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Regulation of Government Agencies Through Limitation Riders

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REGULATION OF GOVERNMENT AGENCIES THROUGH LIMITATION RIDERS

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Congress often attaches limitation riders to appropriations bills to establish its policy directives. Professor Devins argues that the appropriations process is not the proper vehicle for substantive policymaking. In this article, he analyzes institutional characteristics that prevent the full consideration or articulation of policy in appropriations bills. Professor Devins also considers the extent to which Congress's use of limitation riders inhibits the effectiveness of the other branches of the federal government. Professor Devins concludes that, while Congress's use of limitation riders is sometimes necessary, Congress should be aware of the significant risks associated with policymaking through the appropriations process.

Over the past decade, Congress has increasingly relied on the appropriations process to establish its policy directives.[1] Congressional oversight of the executive and independent agencies, as well as substantive policy initiatives, are often the product of funding decisions and so-called limitation riders[2] attached to appropriations bills. Indeed, some of Congress's most controversial policy directives result from the appropriations process. In 1986, for example, Congress threatened to cut off funds to Office of Management and Budget (OMB) regulatory review operations, pressuring OMB into modifying its highly controversial practice of subjecting proposed regulations to a cost-benefit analysis.[3] Congress also

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1. *See generally Regulatory Reform and Congressional Review of Agency Rules: Hearings Before the Subcomm. on Rules of the House Comm. on Rules,* 96th Cong., 1st Sess., pt. 1, at 1355-63 (1979) (statement of Allen Schick) [hereinafter *Regulatory Reform Hearings*]; R. BETH, D. STRICKLAND & S. BACH, LIMITATION AND OTHER HOUSE AMENDMENTS TO GENERAL APPROPRIATION BILLS: FISCAL YEARS 1979-1983 (Congressional Research Service 1982); DEMOCRATIC STUDY GROUP, U.S. HOUSE OF REPRESENTATIVES, SPECIAL REP. NO. 95-12, THE APPROPRIATION RIDER CONTROVERSY (1978); Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices,* 29 CATH. U.L. REV. 51, 83-87 (1979).

2. Limitation riders prohibit the expenditure of funds on specified activities.

3. *See* Havemann, *"Defunding" OMB's Rule Reviewers,* Wash. Post, July 18, 1986, at A17 col. 1. For further discussion of OMB's role in agency rulemaking, see DeMuth & Ginsburg, *White House Review of Agency Rulemaking,* 99 HARV. L. REV. 1075 (1986); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation,* 99 HARV. L. REV. 1059 (1986).

used its budgetary power in 1986 to curb perceived abuse at the Civil Rights Commission, attempting to influence the agency's research agenda by earmarking funds for specific categories of operations.[4]

In addition to earmarking or threatening to cut off agency funds—which is generally done by the committee responsible for that agency's budget—Congress frequently expresses policy preferences through limitation riders introduced on the House or Senate floor while an appropriations bill is under consideration. These riders have had tremendous impact. Military activities in Southeast Asia,[5] public funding of abortion,[6] air bags for automobiles,[7] tax-exemptions for discriminatory schools,[8] religious activities in public schools,[9] and public funding of school desegregation[10] are but some of the areas affected by limitation riders.

This state of affairs is troublesome. Although Congress's power of the purse is near-plenary,[11] the appropriations process may not be conducive to sound substantive policymaking for a variety of institutional rea-

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See also Rovner, *Senators Hail OMB Decision to Open Rule Review Process,* 44 CONG. Q. WEEKLY REP. 1409 (June 21, 1986) (discussing new OMB policies designed to increase public disclosure of office's involvement in federal rulemakiug process).

4. *See* Kurtz, *Hill Slashes Funding for Rights Panel,* Wash. Post, Oct. 19, 1986, at A12, col. 5.

5. *See* Holtzman v. Schlesinger, 484 F.2d 1307, 1312-14 (2d Cir. 1973) (discussing congressional attempts to limit authorization of bombing in Cambodia), *cert. denied,* 416 U.S. 936 (1974).

6. Davidson, *Procedures and Politics in Congress,* in THE ABORTION DISPUTE AND THE AMERICAN SYSTEM 30, 37-45 (G. Steiner ed. 1983) ("The various Hyde amendments dramatically slashed federal funding of abortion.").

7. *See* Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667, 693-94 (1980) (discussing Department of Transportation appropriation bill House amendment, precluding use of funds to enforce any standard or regulation requiring occupant restraint system other than seat belts).

8. *See* Wright v. Regan, 656 F.2d 820, 832-35 (D.C. Cir. 1981) (discussing Treasury appropriations bills prohibiting IRS from formulating more aggressive guidelines to identify racially discriminatory private schools), *rev'd,* 468 U.S. 737 (1984); *cf.* McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools,* 52 FORDHAM L. REV. 441 (1984) (arguing that courts have ignored justiciability standards in addressing merits of tax exemption cases brought by litigants disappointed with curreut legislative policy).

9. Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act of 1984, Pub. L. No. 98-139, tit. III, § 307, 97 Stat. 871, 895 (1983); *see* Joint Resolution of Oct. 10, 1984, Pub. L. No. 98-461, 98 Stat. 1814 (continuing Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act of 1984); Joint Resolution of Oct. 6, 1984, Pub. L. No. 98-455, 98 Stat. 1747 (same); Joint Resolution of Oct. 5, 1984, Pub. L. No. 98-453, 98 Stat. 1731 (same); Joint Resolution of Oct. 3, 1984, Pub. L. No. 98-441, § 101(a), 98 Stat. 1699, 1699 (same).

10. *See* Brown v. Califano, 627 F.2d 1221, 1230-33 (D.C. Cir. 1980) (congressional amendments to HEW appropriations bill prohibiting use of funds to transport student beyond school nearest his or her home); C. DALE, A LEGISLATIVE HISTORY OF FEDERAL ANTI-BUSING LEGISLATION, (Congressional Research Service 1981) (analysis of significant congressional antibusing measures from 1964 to 1981).

11. Of course, Congress may not use its power of the purse in a manner inconsistent with the Constitution. *See infra* notes 116-129 and accompanying text.

sons. House and Senate rules reflect this concern, attempting to separate the process of funding from other lawmaking processes.[12] These rules are a sensible means of ensuring that congressional decisionmaking is deliberate and systematic. The use of the appropriations process to accomplish substantive objectives that have not been considered previously or that contravene established statutory objectives may prevent the appropriate authorizing committee from applying its expertise.[13] Exacerbating this problem, appropriations are often acted on quickly, providing little opportunity for thoughtful deliberation of the issues raised by such measures.[14]

In addition to these institutional concerns, appropriations-based policymaking may strain the effectiveness of the other branches of the federal government. For example, courts called upon to give effect to limitation riders are placed in an untenable position. Because most appropriations are restricted to a specific time period (usually a single fiscal year),[15] the purposes for which they are enacted may vary with changed circumstances. Limitation riders may serve only as temporary stop-gap measures, enabling Congress to review proposed executive action before it becomes effective. On the other hand, Congress may reenact a rider several times to establish its view as to how an authorizations statute should be interpreted. Court interpretations of limitation riders as amendments to previously enacted legislation, therefore, are inherently unreliable; they may be accurate one day, inaccurate the next, and irrelevant at the end of the fiscal year.

Furthermore, riders that prohibit the Executive from launching regulatory initiatives—without altering the underlying authorizations statute—unduly limit the Executive's policymaking responsibilities.[16] While its power of the purse generally allows for such interference, Congress

12. House Rule XXI, clauses 2 and 5, and Senate Rule XVI, clauses 2 and 4, bar legislation in a general appropriations bill. House Rule XXI, cls. 2 and 5, H.R. DOC. NO. 403, 96th Cong., 1st Sess. 525-40, 541-43 (1979) (96th Congress preamble printed over 95th Congress, 2d Session document); Senate Rule XVI, cls. 2 and 4, S. DOC. NO. 1, 95th Cong., 1st Sess. 17-18 (1977). Both chambers, however, have adopted rules which recognize the prevalence of legislation in an appropriation. House Rule XXI, clause 3, requires reports accompanying appropriations bills to "contain a concise statement describing fully the effect of any provision . . . which directly or indirectly changes the application of existing law." House Rule XXI, *supra* at 540. Senate Rule XVI, clause 8, requires the identification of each recommended appropriation that does not "carry out the provisions of an existing law . . . ." Senate Rule XVI, *supra* at 19.

13. *See generally* Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1375-77 (1980) (discussing prudential considerations of preventing administrative agencies from exercising expertise).

