By failing to identify the plaintiffs' specific cause of action, the Court did not have to grapple with any of the limitations posed by any particular type of claim. For example, if plaintiffs' claim was brought under the APA, the Court would need to assure itself that there was "no other adequate remedy" since

307. *Id.*; *see supra* Section II.C.1.

308. 5 U.S.C. § 706 (2)(A)–(D).

309. *See id.* § 704.

310. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 16–17 (2020) (alteration in original) (citation omitted) (first quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967); then quoting 5 U.S.C. § 701(a)(1–2)).

311. *See* Biden v. Texas, 597 U.S. 785, 808–09 (2022).

312. *Id.* at 808 (alteration in original) (quoting Bennett v. Spear, 520 U.S. 154, 178 (1997)).

313. 5 U.S.C. § 706(2)(C).

314. *See* Biden v. Nebraska, 600 U.S. 477, 489–90 (2023).

no statute specifically provided for review.[315] But the plaintiffs' theory of harm was based on the loss of fees MOHELA otherwise would have received from its contract with the Department of Education,[316] and the defendants had explained in their lower court briefing that exclusive jurisdiction over disputes based on the contractual relationship between the Department and Direct Loan servicers like MOHELA lies in the Court of Federal Claims pursuant to the Contract Disputes Act.[317] An adequate remedy thus might be available in the Court of Federal Claims.

The Court also did not have to consider whether plaintiffs fell within the HEREOS Act's zone of interests, a test related to both prudential standing and the existence of a cause of action.[318] While the majority and dissent focused their dispute on whether Missouri could establish standing based on harm to MOHELA, the defendants had challenged below whether MOHELA's claimed harm (lost fees from borrowers who consolidated their loans) fell within the zone of interests of the statutes the defendants had invoked (which was intended to protect federal student loan borrowers).[319] This argument was never considered by any court,[320] and by failing to describe plaintiffs' cause of action, the Supreme Court was also able to avoid a zone-of-interests inquiry.

Whatever the plaintiffs' cause of action was in the student loan decision, the border wall litigation seemed to raise the same issue: whether the executive branch's actions were authorized by statute. Section 8005 specified that its transfer authority was only available for "unforeseen military requirement[s]" and "may not be used if the item to which the funds would be

315. 5 U.S.C. § 704.

316. *Biden*, 600 U.S. at 490.

317. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 229, at 13–14.

318. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126–27 (2014) (explaining that the "zone of interests" test, part of "prudential standing," requires a court to determine whether a legislatively conferred cause of action encompasses a particular plaintiff's claim).

319. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 229, at 16.

320. The district court never addressed whether MOHELA's harms were sufficient because it determined that Missouri did not have standing to bring claims on behalf of MOHELA. Nebraska v. Biden, 636 F. Supp. 3d 991, 1000 n.4 (E.D. Mo. 2022), *cert. granted before judgment*, 143 S. Ct. 477 (2022), *rev'd and remanded*, 600 U.S. 477 (2023). The Eighth Circuit reversed because it determined Missouri did have standing based on the harms to MOHELA, *see* Nebraska v. Biden, 52 F.4th 1044, 1047 (8th Cir. 2022), and this was the determination the government challenged before the Supreme Court, *see* Brief for the Petitioners at 26–28, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506).

transferred is an item for which Congress has denied funds."[321] As in the student loan litigation, there thus seemed to be a role for a court to interpret whether this statutory language authorized the Administration's actions. The Court recently reiterated its holding from *Marbury* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[322] Perhaps, then, the student loan decision merely exemplifies what the court has "long held[:] that federal courts may in some circumstances grant injunctive relief . . . . with respect to violation of federal law by federal officials."[323] The specific name of that cause of action did not matter, but "[w]hen the meaning of a statute was at issue, the judicial role was to 'interpret the act of Congress, in order to ascertain the rights of the parties.'"[324]

Because the Court never mentioned the requirements of any particular cause of action in the student loan litigation, it saw only two tasks before it: "[e]nsuring that the States have standing" and "addressing the legality of the Secretary's program."[325] With such an understanding of the judicial role, the government should not be able to defeat judicial challenges by arguing about the plaintiff's precise cause of action as the Trump Administration did in response to the border wall litigation. The question of whether plaintiffs have a cause of action remains relevant today, as the D.C. Circuit vacated a district court's preliminary injunction enjoining the U.S. Department of State, the U.S. Agency for International Development, and the Office of Management and Budget from unlawfully impounding congressionally appropriated foreign aid funds because the plaintiffs "lack[ed] a cause of action to press their claims."[326] Nor should standing pose a high barrier with this understanding. In determining whether state plaintiffs have standing, the Court has recognized that a state's interest in "protecting its quasi-sovereign interests" requires the Court to take a lenient approach satisfied by a state's "well-founded desire to preserve its sovereign territory."[327] In the student loan litigation, the Court determined that the state of Missouri had standing because it was "harmed in carrying out its responsibilities" based on financial harm to its instrumentality, MOHELA,[328] expanding its standing doctrine beyond injury to a state's sovereign territory to include harm to an entity

321. 10 U.S.C. § 2214(b)(2); Sierra Club v. Trump, 379 F. Supp. 3d, 883, 918 (N.D. Cal. 2019), *aff'd* 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom.*, Biden v. Sierra Club, 142 S. Ct. 46 (2021); *id.* at 913–14 (emphasis omitted) (citing § 2214(b)(2)).

322. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

323. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326–27 (2015).

324. *Loper Bright*, 603 U.S. at 385 (quoting Decatur v. Paulding, 39 U.S. 497, 515 (1840)).

325. Biden v. Nebraska, 600 U.S. 477, 489 (2023).

326. Glob. Health Council v. Trump, No. 25-5097, 2025 WL 2480618, at *1 (D.C. Cir. Aug. 28, 2025).

327. Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007).

328. *See* Biden, 600 U.S. at 493, 493 n.3.

created by the state. In the border wall litigation, the states of California and New Mexico alleged harms more similar to those accepted by the Court in *Massachusetts v. EPA*[329]—harm to a region of the state that was "home to a large number of sensitive plant and animal species" and harm to specific endangered species.[330] In all these cases, the plaintiff states were alleging that the executive had undertaken an unlawful action, and as a result, some entity or asset over which the state claimed some sovereignty would be harmed, whether that be land or a state instrumentality.

So, when is a challenge to an executive spending decision justiciable? As discussed earlier, the executive branch does not have independent spending authority, so Congress sets the terms of the executive branch's involvement in budgetary activities by statute.[331] The Court has indicated it can review whether the executive branch acted within its statutory authority.[332] Even for statutes involving national emergencies, although courts have declined to review whether the President properly invoked statutory power to declare a national emergency,[333] these statutes still impose other limitations on their usage that a court can review.[334] The APA does not apply to presidential actions,[335] but courts can still review whether agency actions directed by the President were authorized by the statute.[336] And while the APA does not permit review where "agency action is committed to agency discretion by law,"[337] the Court has instructed that this is a "narrow" exception that applies only when there is no "meaningful standard" against which to judge the agency's decision,[338] and thus, it should not prove a barrier where the statute provides instructions on when and how the executive branch can exercise its discretion.[339] A court should thus be able to review executive spending decisions to confirm whether they were authorized by statute.

Determining whether a plaintiff has standing and determining whether a plaintiff has a cause of action ultimately seem to ask the same question: Does

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329. 549 U.S. 497 (2007).

330. California v. Trump, 963 F.3d 926, 936 (9th Cir. 2020). *Compare id.* (alleging the aforementioned harms), *with* Massachusetts v. EPA, 549 U.S. at 522 (finding that Massachusetts "alleged a particularized injury in its capacity as a landowner" when it complained of the loss of its coastal land due to climate change).

331. *See supra* Sections II.A–II.B.

332. *See* Stack, *supra* note 149, at 1172.

333. *See, e.g.*, United States v. Shih, 73 F.4th 1077, 1091–92 (9th Cir. 2023)

334. *See, e.g.*, *id.* at 1092 (listing IEEPA provisions that create reviewable statutory restrictions of executive authority).

335. Franklin v. Massachusetts, 505 U.S. 788, 801 (1992).

336. *See id.* at 828 (Scalia, J., concurring in part).

337. 5 U.S.C. § 701(a)(2).

338. Dep't of Com. v. New York, 588 U.S. 752, 772 (2019) (quoting Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 586 U.S. 9, 23 (2018)).

339. *See id.* at 772–73.

this plaintiff have a right to ask the court for relief?[340] The Court's answer in the student loan litigation seemed to be "yes" if the plaintiff can identify that an entity over which it claims sovereignty is injured by the challenged executive action. In other words, the Court is no longer so demanding in its requirement that generalized grievances be handled exclusively by the political branches.[341]

2. Merits Review and the Requirement of Explicit Statutory Authority

Once it turned to the merits in the student loan litigation, the Court considered whether the statute explicitly authorized the Biden Administration's loan forgiveness plan using its new major questions doctrine.[342] As part of this analysis, the Court explained that the "economic and political significance" of the Secretary of Education's action required the Court to not assume a congressional delegation to the agency unless Congress made a clear statement to that effect.[343] While the Court historically did not pay much attention to Congress's power of the purse in determining the relative scope of congressional and presidential powers,[344] the major questions doctrine's emphasis on the economic significance of a program seems to acknowledge that Congress should be authorizing programs that significantly implicate the nation's budget. The Court also considered how the Secretary had invoked the statute on prior occasions to determine its meaning.[345] Although the Court did not cite *Youngstown*, its analysis echoed Justice Frankfurter's reasoning that "[d]eeply embedded traditional ways of conducting government" could give meaning to the words of constitutional or statutory text.[346]

In addition to its recent invocations of the major question doctrine in interpreting statutory grants of power, the Court has also shown a renewed interest in the nondelegation doctrine in reviewing whether statutes may permissibly grant such power. The Court previously explained that the nondelegation doctrine is "rooted in the principle of separation of powers" and "mandate[s] that Congress generally cannot delegate its legislative power to another Branch" unless it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated

340. *See supra* Section II.C.1.