14. *See infra* note 58 and accompanying text.

15. Parnell, *supra* note 13, at 1376.

16. *See infra* notes 100-115 and accompanying text. In the view of some commentators, such infringement is an unconstitutional violation of the separation of powers. *E.g.*, Parnell, *supra* note

should accord due deference to executive enforcement schemes; otherwise, the enforcement schemes are likely to become a confusing patchwork, with some provisions vigorously enforced while others are virtually ignored.

In a sense, the dangers of legislating and regulating through appropriations are symptomatic of Congress's inability to enact authorizing legislation.[17] This failure has blurred the line between appropriations and authorizations. Moreover, in this age of budget deficits, it is likely that Congress will place less emphasis on authorization measures.[18] Instead, Congress will make greater use of appropriations and other devices to ensure that agency operations reflect the legislative will.

Part I of this article considers the prevalence and risks of limitation riders.[19] This discussion emphasizes that, as a means to establish public policy, the appropriations process is incomplete and the implementation of limitation riders is plagued by practical problems. Part II evaluates the constitutionality of such riders.[20] Specific attention is paid to whether Congress has plenary authority to limit either executive enforcement or federal court jurisdiction through budgetary constraints. This analysis reveals that Congress has such authority, provided that it does not command the Executive or the courts to undertake constitutionally proscribed activities. Part III addresses the issue of whether courts should view limitation riders as amendments to related authorizing legislation.[21] This section argues that, because of the inherently transient nature of such measures, riders should not be viewed in this manner.

While highly critical of appropriations-based policymaking, this article is not intended to serve as a rallying call for the termination of this practice. On occasion, Congress will have no choice but to make policy through appropriations: legislative proposals may be stalled in authorizing committees or Congress may need to respond quickly to an emergency situation. At the same time, the risks of appropriations-based policymaking are such that Congress should not ignore the separate functions served by authorizations and appropriations. This article highlights these risks.

13, at 1377-83. As discussed later, this constitutional claim is in error, for appropriations bills are as much legislation as are authorizations. *See infra* notes 108-115 and accompanying text.

17. *See Regulatory Reform Hearings, supra* note 1, pt. 1, at 1359 (charting steady decline in number of public laws enacted from 84th to 95th Congress).

18. *See* A. SCHICK, LEGISLATION, APPROPRIATIONS, AND BUDGETS: THE DEVELOPMENT OF SPENDING DECISION-MAKING IN CONGRESS 67, 75 (Congressional Research Service No. 84-106 1984).

19. *See infra* notes 22-98 and accompanying text.

20. *See infra* notes 99-165 and accompanying text.

21. *See infra* notes 166-295 and accompanying text.

I. APPROPRIATIONS AS OVERSIGHT

Congress's use of its appropriations powers as a policy device reflects Congress's penchant for oversight and the related decline of the authorizations process. Indeed, over the past several years, Congress has focused more on how much government funding a given group or cause should receive than directly on how existing or proposed programs benefit society.[22] Through this greater emphasis on the "purse strings" of government, Congress has not only attempted to check executive abuses; it also has asserted its authority over the other branches of government.[23]

Oversight of executive organization and action is a traditional function of Congress.[24] Yet, this oversight role has moved into the forefront due to an "increasing tendency for legislatures to prescribe administrative organization, procedures, and programs in greater detail."[25] This heightened emphasis by Congress on supervising the enforcement of the laws has found support among various writers who claim that the whole of lawmaking authority is properly located in the legislative branch. One commentator suggests "that the congressional 'input' can and should become a more substantial and innovative one . . . [due to] the President's 'priority problems,' [and] the advantages of a decentralized and specialized Congress in publicizing a range of issues and developing and 'cumu-

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22. *See Regulatory Reform Hearings, supra* note 1, pt. 1, at 1356.

23. *See* Fisher, *Presidential Spending Discretion and Congressional Controls,* 37 LAW AND CONTEMP. PROBS. 135, 137 (1972); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 CALIF. L. REV. 983 (1975). As Allen Schick, then a specialist at the Congressional Research Service, testified before the House Rules Committee:

> The United States is in the midst of a critical realignment in the power relationship between the legislative and the executive branches. In recent years, Congress has been increasingly reluctant to give executive and regulatory agencies carte blanche in carrying out the laws it had enacted.
>
> Congress senses that the life of the law is in its implementation. It has therefore sought to control administrative behavior by circumscribing the discretion of Federal agencies and by reserving to itself the authority to review administrative and regulatory policies.

Regulatory Reform Hearings, supra note 1, pt. 1, at 1346.

24. For a general review of executive and legislative functions under the Constitution, see L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1985).

25. M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 454 (3d ed. 1977).

Several studies have documented congressional attempts to control agency practices through statutory and nonstatutory oversight. *See* Parnell, *supra* note 13, at 1360-75. For example, in a 1980 study of congressional supervision of the IRS, House Ways and Means Counsel Archie Parnell observed:

> Prior to 1975, . . . Congressional review of tax law administration was the exception, not the rule, and such review focused entirely on problems of efficiency and corruption. Since 1975, however, there has been an explosion in the number of congressional hearings that review IRS administration of the tax law, coupled with an increasing tendency of Congress to prohibit the IRS from executing certain aspects of the tax law.

Parnell, *supra* note 13, at 1368-69.

lating' diverse proposals."[26] Others have criticized such oversight as a circumvention of the separation of powers doctrine. They argue that enforcement of the laws has been and should remain entrusted to the agencies of the Executive branch.[27]

Congress asserts control over the administrative state through numerous statutory and nonstatutory measures.[28] The use of appropriations is only one of these oversight techniques, but an especially potent one. Unlike other types of oversight, which, for the most part, rely on the *threat* of direct action, appropriations *are* direct action. As the Senate Committee on Governmental Affairs concluded:

> [A]ppropriations oversight is effective precisely because the statutory controls are so direct, unambiguous, and virtually self-enforcing. While agencies are able to bend the more ambiguous language of authorizing legislation to their own purposes, the dollar figures in appropriations bills represent commands which cannot be bent or ignored except at extreme peril to agency officials.[29]

Because the Antideficiency Act compels the cessation of nonessential government operations if funding is not approved,[30] most appropriations *must* be enacted each year, making appropriations a likely mechanism of congressional oversight.

A. *The Prevalence of Limitation Riders.*

One of the most controversial and frequently used devices of appropriations-based oversight of executive action is the limitation rider. These riders are amendments to an appropriations bill which "prohibit the use of the money for part of the purpose [of the bill] while appropriating for the remainder of it."[31] A limitation rider may not impose additional duties or require judgments and determinations not otherwise

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26. D. PRICE, WHO MAKES THE LAW?—CREATIVITY AND POWER IN SENATE COMMITTEES 331-32 (1972). *But see* Rangel, *Use of Congressional Rules to Delay Progress in Civil Rights Policy*, 8 J. LEGIS. 62 (1981) (criticizing increasing use of limitation riders to appropriations bills).

27. *See* Watson, *supra* note 23, at 1012. As Madison put it: "where the whole power of one department is exercised by the same hand which possess the whole power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST NO. 47, at 247 (J. Madison) (M. Beloff ed. 1987).

28. Frederick Kaiser refers to these devices in his study of alternatives to the legislative veto. *See* Kaiser, *supra* note 7, *passim*. Analyses of the effectiveness of nonstatutory control can be found in M. KIRST, GOVERNMENT WITHOUT PASSING LAWS: CONGRESS' NONSTATUTORY TECHNIQUES FOR APPROPRIATIONS CONTROL (1969); M. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION (1976); Melville, *Legislative Control over Administrative Rule Making*, 32 U. CIN. L. REV. 33 (1963).

29. SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES 31 (Comm. Print 1977).

30. 31 U.S.C. § 1512 (1982).

31. House Rule XXI, cl. 2, § 843, *reprinted in* H.R. DOC. NO. 403, 95th Cong., 2d Sess. 534 (1979) (limitations on appropriations bills).

required by law.[32] A Congressional Research Service analysis offered the following explanation of these appropriations devices:

> The concept of a limitation amendment may be understood as a compromise between two principles: first, the separation of appropriations from policy decisions . . . and second, the right of Congress to decide not to appropriate for [all or part of] an authorized agency, purpose or program. . . . [Such a] provision . . . is not considered to change existing law, because the limitation applies only to the funds appropriated for a single fiscal year . . . .[33]

Congress has been attaching limitation riders to appropriations bills since the 1870s.[34] Nineteenth century riders involved war powers, federal supervision of elections, and extension of the Constitution and revenue laws to territories.[35] By the 1940s, the use of riders was so widespread that the Joint Committee on the Organization of Congress recommended that the practice of attaching legislation to appropriations bills be discontinued.[36] In the 1970s, the line separating authorizations from appropriations grew increasingly blurry.[37] From 1963 to 1970, 116 limitation amendments (26% of all amendments) were offered to appropriations bills; from 1971 to 1977, 225 limitation amendments (31% of all amendments) were offered to appropriations bills.[38] The problem of the appropriations process was so acute that in 1983 the House of Representatives adopted procedures designed to restrict the proliferation of such amendments.[39]

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32. *Id.* at § 842, *reprinted in* H.R. DOC. NO. 403, 95th Cong., 2d Sess. 533 (1979) ("While any limitation in an appropriation bill . . . places some minimal duties on federal officials, . . . an amendment or language in an appropriation bill may not impose additional duties, not required by law.").

33. S. BACH, THE STATUS OF LIMITATION AMENDMENTS UNDER THE RULES OF THE HOUSE OF REPRESENTATIVES FOR THE 98TH CONGRESS 3-4 (Congressional Research Service 1983).

34. *See generally* E. MASON, THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES 47-49 (1967) (rider attached to Army appropriations bill of 1878 prohibiting use of Army personnel at polls on election day).

35. *See id.* at 48 n.1.

36. The report stated:

> The practice of attaching legislation to appropriation bills is often destructive of orderly procedure. Riders obstruct and retard the consideration of supply bills. Sometimes they contradict action previously approved in carefully considered legislation . . . . These practices, when used for purposes other than to effect real economies, should be prohibited by a tightening of the rules.

S. REP. NO. 1011, 79th Cong., 2d Sess. 23 (1946).

37. *See generally Regulatory Reform Hearings, supra* note 1, pt. 1, at 1 (statement of subcommittee chairman Moakley). Since 1933, 196 Acts of Congress have contained 295 separate provisions for reviewing or vetoing executive action. Fisher, *supra* note 1, at 53 ("[A]uthorization bills contain appropriations, appropriations bills contain authorizations, and the order of their enactment is sometimes reversed.").

38. DEMOCRATIC STUDY GROUP, *supra* note 1, at attachment B.

39. *See* R. SACHS, LIMITATION AMENDMENTS TO APPROPRIATION BILLS: THE IMPLEMENTATION OF HOUSE RULE XXI (2)(D) IN THE NINETY-EIGHTH CONGRESS (Dec. 14, 1984); S. BACH, *supra* note 33, at 1.

The House had ample reason to be concerned. The use of appropriations to control executive actions had not been limited to one or two policy areas, but rather was extended to a wide range of subjects. For example, limitation riders for the 1979 fiscal year[40] prohibited the Department of Health, Education and Welfare from either funding abortions[41] or requiring school systems to undertake mandatory student busing as a condition to receiving federal funds;[42] prohibited the Department of Transportation from using any funds to enforce any regulation which required a motor vehicle to be equipped with any kind of personal restraint system other than a seat belt;[43] prohibited the closing or relocation of military bases without prior notification to Congress;[44] and prohibited OSHA regulation of small businesses and firms.[45]

Fiscal year 1979 riders were not an anomaly. In 1980, 86 limitation riders (41% of all amendments) were offered; 67 were adopted.[46] The adopted riders included restrictions on nondiscrimination enforcement by the IRS, Department of Education and the Department of Justice; OSHA enforcement of safety standards in small businesses; HUD financial assistance to student aliens; the distribution of government publications to Cuba, Iran and the USSR; and possible Department of Education efforts to prevent voluntary prayer in the public schools.[47] Indeed, since the mid-seventies, riders have helped shape policy in a great many federal agencies and departments.[48]

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40. These riders are discussed in *Regulatory Reform Hearings*, *supra* note 1, pt. 1, at 1361 and Kaiser, *supra* note 7, at 693-96.

41. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586 (1978).

42. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, §§ 207-209, 92 Stat. 1567, 1585-86 (1978).

43. Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-335, § 317, 92 Stat. 435, 450 (1978).

44. Military Construction Authorization Act, 1979, Pub. L. No. 95-82, § 612, 91 Stat. 358, 379 (1977) (codified as amended at 10 U.S.C. § 2687 (Supp. III 1985)).

45. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, tit. I, 92 Stat. 1567, 1569-70 (1978).

46. *See* D. STRICKLAND, LIMITATION AMENDMENTS OFFERED ON THE FLOOR OF THE HOUSE OF REPRESENTATIVES 1978, 1979, 1980, at 10 (Congressional Research Service 1981).

47. *See id.* at 1-8.

48. Of course, not all riders are passed. In education policy, for example, controversial riders which were not passed include: the 1980 Collins amendment that specifically would have prohibited the Department of Justice from bringing lawsuits "to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home," Rangel, *supra* note 26, at 67; the 1980 Walker amendment that would have prohibited the expenditure of funds for the issuance or implementation of regulations establishing quotas for public school enrollment of women and various minorities, 126 CONG. REC. 23,515 (1980); and the 1983 Walker amendment that would have prohibited the Department of Education from using funds to prevent the implementation of programs of voluntary prayer in public schools, 129 CONG. REC. H7043 (daily ed. Sept. 19, 1983). For congressional debate on the 1983 Walker amendment, see 129 CONG. REC. H7044 (daily

B. *The Limitation Rider Controversy.*

When no other legislative device is available, Congress often resorts to limitation riders in response to pending or recent agency action or to large-scale public protest of court rulings.[49] Therefore, limitation riders are often introduced on emotional issues where the stakes are high. At other times, members of Congress introduce limitation riders out of sheer frustration with the committee system. Representative James Collins captured this feeling in 1980 when he stated: "For [twenty-five] years Congress has been controlled by liberal Democrats and [no conservatives can] get any type of freedom from regulation out of their committees . . . . The only recourse [conservatives] have is to go to the appropriations bill."[50] Although it might be preferable for members of Congress to work through the proper authorizations committee, appropriations may be the only mechanism available to force consideration of certain issues.

Appropriations-based restrictions on agency action may also be the only realistic way to stop the Executive from launching administrative initiatives that Congress disfavors. There simply may not be sufficient time to work through the deliberative authorizations process. For example, when Congress prohibited the Internal Revenue Service from implementing its proposed nondiscrimination standards for private schools in 1979, the House Appropriations Committee contended that "the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them."[51] Were riders not used in this and like circumstances, Congress's power of the purse as well as its power to establish substantive policy would be undercut.

Appropriations-based policymaking may be useful, but there are strong reasons to caution against it. First, policy-based appropriations "generate[ ] 'vehement contention and debate' in the House and 'discord and dissension' between the House and the Senate."[52] Second, policymaking through the appropriations process is conducted without the benefit of review by the authorizing committee with appropriate subject-

ed. Sept. 19, 1983). Although these controversial proposals failed, their introduction further demonstrates that Congress frequently resorts to the appropriations process to resolve substantive policy issues.

49. *See* sources cited *supra* note 1. *See generally* R. FENNO, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS (1966) (offering empirical description of appropriations process); M. KIRST, *supra* note 28, 83-107 (discussing practice of using appropriations as alternative legislative techniques).

50. Murray, *House Funding Bill Riders Become Potent Policy Force,* 38 CONG. Q. WEEKLY REP. 3251, 3252 (Nov. 1, 1980) (quoting Rep. Collins).

51. H. REP. NO. 248, 96th Cong., 1st Sess. 15 (1979). For further discussion, *see infra* notes 227-245 and accompanying text.

52. W. KRAVITZ, LEGISLATION IN APPROPRIATION BILLS: PROCEDURAL PROBLEMS IN THE HOUSE OF REPRESENTATIVES AND SOME OPTIONS 1-2 (Congressional Research Service 1977).

matter expertise.[53] Third, House and Senate rules prohibit the attachment of legislation to appropriations bills.[54] As a result, parliamentary restrictions that limit the content of appropriations may undercut the objectives of appropriations-based policymaking.[55] Fourth, since most appropriations are reenacted every year, agencies frequently do not know whether to view limitation riders as permanent changes or temporary measures.[56] Fifth, when Congress resolves to determine matters of substantive policy in the appropriations process, inadequate consideration may be given to fiscal concerns: heated debate on substantive matters may displace significant fiscal policy issues.[57] Finally, substantive policymaking by limitation riders does not allow for sufficient study of the policy issues in question.[58]

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53. *See id.* at 2 (citing VII A. HINDS & C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1664 (1935)).