341. See *supra* Section II.C.1 for discussions of the traditional, more stringent view.

342. Biden v. Nebraska, 600 U.S. 477, 504–06 (2023).

343. *Id.* at 502, 505–06.

344. *See supra* Section II.C.2.

345. Biden v. Nebraska, 600 U.S. at 496–97.

346. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *see* Biden v. Nebraska, 600 U.S. at 496–97.

authority] is directed to conform" because "such legislative action is not a forbidden delegation of legislative power."[347] Although the Court has only relied on the nondelegation doctrine to invalidate a statute twice (both in the same year), a majority of the justices on the Supreme Court have suggested an openness to reviving the nondelegation doctrine to prohibit statutory delegations of legislative power to agencies.[348]

Both the major questions doctrine, as a means of interpreting statutory grants of power, and the nondelegation doctrine, as a means of determining the permissibility of such statutory grants, demonstrate the Court's increased skepticism of broad delegations to the executive branch to determine major questions of vast economic and political significance. The Court also demonstrated its skepticism of agencies in *Loper Bright Enterprises v. Raimondo*[349], in which the Court overruled *Chevron v. Natural Resources Defense Council*,[350] its forty year precedent of deferring to an agency's reasonable interpretation of an ambiguous statute.[351] In concluding that deference to agencies' statutory interpretations was inappropriate, the Court explained that "a statutory ambiguity . . . is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute."[352] The same should be true when the President attempts to exploit statutory ambiguity intended to allow the executive to respond to unexpected circumstances to undertake massive spending programs without congressional authorization.

Of course, none of this acknowledges the incredible deference the Court now shows to the President.[353] In its student loan decision, the Court treated the loan forgiveness program as an agency decision without acknowledging that this decision was the product of President Biden's personal policy

347. Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (last alteration in original) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

348. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278–79 (2021); *see also* Peter J. Wallison, *An Empty Attack on the Nondelegation Doctrine*, FEDERALIST SOC'Y: FEDSOC BLOG (Apr. 22, 2021), https://fedsoc.org/commentary/fedsoc-blog/an-empty-attack-on-the-nondelegation-doctrine [https://perma.cc/AVF7-CKPC] (describing how five, and possibly all six, conservative justices were ready to revive the nondelegation doctrine).

349. 603 U.S. 369 (2024).

350. 467 U.S. 837 (1984).

351. Amy Howe, *Supreme Court Strikes Down* Chevron*, Curtailing Power of Federal Agencies*, SCOTUSBLOG (June 28, 2024), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/ [https://perma.cc/R3JP-5JP9].

352. *Loper Bright*, 603 U.S. at 400.

353. *See* Trump v. United States, 603 U.S. 593, 642 (2024).

preferences rather than just agency expertise.[354] In doing so, the Court mirrored the language of the HEROES Act,[355] which describes the authority of the Secretary of Education, but the Court thus also did not have to wrestle with "the unique constitutional position of the President."[356] In fact, in almost all of its major questions cases, the Court has ignored the President's role, blaming the agency for overstepping its delegated power instead of the President for violating the separation of powers.[357] In this context, the Court has thus shown the same skepticism of spending decisions carried out at the direction of the President that it has shown toward all agency interpretations of statutory authority.

The Court's recent cases suggest an increased willingness to invalidate executive actions when they are made without explicit congressional authorization. While other separation of powers disputes might present a different balance of constitutional powers, spending disputes unrelated to specific Article II powers present a clean vehicle for courts to determine whether executive spending was authorized by legislation. The next section discusses a role courts might play in reviewing these disputes in the future.

V. FUTURE JUDICIAL REVIEW OF EXECUTIVE ACTIONS

Judicial intervention is not the only tool to protect Congress's appropriations power,[358] but the Supreme Court has shown a willingness to loosen justiciability barriers and probe the statute cited by the executive branch in order to prevent the President from diverting government funds toward policy goals never statutorily authorized by Congress. Lower courts have shown how a similar analysis can be conducted when the President's

354. *Contrast* Biden v. Nebraska, 600 U.S. 477, 487 (2023) (describing the loan cancellation as having been announced by the Department of Education), *with Fact Sheet: Student Loan Relief*, *supra* note 9 (describing the loan cancellation "as part of a comprehensive effort to address the burden of growing college costs and make the student loan system more manageable for working families").

355. *See* Biden v. Nebraska, 600 U.S. at 495–96.

356. Franklin v. Massachusetts, 505 U.S. 788, 800 (1992).

357. Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511, 512 (2024).