54. *See supra* note 12.

55. *See* W. KRAVITZ, *supra* note 52, at 2.

56. Archie Parnell, in his study of IRS enforcement, contended that the one-year nature of appropriations bills raised numerous problems for tax practitioners.

> Do changes in the law apply only for the last quarter of one calendar tax year and for the next three quarters of the next calendar tax year? At the end of the fiscal year, does the former substantive law again come into effect? It is [also] not clear what should happen to tax deficiencies pending before the pertinent fiscal year, presumably, prior law would continue to apply.

Parnell, *supra* note 13, at 1376. Furthermore, as this article will demonstrate, the temporary nature of appropriations-based policy makes substantive statutory interpretation of limitation riders impossible. *See infra* notes 166-295 and accompanying text.

57. The danger of insufficient attention being given to fiscal matters is exemplified by the Treasury, Postal Service, and General Government Appropriation Act, 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979). As Senator Chiles put it in floor debate concerning the 1979 IRS nondiscrimination enforcement issue: "[W]e have been here 2 days now, and we have not been arguing numbers on this bill . . . . It looks to me as if we can do away with the authorizing committees and just have everything come on the appropriations bills." 125 CONG. REC. 23,208 (1979). In a 1978 report, the Democratic Study Group noted that "[t]he debate over appropriation riders can destroy the timetable set up in the [1974] Budget Act for consideration of appropriations bills." DEMOCRATIC STUDY GROUP, *supra* note 1, at 7.

58. These risks of appropriations-based policy are significant. On numerous occasions members have alleged that hurried action on appropriations does not lend itself to sound policymaking because the issues involved have not been sufficiently studied. Former Senator Harrison Williams, Jr., for example, stated that riders "are an insult to the legislative process . . . [a]nd are often offered with no advance warning and with little explanation. They are taken up in circumstances where they cannot be carefully considered and are unlikely to be fully understood." Murray, *supra* note 50, at 3252 (quoting Sen. Williams). Congressman Charles Rangel dubbed such practices as legislating in haste:

> Frequently, copies of the amendment or "rider" are not available when Congress is scheduled to vote, nor are Congressional staff aides provided with adequate time to review appropriation amendments and prepare background material for meaningful debate or reflective voting . . . . Despite the inequity of changing . . . policy without a proper hearing, capitulation is necessary in order to assure government funding for essential services to the nation.

Rangel, *supra* note 26, at 65-66.

C. *The Hyde Amendments.*

The paradigmatic limitation riders—the series of Hyde amendments, which prohibit federal funding of abortions[59]—exemplify many of the problems encountered in appropriations-based oversight. In 1974, prior to enactment of the first Hyde amendment, Congress considered and *rejected* limitations on federal funding of abortions. At that time, the conference committee claimed that "an annual appropriation bill is an improper vehicle for such a controversial and far-reaching legislative provision whose implications and ramifications are not clear, whose constitutionality has been challenged, and on which no hearings have been held."[60]

Despite consistent reenactment,[61] the Hyde amendments do not symbolize the prevalence of majority will over obstinate authorization committees. It is true that the amendments came to the House floor in part because opponents of abortion were unable to get a comparable measure out of committee. Yet, as Allen Schick noted in his study of appropriations-based oversight, the Senate, despite strong opposition, approved the first Hyde amendment to prevent the closing of key federal agencies.[62]

The Hyde amendments travelled a tortuous road in becoming an ingrained part of the appropriations landscape.[63] As initially proposed, the first Hyde amendment would have prohibited the use of funds "to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."[64] The Chair upheld a point of order on this: because the administrative agency took on a new duty by

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59. Since FY 1977, appropriations bills for the Department of Labor and HEW have contained language prohibiting federal funding of abortions in almost all circumstances. A legislative history of the various forms this rider has taken through FY 1981 was prepared by the Senate Republican Policy Committee and can be found in 127 CONG. REC. 10,677-83 (1981).

60. H.R. REP. No. 1489, 93rd Cong., 2d Sess., *reprinted in* 120 CONG. REC. 36,933 (1974).

61. Department of Health and Human Services Appropriation Act, 1983, Pub. L. No. 97-377, tit. II, § 204, 96 Stat. 1884, 1894 (1982); Act of Oct. 1, 1980, Pub. L. No. 96-369, § 101(c), 94 Stat. 1351, 1352; Joint Resolution of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926; Department of Health, Education, and Welfare Appropriation Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1571, 1586 (1978); Joint Resolution of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460; Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

62. *Regulatory Reform Hearings, supra* note 1, pt. 1, at 1362.

63. Congress has accepted the Hyde amendment, as evidenced by the refusal of any member of the House to seek to defeat the anti-abortion rider under recently adopted procedures designed to further limit the attachment of legislation to an appropriations bill. *See* R. SACHS, *supra* note 39, at 25-26. In fact, Representative Henry Waxman, while urging defeat of the "usual Hyde amendment" because it "is out of order as . . . legislation on this appropriation bill," refused to utilize the new procedure. 129 CONG. REC. H7323 (daily ed. Sept. 22, 1983).

64. 123 CONG. REC. 19,699 (1977).

ascertaining whether the mother could safely carry the fetus to term, the amendment constituted legislation on an appropriations bill—a practice forbidden by House rules.[65] A point of order was also sustained on a subsequently offered amendment that would have prohibited funding "except where a physician has certified the abortion is necessary to save the life of the mother."[66] The Chair noted that, because some physicians are paid by the federal government, the proferred amendment still constituted legislation on an appropriations bill.[67] To avoid such problems, the amendment was modified: "None of the funds appropriated under this Act shall be used to pay for abortions or to promote or encourage abortions."[68] Representative Hyde, regretful that he had to omit the exception for therapeutic abortions, claimed that he was "forced into this position today by points of order."[69]

Points of order often will be raised on such controversial measures.[70] The rule prohibiting legislation on appropriations, even if skirted, may therefore prevent Congress from fully articulating its policy preference. Furthermore, as Walter Kravitz noted in his 1977 study of legislation in appropriations bills, "[t]hese constraints involve technicalities of interpretation that are not only frequently unpredictable but often irrelevant to the substantive merit of a proposal."[71]

The Hyde amendments also typify the switch from multi-year authorization to single-year appropriations-based policy. Congress constantly has tinkered with the amendments' language.[72] In 1977, the amendment excepted from its reach those situations in which "the life of the mother would be endangered if the fetus were carried to term."[73] The 1978 and 1979 amendments allowed federally-funded abortions to be

65. *Id.* The Chair noted that "the language in the bill addresses determinations by the Federal Government and is not limited by its terms to determinations by individual physicians or by the respective States." *Id.*

66. *Id.* (amendment offered by Rep. Hyde).

67. *Id.*

68. *Id.* at 19,700 (amendment offered by Rep. Hyde).

69. *Id.*

70. This is especially true in the House, where rules against legislation on an appropriations bill are stricter than those of the Senate. *See* L. FISHER, THE AUTHORIZATION-APPROPRIATIONS PROCESS: FORMAL RULES AND INFORMAL PRACTICES 31-34 (Congressional Research Service No. 79-161, 1979). The Senate, with its more lenient rules, later incorporated therapeutic abortions in its version of the Hyde amendment. This language was subsequently adopted in conference, where the House rule does not apply. *See* Joint Resolution of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460.

71. Kravitz, *supra* note 52, at 14.

72. Other examples of congressional tinkering include limitation riders passed to limit agency-mandated busing and to curtail IRS nondiscrimination enforcement. A discussion of the antibusing rider can be found in C. DALE, *supra* note 10, at 20-22. For a discussion of the IRS rider, *see infra* notes 227-290 and accompanying text.

73. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434.

performed if the pregnancy resulted from rape or incest, if the life of the mother was endangered, or if "severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term."[74] The 1980 and 1981 amendments omitted the exception for severe and long-lasting physical health impairment.[75] Although the single-year nature of appropriations affords Congress the luxury of fine tuning, it also forces Congress to address this acrimonious issue each fiscal year. Furthermore, the annual changes inherent in appropriations-based policy create a moving target for courts to interpret, and frustrate executive branch efforts to develop a long-term enforcement structure.[76]

The disruption caused by the Hyde amendments also demonstrates the potentially debilitating effect appropriations-based policy initiatives can have on Congress's ability to perform essential legislative functions. Debate over the fiscal year (FY) 1977 rider lasted eleven weeks, with dozens of compromise proposals on the floor.[77] The FY 1978 stalemate was worse, lasting more than five months. During the course of debate, twenty-eight separate votes were taken: seventeen in the Senate and eleven in the House.[78] By the time the final bill was approved, two continuing resolutions had expired, and paychecks for employees of the Departments of Labor and Health, Education and Welfare were about to be delayed.[79] This disruption prompted an investigation by the Democratic Study Group and a spate of proposals to restrict the enactment of limitation riders.[80] Representative Hyde's amendment, however, was just the beginning. The use of limitation riders and other appropriations-based oversight devices has grown significantly in the decade since the first Hyde amendment was introduced.[81]

D. *Obstacles to Appropriations-Based Policymaking.*

Although the appropriations process continues to play a significant role in setting federal policy, increasing reliance on continuing resolutions, rather than discrete budget bills, and new House rules governing limitation amendments have significantly altered the manner in which

74. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586 (1978); Joint Resolution of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460.

75. Joint Resolution of Oct. 1, 1980, Pub. L. No. 96-369, § 101(c), 94 Stat. 1351, 1352-53; Joint Resolution of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926.

76. *See infra* notes 100-115 and accompanying text.

77. Davidson, *supra* note 6, at 39.

78. 127 CONG. REC. 10,680 (1981) (statement of Rep. Wright).

79. Davidson, *supra* note 6, at 39.

80. *See* DEMOCRATIC STUDY GROUP, *supra* note 1.

81. *See supra* notes 34-48 and accompanying text.

appropriations-based oversight is conducted. Continuing resolutions are adopted whenever Congress is unable to pass one or more of the regular appropriations bills.[82] Over the past few years, fiscal intransigency has been great, prompting the increased use of this budgetary device. As a result, the use of policy-based limitation riders has declined because the rule prohibiting legislation on an appropriation is applicable only when a regular appropriations bill is before Congress.[83] Another explanation for this decline is a July 1983 House rule which creates two obstacles to the adoption of limitation riders: (1) riders can only be considered after all other work on the bill has been completed; and (2) those opposing particular limitation riders can make a motion for the House to rise and report, requiring a majority of members to vote in favor of a rider's consideration.[84]

Upon close examination, however, neither of these obstacles has diminished the use of appropriations-based oversight. Substantive legislation is often attached to continuing resolutions enacted in place of appropriations bills, resurrecting the limitation rider in another form. Furthermore, the new House rule frequently has proven little more than a detour to the enactment of riders.

Continuing resolutions are fast becoming a repository of last-minute legislation. A crude measure of growth is the length in pages of such resolutions. Prior to 1981, continuing resolutions uniformly were less than ten pages in length.[85] Over the past five years, each continuing resolution has been at least twice that length—the most notable of these being FY 1985's 363 page continuing resolution.[86] Many factors explain the transformation of continuing resolutions from stop-gap funding devices to mechanisms used to enact omnibus legislative measures. Under House rules, the bar against legislation in appropriations bills does not apply to continuing resolutions.[87] More significantly, Congress is often unable to reach a consensus on regular appropriations bills, and because

82. These measures allow agencies and departments to continue operation until Congress enacts the regular appropriations. In some instances, however, Congress may use this device to fund an agency or department for an entire fiscal year. *See generally,* R. KEITH, AN OVERVIEW OF THE USE OF CONTINUING APPROPRIATIONS (Congressional Research Service 1980); U.S. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 7-1 to 7-19 (1982).

83. In FY 1984, for example, only eleven riders were introduced on the House floor. *See* R. SACHS, *supra* note 39.

84. H.R. RES. 5, 98th Cong., 1st Sess., 129 CONG. REC. H48 (daily ed. Jan. 5, 1983). For a thorough discussion of this rule, see R. SACHS, *supra* note 39; S. BACH, *supra* note 33. Adoption of this rule was prompted by the increasing use of limitation riders to set public policy. S. BACH, *supra* note 33, at 4.

85. Keith & Davis, *Lines and Items,* PUB. BUDGETING AND FIN., Spring 1985, at 97, 99.

86. *Id.*

87. A. SCHICK, *supra* note 18, at 58.

"the continuing resolution is approved 'at the last minute,' it has become an inviting vehicle for provisions which otherwise might not make it into law."[88]

Over the past few years, Congress has considered several significant substantive measures in the hurlyburly of the continuing resolution process. The FY 1983 continuing resolution included restrictions on the procurement of imported goods by the Defense Department, rules for the disposal of federal lands and for exploration in wilderness areas, restrictions on legal assistance to aliens, and payments to state governments for federal programs.[89] The FY 1984 continuing resolution included, among other substantive provisions, various foreign assistance authorizations.[90] Congress enacted three discrete authorizations measures in the FY 1985 continuing resolution: the Comprehensive Crime Control Act of 1984,[91] the President's Emergency Food Assistance Act of 1984,[92] and child abuse prevention amendments to the Social Security Act.[93] Debate pertaining to policy aspects of this continuing resolution was so prolonged—a reflection of the legislative character of continuing resolutions—that Congress was unable to enact the FY 1985 appropriation before the end of FY 1984.[94]

Like Congress's reliance on continuing resolutions, changes in House procedures governing the introduction of riders have not stemmed the tide of appropriations-based policymaking. In FY 1984, eleven policy-based riders were introduced on the House floor, six of which were adopted.[95] These riders limited the sanctions that can be imposed under the Clean Air Act, the direct or indirect use of federal funds to pay for abortions, and the restructuring of employee compensation practices.[96] During this process, not one limitation rider was defeated after a motion to rise was rejected.[97] In other words, the motion to rise is viewed as a substantive vote on the issue addressed by the rider; if the motion to rise fails, Congress will adopt the rider.

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88. *Id.*

89. *Id.* at 58-59.

90. *See* Keith & Davis, *supra* note 85, at 100.

91. Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (1984).

92. Pub. L. No. 98-473, tit. III, 98 Stat. 2194 (1984).

93. Pub. L. No. 98-473, § 402, 98 Stat. 2197 (1984). For an extensive review of the legislative history of this measure, see E. DAVIS & R. KEITH, SUMMARY AND LEGISLATIVE HISTORY OF PUBLIC LAW 98-473: CONTINUING APPROPRIATION FOR FISCAL YEAR 1985 1-4 (Congressional Research Service No. 85-12, 1984).

94. Public Law 98-473 was signed by the President on October 12, 1984, twelve days into FY 1985. E. DAVIS & R. KEITH, *supra* note 93, at 1-4.

95. R. SACHS, *supra* note 39, at 7-8.

96. *Id.* at 15-27.

97. *See id.* at 15-19.

legislation.[108]

Congress's ability to set policy through appropriations was clearly demonstrated in the late 1960s and early 1970s when President Richard Nixon sought to frustrate congressional intent by spending less than Congress had appropriated for various social programs.[109] When beneficiaries of these programs challenged these "impoundments," the courts almost always ruled that Congress's power of the purse included the right to specify funding levels for governmental programs.[110] This principle dates back to an 1838 Supreme Court decision, *Kendall v. United States ex rel. Stokes*.[111] Holding that an officer of the Executive must expend funds in a manner consistent with legislative intent, the Court insisted:

> [I]t would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any right secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not the direction of the President.[112]

Although *Kendall* and the 1970s impoundment cases concern executive refusal to expend appropriated funds, the reasoning of these decisions should extend to the converse situation in which Congress prohibits the President from launching enforcement initiatives by limiting the funds available for such purposes.[113] As long as it is not repugnant to

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108. *See supra* note 99 and accompanying text. In fact, the Supreme Court clearly recognizes that the constitutional duty to execute the law presupposes that there is a program "created and funded" by Congress. Morton v. Ruiz, 415 U.S. 199, 231 (1974).

109. *See generally* Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974); Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969); Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693 (1984).

110. By 1974, 50 presidential impoundments were invalidated, while only four were upheld as constitutional. *See generally* STAFF OF JOINT COMM. ON CONGRESSIONAL OPERATIONS, 93D CONG., 2D SESS., SPECIAL REPORT ON COURT CHALLENGES TO EXECUTIVE BRANCH IMPOUNDMENTS OF APPROPRIATED FUNDS (Comm. Print 1974). In the major test case of the Nixon impoundment policy, Train v. City of New York, the Supreme Court emphasized that legislative intent determines whether the Executive may withhold appropriated funds. 420 U.S. 35 (1975). In so ruling, however, the Court did not consider the constitutionality of such executive practices. *Id.* at 41 n.7.

111. 37 U.S. (12 Pet.) 524 (1838). For a thoughtful discussion of *Kendall*, see Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636, 1638-40 (1973); Note, *supra* note 109, at 698-99 (discussing constitutional grounds for impoundment authority).