358. Pasachoff has shown how this can be accomplished via legislative reform by updating the Antideficiency and Impoundment Control Acts. Pasachoff, *supra* note 49. Specifically, Pasachoff described four categories of sensible reforms: improving disclosure about apportionments, expenditures and obligations made during shutdowns, and expired or canceled unobligated appropriations; enhancing limitations on the authority of OMB with respect to apportionments, deferrals, and reporting requirements for agencies; enhancing GAO's ability to conduct investigations; and updating the Impoundment Control Act to respond to contemporary executive practices of programmatic delay and spending "releases" based on expansive interpretations of spending statutes. *Id.* at 382, 405–24.

action is with respect to a transfer of appropriated funds.[359] A similar approach should also be employed when reviewing presidential impoundments, which similarly involve executive failure to follow statutory directives.[360] In the face of legislative gridlock and presidential ambitions, judicial involvement may become increasingly important.[361]

Courts can use this more flexible approach to justiciability and this strict requirement of explicit statutory approval when reviewing challenges to current and future presidential spending decisions for exceeding statutory authority. While the Court's recent use of this approach against a Democratic Administration has opened the Court to accusations of a partisan bias,[362] courts could consistently apply this approach to review all allegedly unauthorized executive spending.

On the first day of his second term, President Trump issued a slew of executive orders, a number of which touched on the federal budget.[363] One such order was a declaration of a national energy emergency which authorized the heads of executive departments and agencies to identify, lease, site, produce, transport, refine, and generate domestic energy resources, including by using eminent domain authorities and authorities under the Defense Production Act.[364] Another order was a pause in United States foreign development assistance "pending reviews of such programs for programmatic efficiency and consistency with United States foreign policy."[365]

In implementing these orders, his Administration has initiated processes with immediate budget implications. In response to the executive order on foreign development assistance, on January 24, 2025, the State Department's Office of Foreign Assistance stopped work on all existing foreign assistance awards and halted all new obligations for foreign assistance programs pending review.[366] On February 6, it was announced that the Trump Administration

359. *See supra* Sections III.A.2–III.A.3.

360. *See* FISHER, *supra* note 21, at 223–24.

361. As Metzger has explained, the marginalization of appropriations benefits the President at Congress's expense. *See* Metzger, *supra* note 138, at 1084.

362. *E.g.*, Ian Millhiser, *The Supreme Court's Lawless, Completely Partisan Student Loans Decision, Explained*, VOX (June 30, 2023, at 17:15 UTC), https://www.vox.com/scotus/2023/6/30/23779903/supreme-court-student-loan-biden-nebraska-john-roberts [https://perma.cc/MX65-NAH9].

363. *See* Curt Merrill & Amy O'Kruk, *CNN Tracked Trump's Executive Actions in the First 100 Days*, CNN: POLITICS (May 1, 2025, at 09:00 ET), https://www.cnn.com/politics/tracking-trump-executive-orders-actions-dg/index.html [https://perma.cc/VF6X-KMCW].

364. Exec. Order No. 14156, 90 Fed. Reg. 8433, 8433–34 (Jan. 29, 2025).

365. Exec. Order No. 14169, 90 Fed. Reg. 8619, 8619 (Jan. 30, 2025).

366. Nick Schifrin (@nickschifrin), X (Jan. 24, 2025, at 18:28 ET), https://x.com/nickschifrin/status/1882933475809902714 [https://perma.cc/H3QF-QQMB] (posting full text of Secretary of State message to all diplomatic and consular posts).

planned to reduce the number of workers at the U.S. Agency for International Development (USAID) from more than 10,000 to about 290 positions.[367]

Nor have the spending cuts been limited to foreign aid. On January 27, the Trump Administration's Office of Management and Budget sent a memorandum to the heads of all executive departments and agencies instructing all federal agencies to "temporarily pause all activities related to obligation or disbursement of all Federal financial assistance" while they completed "a comprehensive analysis of all of their Federal financial assistance programs to identify programs, projects, and activities that may be implicated by any of the President's executive orders."[368] This memorandum cited "more than $3 trillion" in federal financial assistance programs that could be affected by the memorandum but explicitly carved out "assistance received directly by individuals" and "Medicare or Social Security benefits."[369] While numerous courts immediately entered orders staying the Administration's orders that paused federal funding,[370] and indeed the Administration itself seemed to walk back the policy,[371] courts will almost certainly have to review further similar lawsuits.[372]

A number of these policies build on campaign promises. In a meeting with GOP lawmakers in June 2024, Donald Trump brought up the idea of imposing an "all tariff policy" to eliminate the income tax.[373] Shortly after entering office, the Trump Administration began announcing tariffs. On February 1, 2025, President Trump announced a 25% tariff on imports from Canada and

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367. Karoun Demirjian & Aishvarya Kavi, *Trump Administration to Lay Off Nearly All of U.S. Aid Agency's Staff*, N.Y. TIMES (Feb. 6, 2025), https://www.nytimes.com/2025/02/06/us/politics/usaid-job-cuts.html [https://perma.cc/N52G-7PM5].

368. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *supra* note 271.

369. *Id.* at 1 & nn.1–2.

370. *See, e.g.*, Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, 763 F. Supp. 3d 13, 17 (D.D.C. 2025) (issuing an administrative stay after the release of the OMB memo); New York v. Trump, 769 F. Supp. 3d 119, 147 (D.R.I. 2025) (issuing a preliminary injunction against the OMB memo's directive); AIDS Vaccine Advocacy Coal. v. U.S. Dep't of State, 770 F. Supp. 3d 121, 155 (D.D.C. 2025) (enjoining the implementation of Executive Order 14169); Pacito v. Trump, 768 F. Supp. 3d 1119, 1215–16, 1239 (W.D. Wash. 2025) (enjoining the suspension of foreign aid funds, despite Executive Order 14169 being invoked to justify the suspension).

371. *See* Chris Megerian, Zeke Miller & Lisa Mascaro, *Trump White House Rescinds Memo Freezing Federal Money After Widespread Confusion*, ASSOCIATED PRESS: POLITICS (Jan. 29, 2025, at 21:32 ET) https://apnews.com/article/donald-trump-pause-federal-grants-aid-6d41961940585544fa43a3f66550e7be [https://perma.cc/2DAZ-QAUJ].

372. *See, e.g.*, *Nat'l Council of Nonprofits*, 763 F. Supp. 3d at 49–52 (holding that the Trump Administration's executive funding freezes were subject to judicial review even after the Administration retracted the January 27 OMB memo).

373. Emily Wilkins & Kevin Breuninger, *Trump Floats Eliminating U.S. Income Tax and Replacing It with Tariffs on Imports*, CNBC: POLITICS (June 13, 2024, at 13:08 ET), https://www.cnbc.com/2024/06/13/trump-all-tariff-policy-to-replace-income-tax.html [https://perma.cc/R2N3-4FA4].

Mexico and a 10% tariff on imports from China.[374] The tariffs on Canadian and Mexican imports were delayed for thirty days as the leaders of those countries said they had agreed to bolster border enforcement, but the tariffs on China took effect on February 4, 2025.[375]

President Trump also pledged to give funding preferences and "favorable treatment" to schools that allow parents to elect principals, abolish teacher tenure for K-12 teachers, and use merit pay to incentivize quality teaching and to eliminate certain school administrators such as those overseeing diversity, equity and inclusion initiatives.[376]

What should happen if orders like these are challenged in court? Indeed, some of these orders have already been challenged and temporarily paused.[377] How should a court review these challenges on the merits?

Consider the pause on federal funding. This attempt to freeze as much as $3 trillion in federal funding was challenged in two separate lawsuits, one filed by a group of nonprofits and another by a group of 22 states.[378] Although the Trump Administration subsequently rescinded the memo, many nonprofits have still not had their funding restored,[379] and the Trump Administration has shown a willingness to revise and reissue policies when they face judicial setbacks.[380] The claims brought in these initial two lawsuits, analyzed below, illuminate how a court might review future challenges.

In the action brought by the nonprofits, the plaintiffs asserted that they and their members relied on federal grants and financial assistance to serve their missions, and halting the funding would lead to potentially devastating

374. *Fact Sheet: President Donald J. Trump Imposes Tariffs on Imports from Canada, Mexico and China*, WHITE HOUSE (Feb. 1, 2025), https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-imposes-tariffs-on-imports-from-canada-mexico-and-china/ [https://perma.cc/P3V8-ZA8G].

375. *Reactions to China's Tit-for-Tat Tariffs*, REUTERS (Feb. 4, 2025), https://www.reuters.com/markets/view-china-announces-tit-for-tat-tariffs-us-levies-come-into-effect-2025-02-04/ [https://perma.cc/WST4-UD3L].

376. DONALDTRUMP, *President Trump's Plan to Save American Education and Give Power Back to Parents*, at 2:24–3:12 (Rumble, Jan. 26, 2023), https://rumble.com/v27959i-president-trumps-plan-to-save-american-education-and-giver-power-back-to-pa.html [https://perma.cc/JFM3-6P2H].

377. *See, e.g.*, cases cited *supra* note 370.

378. Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, F. Supp. 3d 13, 16 (D.D.C. 2025); Request for Emergency Temporary Restraining Order Under Federal Rule of Civil Procedure 65(b), *supra* note 281, at 1, 46.

379. David A. Fahrenthold et al., *Trump's Attempt to Freeze Grant Funding Leaves Nonprofits Reeling*, N.Y. TIMES (Feb. 6, 2025), https://www.nytimes.com/2025/02/04/us/politics/grant-funding-freeze-nonprofits.html [https://perma.cc/PW6T-LPUR].