112. 37 U.S. (12 Pet.) at 610.

113. Even proponents of broad executive authority concede this point. For example, Robert Dixon (former Assistant Attorney General in charge of the Office of Legal Counsel) recognizes that "[b]y threats of no funding, or underfunding, policy may be influenced, but this is within the 'power of the purse' expressly given to Congress by the Constitution." Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash*, 56 N.C.L. REV. 423, 448 (1978).

specific constitutional demands, Congress's power to set spending priorities is as valid an exercise of legislative power as the decision to enact the affected authorization. As Justice Jackson stated in *The Steel Seizure Case*:[114] "While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army and navy to command."[115]

The question then arises as to what types of appropriations-based restrictions are repugnant to the Constitution. The balance of this section is devoted to this question.

B. *The Obligation to Abide by the Constitution.*

Appropriations acts, like other legislation, must comport with the Constitution.[116] Congress, therefore, cannot use its power of the purse to direct the President to violate the Constitution. For example, just as Congress cannot provide direct financial assistance to racially discriminatory institutions,[117] Congress—through denial of funds—cannot prevent the Executive from taking adequate steps to ensure that federal funds do not support invidious discrimination.[118]

Indeed, in *United States v. Lovett,*[119] the Supreme Court ruled that Congress could not punish named individuals for their political beliefs by prohibiting federal funds to be used in the payment of their salaries. The Court concluded that this appropriation[120] punished the individuals without a jury trial and therefore amounted to an unconstitutional bill of attainder.[121] The Court rejected the government's claim that "Congress under the Constitution has complete control over appropriations,"[122] and ruled that the prohibition against bills of attainder "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest

114. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

115. 343 U.S. at 644 (Jackson, J., concurring).

116. *See* Parnell, *supra* note 13, at 1385 & n.153 ("appropriations acts have been held just as unconstitutional as substantive legislation"). *See also* Norwood v. Harrison, 413 U.S. 455 (1973) (state cannot support racially discriminatory private schools).

117. Brown v. Califano, 627 F.2d 1221, 1235 (D.C. Cir. 1980).

118. Laurence Tribe made this point in testimony about whether the IRS has a constitutional obligation to withhold tax benefits from racially discriminatory private schools. Claiming that proposed IRS enforcement standards were mandated by the Constitution, Tribe argued that limitation riders prohibiting the implementation of this proposal "would be unenforceable and would bring Congress into a pointless confrontation with the federal courts." *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. of Oversight of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 347, 377 (1979).

119. 328 U.S. 303 (1946).

120. Urgent Deficiency Appropriation Act of 1943, Pub. L. No. 78-132, § 304, 57 Stat. 431, 450.

121. 328 U.S. at 315-18.

122. *Id.* at 313.

The new House rule may prove to be little more than a symbolic gesture. Indeed, House leaders have remarked that the rule does not prevent members from introducing, and voting on, appropriations measures dealing with controversial issues in which they had a strong interest.[98] Moreover, since the new rule only affects floor amendments, riders added in committee, on the Senate floor, in conference and on continuing resolutions are not subject to this procedural obstacle.

II. THE CONSTITUTIONALITY OF APPROPRIATIONS-BASED POLICY

The Constitution does not distinguish between Congress's power to appropriate funds and its other lawmaking powers. Article I, section 9 simply provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[99] Thus, House and Senate rules prohibiting the attachment of authorizing legislation on an appropriations bill are properly viewed as a matter of congressional preference, not constitutional necessity. Critics of this use of appropriations, however, argue that in practice appropriations-based oversight might serve as an unconstitutional limitation on the Executive's article II duty to implement the law, on the Executive's obligation to abide by the Constitution, on the enforceability of federal court orders, and on federal court jurisdiction. Each of these charges is explored in this section.

A. *Congressional Oversight and the Executive's Duty to Implement the Law.*

The Executive is constitutionally obligated to "take Care that the Laws be faithfully executed."[100] As the Supreme Court stated in *Springer v. Philippine Islands*:[101] "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce

98. *See* Davis & Smith, *54.4 Billion HUD Bill Passed After Test of New Rider Rule*, 41 CONG. Q. WEEKLY REP. 1125 (June 4, 1983). In a similar vein, Representative Matthew McHugh remarked:

> If the House wants to consider a restrictive amendment on abortion, on [income and dividend] withholding, or on any other issue, it can do so by voting down the motion to rise when it is offered. That is a good escape valve on any substantive issue . . . .

129 CONG. REC. H3747-48 (daily ed. June 8, 1984).

99. U.S. CONST. art. I, § 9. As Louis Fisher notes:

> The Constitution makes no mention of Appropriations Committees. It does not distinguish between appropriation and authorization. In fact, [prior to the Civil War], . . . the House Ways and Means Committee handled appropriation bills as well as revenue measures. On the Senate side, the Finance Committee reported both appropriation and revenue bills.

L. FISHER, *supra* note 70, at 3.

100. U.S. CONST. art. II, § 3.

101. 277 U.S. 189 (1928).

them . . . ."[102] On several occasions, the Court has recognized the primacy of the executive as law enforcer. In *Buckley v. Valeo,*[103] for example, the Court struck down a provision in the Federal Election Campaign Act that vested the power to appoint members of the Federal Election Commission in both the President and the Congress. The Court explained that "[t]he Commission's enforcement power . . . is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. . . . [I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' "[104] By allowing four members of the Commission to be appointed by members of Congress without the President's participation, the Act extended Congress's power beyond that allowed by the Constitution.[105]

Oversight through the use of limitation riders impedes the executive branch's ability to implement enforcement schemes that it believes are authorized by the underlying legislation.[106] Several commentators claim that such limitations thereby undermine the Executive's constitutionally designated role, for "[i]f the power to execute the laws means anything, it is that neither Congress nor individual congressmen may interfere with the executive decisions of administrative agencies as to how they interpret laws already in force."[107]

This argument, however, is based on the remarkable and unfounded proposition that article II provides the Executive plenary power to shape the implementation of substantive legislative authorizations. Limitation riders are as much an act of Congress as are authorizations. Moreover, the Constitution does not distinguish between these two forms of

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102. *Id.* at 202.

103. 424 U.S. 1 (1976) (per curiam).

104. *Id.* at 138 (citing U.S. CONST. art. II, § 3).

105. The Court held that these provisions violated the express requirement of article I, section 2 of the Constitution vesting the appointment of "*all* officers of the United States" in the President, in presidentially-appointed heads of departments or the judiciary. *Id.* at 127, 132 (emphasis supplied by Court).

The Court recently reaffirmed the separation of powers principle forbidding congressional participation in the execution and enforcement of the law. In Bowsher v. Synar, the Court noted:

> Congress of course initially determine[s] the content of the [law]; and undoubtedly the content of the [law] determines the nature of the executive duty. However, . . . once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.

106 S. Ct. 3181, 3192 (1986).

106. Of course, if such oversight is viewed as a substantive amendment to the underlying legislation, it would be implausible to argue that executive authority is undercut.

107. Parnell, *supra* note 13, at 1379.

tenor of the Constitution void."[123]

In *Brown v. Califano,*[124] the United States Court of Appeals for the District of Columbia Circuit utilized a similar analytical approach. *Brown* considered the constitutionality of an antibusing rider—the Eagleton-Biden amendment[125]—limiting the Department of Health, Education and Welfare's (HEW) efforts to ensure that recipients of federal aid do not engage in illegal discrimination.[126] The amendment prohibited HEW from requiring, "directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home" as a condition to its granting of funds to school districts with mandatory transportation plans.[127] The court of appeals rejected the claim that the Eagleton-Biden amendment forced the government to fund dual school systems and upheld the amendment's restrictions. Noting that alternative enforcement mechanisms were available, the court ruled that Congress has the power to limit the executive branch's enforcement options in such circumstances.[128] The court, however, emphasized that "[d]istinct from its duty to enforce the law, the Executive must not itself participate in unlawful discrimination. . . . To avoid the cloud of constitutional doubt, we must assume that Congress did not intend the amendments to force federal financial support of illegal discrimination."[129]

Taken together, these cases suggest that while Congress has broad authority both to limit and redefine the execution of the law, it is unconstitutional for Congress to direct the Executive to act in a manner forbidden by the Constitution.

C. *The Enforceability of Federal Court Orders.*

Limitation riders may run afoul of the Constitution if they prohibit the Executive from implementing final court orders.[130] This principle

123. *Id.* at 314 (quoting THE FEDERALIST NO. 78 (A. Hamilton)).