380. *See, e.g.*, Saba Hamedy, *Everything You Need to Know About the Travel Ban: A Timeline*, CNN: POLITICS (June 26, 2018, at 12:42 ET), https://www.cnn.com/2018/06/26/politics/timeline-travel-ban/index.html [https://perma.cc/Y66B-YNL7] (describing timeline of the travel ban as it went through multiple iterations during the first Trump Administration).

pauses in programs.[381] They sought judicial review of the memo as final agency action under the APA that was arbitrary and capricious, contrary to the First Amendment, and in excess of statutory authority.[382] Meanwhile, the coalition of states asserted that they each received billions of dollars annually in congressionally designated and appropriated federal funds, and they described the serious impacts of a pause on federal funds as the memo directed.[383] They challenged the memo under the APA as arbitrary and capricious and as contrary to law because the defendants could not refuse to disburse appropriated funds and had no authority to impose a government-wide pause on federal awards.[384] They also brought a claim for violation of the separation of powers and constitutional claims for violation of the spending clause and violation of the presentment, appropriations, and take care clauses.[385]

Could a court properly consider these claims on the merits? In the student loan litigation, the Court indicated that financial harm was clearly sufficient to establish standing, and financial harm to an entity subject to the state's control was also sufficient.[386] In the litigation challenging the federal funding pause, the states and nonprofit plaintiffs explained how a delay in receiving federal funds would cause harm, and this concrete harm should also be sufficient to establish standing.[387] As for the cause of action, several of the plaintiffs' theories seem viable. The Court has entertained separation-of-powers claims in other contexts, and it may be willing to do so here to review executive encroachment on Congress's spending powers.[388] The Court has also entertained claims for violations of the presentment and appropriations clauses, and it could extend the reach of claims brought pursuant to those

381. Complaint ¶¶ 32, 37–38, Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, F. Supp. 3d 13 (D.D.C. 2025) (No. 25-cv-00239) [hereinafter Nat'l Council of Nonprofits Complaint].

382. *Id.* ¶¶ 26, 44–61 (citing 5 U.S.C §§ 706(2)(A), 706(2)(B), (C)).

383. *See* Request for Emergency Temporary Restraining Order Under Federal Rule of Civil Procedure 65(b), *supra* note 280, ¶¶ 30, 77–91.

384. *See id.* ¶¶ 98–116.

385. *Id.* ¶¶ 31–35.

386. *See* Biden v. Nebraska, 644 U.S. 477, 489–90 (2023).

387. *See* Nat'l Council of Nonprofits Complaint, *supra* note 381, ¶¶ 31–42.

388. *See, e.g.*, SEC v. Jarkesy, 603 U.S. 109, 120, 140 (2024) (reviewing whether SEC action seeking civil penalties for securities fraud before the agency rather than before a jury in federal court violated separation of powers); Axon Enter., Inc. v. FTC, 598 U.S. 175, 188–96 (2023) (reviewing whether a federal district court had federal-question jurisdiction over claims challenging tenure protections for SEC and FTC Administrative Law Judges as rendering such judges insufficiently accountable to the President in violation of separation-of-powers principles); Collins v. Yellen, 594 U.S. 220, 250–57 (2021) (reviewing whether a for-cause removal restriction for the single Director of the Federal Housing Finance Agency violated the constitutional separation of powers).

clauses.[389] If no other remedy is available in court, then an APA cause of action should be available, as the OMB did not indicate it would engage in any further deliberations and the order determined that plaintiffs could no longer access funds to which they claimed an immediate right,[390] so the order should be "final." However, there is perhaps the most room for debate on the APA cause of action given that the memo did not itself determine which funds or grants should be paused and that the government argued agencies themselves would still have to make that determination consistent with their own authorities.[391]

And what about the merits? In their motion for a temporary restraining order, the nonprofit plaintiffs argued that the memo failed to explain the Administration's legal authority for its action, failed to consider the reliance interest of the many grant recipients, and announced a policy of targeting grant recipients based on those recipients' exercise of their First Amendment rights and for reasons with no bearing on their eligibility to receive federal fund.[392] The state plaintiffs argued that Congress alone held the power of the purse, and not only had Congress not delegated any unilateral authority to indefinitely pause all federal financial assistance, but this order could not be squared with the complex statutory regime governing federal grants.[393] The memo was also arbitrary and capricious because it failed to consider the significant harm imposed on grant recipients, its impact was removed from its purported basis, the directive did not consider any alternatives, and it did not provide any reasoned explanation.[394]

In its response, the government argued that the memo had been withdrawn and criticized plaintiffs for seeking overbroad relief.[395] However, the

389. *See, e.g.*, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 424–41 (2024) (reviewing a claim that the CFPB's funding structure violated the appropriations clause); Clinton v. City of New York, 524 U.S. 417, 436–47 (1998) (reviewing challenge that the President's exercise of the Line Item Veto Act to cancel an item of new direct spending violated the presentment clause).

390. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *supra* note 271 (indicating the pause would take effect the following day); Nat'l Council of Nonprofits Complaint, *supra* note 381, at 2.

391. Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order & in Support of Motion to Dismiss at 14, Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, 763 F. Supp. 3d 13 (D.D.C. 2025) (No. 25-cv-00239).

392. Plaintiffs' Motion for a Temporary Restraining Order at 3, Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, 763 F. Supp. 3d 13 (D.D.C. 2025) (No. 25-cv-00239).

393. Request for Emergency Temporary Restraining Order Under Federal Rule of Civil Procedure 65(B) at 8, 10, New York v. Trump, 764 F. Supp. 3d 46 (D.R.I. 2025) (No. 25-cv-00039).