124. 627 F.2d 1221 (D.C. Cir. 1980).

125. Departments of Labor and Health, Education, and Welfare Appropriation Act, 1976, Pub. L. No. 94-206, § 208(b), 90 Stat. 3, 22 (1976) (codified at 42 U.S.C. § 2000c-6(a) (1982)).

126. For a legislative history of the Eagleton-Biden amendment, see Brown v. Califano, 627 F.2d 1221, 1226-29 (D.C. Cir. 1980). *See also* C. DALE, *supra* note 10, at 18-23 (discussing history and effect of Eagleton-Biden amendment).

127. Departments of Labor and Health, Education, and Welfare Appropriation Act, 1976, Pub. L. No. 94-206, § 209, 90 Stat. 3, 22 (1976) (codified at 42 U.S.C. § 2000d (1982)).

128. 627 F.2d at 1233-34.

129. *Id.* at 1235-36.

130. Substantial disagreement exists over the question of what constitutes finality. *Compare* Memorandum in Support of the United States' Motion to Modify the Court's Order of June 30, 1983, at 33-37, United States v. Board of Educ., 588 F. Supp. 132 (N.D. Ill.) (No. 80 C 5124) (district court judgments not final), *vacated,* 744 F.2d 1300 (1984), *cert. denied,* 471 U.S. 1116

embraces the notion that the core of the federal courts' article III authority rests in the finality of their judgments. Otherwise, judicial orders could not be distinguished from constitutionally prohibited advisory opinions.[131] As Chief Justice Taney stated in *Gordon v. United States*:[132] "The award of execution is a part, and an essential part of every judgment passed by a court exercising [article III] judicial power. It is no judgment, in the legal sense of the term, without it."[133] Congress therefore cannot set aside judgments that it finds unsatisfactory, for such action exceeds the line separating judicial power from legislative authority.[134] At the same time, Congress's power to create new legal rights, modify existing rights, or establish fiscal priorities cannot be negated by existing court orders.[135]

The Supreme Court has long recognized this distinction. In *United States v. Swift & Co.*,[136] the Court spoke of "[t]he distinction . . . between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."[137] With respect to rights vested by a judgment, "[i]t is not within the power of a legislature to take away [such] rights."[138] Congress's lawmaking power does, however, permit it to

(1985) *with* Memorandum in Opposition to the United States' Motion to Modify the Court's Order of June 30, 1983, at 27-36, United States v. Board of Educ., 588 F. Supp. 132 (N.D. Ill.) (No. 80 C 5124) (district court judgments may be final), *vacated*, 744 F.2d 1300 (1984), *cert. denied*, 471 U.S. 1116 (1985).

131. Federal courts are barred from deciding "abstract, hypothetical or contingent questions." Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945). The duty of federal courts, instead, is to "decide actual controversies by a judgment which can be carried into effect." Mills v. Green, 159 U.S. 651, 653 (1895).

132. 117 U.S. 697 (1864).

133. *Id.* at 702. For further discussion of this proposition, see Mayerson, *Executability of Article III Judgments and the Problem of Congressional Discretion:* United States v. Board of Education of Chicago, 35 DE PAUL L. REV. 51, 62-63 n.70 (1986).

134. United States v. Sioux Nation of Indians, 448 U.S. 371, 427-30 (Rehnquist, J., dissenting) (1980).

135. *See, e.g.*, System Fed'n No. 91 v. Wright, 364 U.S. 642, 651 (1961) (change in underlying legislation may compel modification of a consent decree); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 424-25 (1946) (Court will defer to a "congressional judgment contradicting [Congress's] previous one," even if it denies previously available relief to petitioners.). This same principle extends to the Executive's ability to establish public policy, even if a previous administration had entered into a consent decree committing itself to a contradictory policy. *See* Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. (Nov. 1987) (forthcoming).

136. 286 U.S. 106 (1932).

137. *Id.* at 114. *See also* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855), in which the Court approved a statute legalizing a bridge, despite a previously issued court injunction requiring the bridge's removal.

138. McCullough v. Virginia, 172 U.S. 102, 123 (1898).

redefine the right underlying injunctive statutory relief. Consequently, in *United States v. Sioux Nation of Indians,*[139] the Court upheld a congressional waiver of the res judicata effect of an earlier court order precisely because Congress, rather than disturb the finality of a judicial decree, created a new legal right.[140]

This issue has arisen in the context of judicial interpretations of limitation riders.[141] In *United States v. Board of Education,* the District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit[142] were called upon to interpret a limitation rider that undercut the force of a prior order issued by the district court. The court order, an injunction freezing $250 million of FY 1983 and 1984 Education Department funds, was the by-product of the district court's effort to enforce the United States' obligation—undertaken in a consent decree—to assist the Chicago school board in financing its desegregation plan.[143] The district court refused to release the frozen funds despite a congressional appropriation of $20 million "to enable the Secretary of Education to comply with the consent decree."[144] In response to the district court's actions, Congress adopted the Weicker amendment, which stated that "[n]o funds appropriated in any Act to the Department of Education for fiscal years 1983 and 1984 shall be

139. 448 U.S. 371 (1980).

140. *Id.* at 397-98. For the Court, Congress's waiver "neither brought into question the finality of that court's earlier judgment, nor interfered with that court's judicial function in deciding the merits of the claim." *Id.* at 406. The Court thereby upheld the waiver because it " 'perceive[d] no constitutional obstacle to Congress' imposing on the Government a new obligation where there had been none before.' " *Id.* at 401 (quoting Pope v. United States, 323 U.S. 1, 9 (1944)). Indeed, *Sioux Nation* recognized that had Congress refused to give effect to a judgment, such "legislative review of a judicial decision would interfere with the independent functions of the Judiciary." *Id.* at 392.

141. One decision pertinent to this issue is Green v. Miller, 80-1 U.S. Tax Cas. (CCH) ¶ 9401, 45 A.F.T.R.2d (P-H) ¶ 80-650 (D. Colo. 1980). In *Green,* however, the issue of congressional authority over existing court orders was sidestepped. The district court ruled that riders on appropriations bills limiting IRS nondiscrimination enforcement did not serve as a bar to the court's enforcement of a permanent injunction against the Service. Indeed, the *Green* court ordered the Service to adopt standards clearly inconsistent with these limitations. In support of this reading, the United States Court of Appeals for the District of Columbia Circuit, pointed to legislative sponsors' statements that these riders did not "address the viability of court orders." Wright v. Regan, 656 F.2d 820, 835 n.48 (D.C. Cir. 1981) (quoting 126 CONG. REC. 21,984 (1980) (statement of Chairman Panetta)), *rev'd,* 468 U.S. 737 (1984). The court of appeals concluded that such limitations did not undercut the court's authority in *Green.* For further discussion, see *infra* notes 240-245 and accompanying text.

142. 588 F. Supp. 132 (N.D. Ill.), *aff'd,* 744 F.2d 1300 (7th Cir. 1984). For a history of the *Board of Education* litigation, see Devins & Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases,* 59 NOTRE DAME L. REV. 1243 (1984). For a discussion of executability in *Board of Education,* see Mayerson, *supra* note 133.

143. 588 F. Supp. at 245-46; *see also* Devins & Stedman, *supra* note 142, at 1284-85.

144. Continuing Appropriations for Fiscal Year 1984, Pub. L. No. 98-107, § 111, 97 Stat. 733, 742 (1983).

withheld from distribution to grantees because of the provisions of the [district court's] order."[145]

The United States, claiming that Congress is empowered to clarify the purposes for which the money it appropriates is used, argued that this rider empowered the Secretary of Education to expend the frozen funds in whatever manner he deemed appropriate.[146] The school board argued otherwise, claiming that it would "destroy the finality and independence of judicial action" to allow Congress to retroactively effect a final judgment.[147] In ruling against the United States, the district court concluded, among other things,[148] that the doctrine of separation of powers prevents Congress from requiring a federal court to reverse—either directly or indirectly—a judgment against the United States.[149] On appeal, the Seventh Circuit signified its approval of this holding, although it did not explicitly rule on this matter.[150]

The district court's approach is sound.[151] Once Congress enacts an appropriations bill, the Executive is free to obligate moneys within the parameters of its authority under pertinent statutes.[152] According to the district court, the Chicago consent decree required the Secretary of Education to provide the board with certain categories of available funds.[153] Consequently, when Congress enacted the Weicker amendment, the Secretary was already obligated—based on prior appropriations—to commit certain funds to the board. Congress, therefore, was no longer author-

145. Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-139, § 309, 97 Stat. 871, 895 (1983).