394. *Id.* at 9.

395. Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order & in Support of Motion to Dismiss, *supra* note 391, at 1; Defendants'

Administration offered little on the merits, instead largely defending against the plaintiffs' challenges on procedural grounds.[396] Although no court ever considered the plaintiffs' claims on the merits, if the Trump Administration again orders spending freezes, the plaintiffs have a strong claim on the merits that this action violates the constitutional separation of powers and is unauthorized by any statute. Whether this is called a constitutional claim under the appropriations clause, an equitable action to enjoin ultra vires action, or an APA claim for action in excess of statutory authority, such a spending decision should be held unlawful on the merits.

When the Administration first acted, it did not cite any statute authorizing its actions.[397] Even in litigation, the Administration has not always invoked statutory authority for its actions, instead challenging plaintiffs' standing and their failure to challenge final agency action, or arguing that the President's powers in the realm of foreign affairs are vast and generally unreviewable.[398] But as discussed above, these justiciability doctrines should not bar review.[399] Instead, some of these cases resemble *Youngstown*, in that the government has often not argued that Congress authorized the President's actions.[400] Instead, because Congress has explicitly legislated spending that the President is not following,[401] the President is taking "measures incompatible with the expressed or implied will of Congress."[402] In this situation, courts "can sustain the President only by holding that [his action] is within his domain and beyond control by Congress."[403] But spending is certainly not something that is

Response to Plaintiffs' Proposed Temporary Restraining Order at 2, New York v. Trump, 764 F. Supp. 3d 46 (D.R.I. 2025) (No. 25-cv-00039).

396. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order & in Support of Motion to Dismiss, *supra* note 391, at 6–16; Defendants' Response to Plaintiffs' Proposed Temporary Restraining Order, *supra* note 395, at 2–4.

397. *See* Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, 763 F. Supp. 3d 36, 58 (D.D.C. 2025) (issuing a temporary restraining order but not a final merits determination); New York v. Trump, 769 F. Supp. 3d 119, 146–47 (D.R.I. 2025) (issuing a preliminary injunction but not a final merits determination); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *supra* note 271.

398. *See, e.g.*, Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, Personal Services Contractor Association v. Trump, 2025 WL 1766680 (D.D.C. 2025) (No. 25-cv-00469); Defendants' Opposition to Plaintiffs' Motions for Preliminary Relief at 24–26, AIDS Vaccine Advoc. Coal. v. U.S. Dep't of States, 768 F. Supp. 3d 26 (D.D.C. 2025) (No. 25-cv-00400).

399. *See supra* Section IV.B.1.

400. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

401. *See* New York v. Trump, 769 F. Supp. at 139–40.

402. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

403. *See id.* at 640.

exclusively within the President's control (as it is instead exclusively within Congress's control),[404] so these actions should be invalidated on the merits.

Next, consider a policy in which the Administration might attempt to invoke statutory authority: conditioning school funding on adherence to the Administration's social agenda. During his first term, President Trump also proposed a $9 billion reduction to the Department of Education's budget during his first months in office,[405] and in each subsequent year he continued to propose budgets with cuts to programs at the Department of Education.[406] Each year his budget cuts were rejected by Congress,[407] but in his second term he might try more creative methods to achieve the policy goals he desires like how he previously attempted to access additional funds for border wall funding when Congress rejected his budget proposal.[408] If he now tries to adjust school eligibility for federal funds to cut funding to schools that treat race or gender in ways with which he disagrees and to instead prioritize schools that maximize parent choice, states that lose or risk losing federal funds might bring suit.

Although the Trump Administration has largely proceeded without reference to legislative authority,[409] there are a number of existing statutes the Administration might attempt to invoke to defend its actions in court. For example, Section 1111 of ESSA requires states to submit a state education plan to the Secretary of Education for her approval before they may access ESSA funds.[410] The Secretary has the authority to establish a review process and reject state plans.[411] If the Trump Administration's Secretary of Education invokes this authority to favor parent choice and reject plans from states that include topics of race or gender in their curriculum, states that have their plans rejected or fear having their plans rejected based on the Secretary's guidance

404. *See supra* Sections II.A–II.B.

405. Douglas Belkin & Leslie Brody, *Trump Budget Proposal Cuts $9 Billion from Department of Education*, WALL ST. J. (Mar. 16, 2017, at 13:21 ET), https://www.wsj.com/articles/trump-budget-proposal-cuts-9-billion-from-department-of-education1489684887 [https: //perma.cc/847N-89R6].

406. Wesley Whistle, Trump Budget Proposes Cuts to Education, Forbes (Dec. 15, 2020, at 09:16 ET), https://www.forbes.com/sites/wesleywhistle/2020/02/10/trump-budget-proposes-cuts-to-education/ [https://perma.cc/LE6U-KC4L].

407. *See, e.g.*, Adam Harris, *The Trump Administration Really Wants to Cut Education Funding. Congress Doesn't.*, ATLANTIC (Mar. 11, 2019), https://www.theatlantic.com/education/archive/2019/03/trump-administration-would-cut-education-budget-again/584599/ [https://perma.cc/C8PV-Q6K2]; Richard Kogan, Kathleen Romig & Jennifer Beltrán, *Trump's 2021 Budget Would Cut $1.6 Trillion From Low-Income Programs*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 9, 2020), https://www.cbpp.org/research/federal-budget/trumps-2021-budget-would-cut-16-trillion-from-low-income-programs [https://perma.cc/AVE2-S264].

408. *See supra* Section III.A.1.

409. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *supra* note 271.

410. 20 U.S.C. § 6311(a)(1), (a)(4)(A)(v)-(vi).

411. *Id.* § 6311(a)(4)(A)(i), (vi).

might challenge this guidance as "exceed[ing] the Secretary's statutory authority."[412]

These states should be able to establish standing based on "concrete and imminent harm to a legally protected interest"[413]—the federal funding they will no longer be able to access when their plans are rejected. Once one state is able to establish standing, the court should be able to turn to the merits to determine whether the statute the executive cites grants it the authority it claims.[414]

On the merits, the court must determine whether the statute authorizes the Trump Administration's education funding prioritization policy. In making this determination, the court should consider the "economic and political significance" of the Secretary of Education's action.[415] In Fiscal Year 2024 the Department of Education received $79.1 billion in funding,[416] so funding cuts (or the outright elimination of the department) will likely be economically and politically significant. In such a situation, the court should require a clear statement from Congress before allowing such a program.[417]

In interpreting the statute's language, the court should also consider how Secretaries of Education have previously invoked the statute to determine its meaning.[418] To the extent the literal words of the statute might be interpreted to allow such broad authority, the court should consider nondelegation concerns from granting the executive such broad authority.[419] Although the exact terms and authority for any Trump Administration policy are unknown, courts should carefully scrutinize the claimed statutory authority for any massive spending program like the Court did in reviewing President Biden's loan forgiveness program.

* * *

As Courts have increasingly found challenges to executive programs to be justiciable and scrutinized closely the claimed statutory authority for such

412. Biden v. Nebraska, 600 U.S. 477, 488 (2023).

413. *Id.* at 489.

414. *Cf. id.* at 494 (turning to the merits after determining standing was satisfied in the student loan litigation).

415. *Id.* at 506.

416. Katharine Meyer, Rachel M. Perera & Michael Hansen, *Brown Center Scholars React to President Biden's FY 2025 Department of Education Budget Proposal*, BROOKINGS INST. (Apr. 9, 2024), https://www.brookings.edu/articles/brown-center-scholars-react-to-president-bidens-fy-2025-department-of-education-budget-proposal/ [https://perma.cc/9DEL-2KLS].

417. *See* Biden v. Nebraska, 600 U.S. at 505–06.

418. *See id.* at 496–97; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

419. *See supra* Section IV.B.2.

programs,[420] and this may prove an important tool against future unauthorized programs. Kevin Stack has explained the relative ease with which the political process can reverse a court decision that a President's action was not authorized by statute, as Congress need only sign legislation explicitly authorizing the program which the President will surely sign, compared to a decision upholding the President's action, when Congress must then either convince the President to sign legislation stripping him of the power or else overcome a presidential veto.[421] Consistent application of this lenient approach to justiciability and strict requirement of explicit authorization therefore might prove helpful in protecting democratic accountability. Such review could be undertaken alongside efforts by Congress itself to strengthen its control over the power of the purse[422] and to limit presidential emergency powers.[423]

VI. CONCLUSION

Presidents have shown an increased willingness to divert government funds toward their preferred policies without explicit congressional authorization, perhaps none more than the current President.[424] At the same time, courts have shown an increased willingness to intervene in political disputes and to narrowly construe statutory delegations to the executive branch, this article shows how these trends should be consistently applied, to invalidate large presidential spending decisions never authorized by Congress.

420. *See supra* Section IV.B.

421. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 576 (2005).

422. *See, e.g.*, Pasachoff, *supra* note 49, at 405–24 (proposing legislative reforms to modernize the Anti-Deficiency Act and Impoundment Control Act); Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 NOTRE DAME L. REV. 127 *passim* (2021) (proposing using Congress's powers of the purse to condition funding to agencies on their compliance with congressional oversight requests).

423. *See, e.g.*, Jennifer Shutt, *Wide Scope of Presidential Emergency Powers Could be Reined in by Congress This Year*, ARK. ADVOC. (May 22, 2024, at 16:02 CT), https://arkansasadvocate.com/2024/05/22/wide-scope-of-presidential-emergency-powers-could-be-reined-in-by-congress-this-year/ [https://perma.cc/3JG8-ZKBK]; Illya Somin, *Don't Let the Executive Abuse Emergency Powers to Raid the Treasury*, SCOTUSBLOG (Feb. 21, 2023), https://www.scotusblog.com/2023/02/dont-let-the-executive-abuse-emergency-powers-to-raid-the-treasury/ [https://perma.cc/NB58-SMX7].

424. *See supra* Section II.B.