146. Memorandum in Support of the United States' Motion to Modify the Court's Order of June 30, 1983, at 25, 29, United States v. Board of Educ., 588 F. Supp. 132 (N.D. Ill.) (No. 80 C 5124), *vacated*, 744 F.2d 1300 (1984), *cert. denied*, 471 U.S. 1116 (1985).

147. Memorandum in Opposition to the United States' Motion to Modify the Court's Order of June 30, 1983, at 31, United States v. Board of Educ., 588 F. Supp. 132 (N.D. Ill.) (No. 80 C 5124), *vacated*, 744 F.2d 1300 (1984), *cert. denied*, 471 U.S. 1116 (1985).

148. The district court, noting that Congress failed to pass a more restrictive rider that would not have allowed the Board to receive money in excess of the special $20 million appropriation, also rejected the United States' contention that the Weicker amendment limited its obligation under the consent decree. 588 F. Supp. at 231-33.

149. *Id.* at 234-35.

150. United States v. Board of Educ., 744 F.2d 1300, 1305 n.3 (7th Cir. 1984) ("The government has wisely abandoned this position in its argument to this court.").

151. The consent decree, however, may well be invalid. By allowing one administration to tie its successor's hands on otherwise discretionary public policy determinations, the decree may well unconstitutionally limit the Executive's article II authority. *See* Rabkin & Devins, *supra* note 135.

152. *See* L. FISHER, PRESIDENTIAL SPENDING POWER 158 (1975).

153. 588 F. Supp. at 211. There are possible separation of powers problems with this approach. If the appropriation was intended to cover a large number of projects and full satisfaction of a prior commitment has the effect of excluding most other expenditures, enforcement of a contingent funding commitment might thwart both legislative expectations and legislative control of the federal purse strings.

ized to make previously committed funds unavailable. Making funds unavailable would, in effect, both negate the court's authority to enforce the consent decree and the Executive's responsibility to comply with the decree by committing available funds. In short, with respect to appropriated funds already obligated, the district court's judgment was final. In contrast, with respect to funds not yet appropriated, the judgment was contingent upon future congressional appropriations. Since Congress cannot be forced to appropriate funds against its will, Congress could therefore restrict the amount of funds devoted to the consent decree in future appropriations.[154]

D. *Limitations on Federal Court Jurisdiction.*

Limitation riders that limit federal court authority to fashion appropriate equitable relief may also be unconstitutional. Although Congress clearly has near-plenary authority to define available relief for the violation of statutory rights,[155] it is unclear whether Congress can prevent federal courts from issuing effective relief when constitutional rights are violated.

The Constitution grants Congress the right to restrict the scope of both Supreme Court and lower court jurisdiction.[156] Despite this broad grant of authority, many commentators and jurists have argued that the separation of powers doctrine prevents Congress from exercising this power in a manner that undercuts the courts' ability to effectively perform its constitutionally designated functions.[157] In *Nixon v. Administrator of General Services,*[158] the Supreme Court seemed to agree in principle, stating that "in determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [another] Branch from accomplishing its constitutionally assigned functions."[159] Consequently, if fashioning effective equitable relief is a function constitutionally assigned to the federal courts, congressional authority to restrict the courts' power to fashion such remedies may be limited. The Supreme Court, however,

154. In fact, Congress recently extended a prohibition against involving the federal government in any "obligation for the payment of money before an appropriation is made unless authorized by law." Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1341(a)(1)(B), 96 Stat. 877, 923.

155. *See, e.g.,* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329-30 (1938) (sustaining constitutionality of congressional limitation of federal courts' ability to issue injunctions in labor disputes).

156. U.S. CONST. art. III, § 2. *See generally* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7-34 (1980) (describing and criticizing congressional restriction of jurisdictional scope).

157. *See, e.g.,* M. REDISH, *supra* note 156, at 29-34.

158. 433 U.S. 425 (1977).

159. *Id.* at 443.

has not definitively answered this question and commentators are bitterly divided on the subject.[160]

Federal courts have side-stepped this question when confronted with limitation riders that could—either by their own terms or in combination with other riders—be interpreted to limit the courts' authority to remedy the infringement of constitutional rights. In *Wright v. Regan,*[161] the United States Court of Appeals for the District of Columbia Circuit refused to give substantive effect to a rider that could have been interpreted as a restriction on the federal courts' authority to order the Internal Revenue Service to launch constitutionally mandated nondiscrimination enforcement procedures.[162] The court of appeals, rejected this reading, noting that "[t]urbulent issues under our fundamental instrument of government would confront us were we to read the appropriations riders [in such a manner]."[163] Another decision by the District of Columbia Circuit, *Brown v. Califano,*[164] also sheds light on this question. In upholding an antibusing restriction, the court emphasized that these riders did not limit the federal courts' remedial authority. Indeed, the court held that "[w]here a choice of alternative enforcement routes is available, and the one preferred is not *demonstrably less effective,* Congress has the power to exercise its preference."[165]

These decisions, like the other cases discussed in this section, speak to the same proposition: appropriations are the constitutional equivalent of authorizations. Questions regarding Congress's authority to limit federal court jurisdiction are identical in both the appropriations and authorizations context. Moreover, like authorizations, appropriations must comport with the Constitution and not impede the execution of final judgments. Finally, as the impoundment cases demonstrate, Congress is empowered to set policy through appropriations.

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160. *Compare, e.g.,* Sager, *The Supreme Court, 1980 Term*— Foreword: *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17, 17-21 (1981) (arguing that Congress should not have authority to deprive federal courts of jurisdiction over constitutional claims) *with* Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today,* 65 JUDICATURE 190, 197 (1981) (approving proposed legislation to limit federal court authority).

161. 656 F.2d 820 (D.C. Cir. 1981), *rev'd,* 468 U.S. 737 (1984).

162. The court instead read the rider as a temporary measure which, although limiting IRS authority, had no impact on federal court jurisdiction. *Id.* at 833-35.

163. *Id.* at 835.

164. 627 F.2d 1221 (D.C. Cir. 1980).

165. *Id.* at 1234 (emphasis added). A rider that foreclosed the busing remedy, if alternative remedies were "demonstrably less effective," might therefore prove unconstitutional under *Brown.*

III. INTERPRETING LIMITATION RIDERS

A. *The Authorizations/Appropriations Dilemma.*

Since the Constitution does not distinguish appropriations from authorizations,[166] there is no doubt that appropriations bills can establish, amend or repeal federal programs and priorities.[167] Yet, appropriations generally do not contain clear policy statements. Instead, courts are faced with the dilemma of determining whether appropriations should be viewed as amendments to related authorizations. On this score, the Supreme Court and lower federal courts have sent out inconsistent messages.

The Supreme Court has long acknowledged the distinction between authorizations and appropriations.[168] In *Andrus v. Sierra Club,*[169] for example, the Court held that appropriations requests should not be considered proposals for legislation[170] and concluded that appropriations were not subject to the statutory requirement that environmental impact statements accompany "proposals for legislation."[171] The Court believed that "[t]he distinction [between appropriations and authorizations] is maintained to assure that program and financial matters are considered independent of one another, [thereby preventing the Appropriations Committee] from trespassing on substantive legislation."[172]

The Court also placed great emphasis on this distinction in *Tennessee Valley Authority v. Hill.*[173] In *Hill,* the Court rejected the argument that Congress's continued funding of the Tellico Dam project effectively repealed those portions of the Endangered Species Act of 1973[174] that were inconsistent with the project.[175] The Court broadly proclaimed:

> We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. . . . [Otherwise,] every appropriations measure would be pregnant with

166. *See supra* note 99 and accompanying text.

167. *See, e.g.,* Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973) (appropriations as effective as ordinary bills in enacting legislation), *cert. denied,* 414 U.S. 1171 (1974).

168. *See, e.g.,* Morton v. Mancari, 417 U.S. 535 (1974); United States v. Borden Co., 308 U.S. 188 (1939); Posadas v. National City Bank, 296 U.S. 497 (1936).

169. 442 U.S. 347 (1979).

170. *Id.* at 358-61.

171. *Id.* at 356. *See* National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (codified at 42 U.S.C. § 4332(2)(c) (1977)).

172. 442 U.S. at 361.

173. 437 U.S. 153 (1978).

174. 16 U.S.C. § 1531(c) (1982). In addition to appropriating funds for the dam, some committee statements reveal legislative awareness of the inconsistency of the project with the Act. *See* Fisher, *supra* note 1, at 86-87.

175. *Hill,* 437 U.S. at 189.

> prospects of altering substantive legislation, repealing by implication any prior statutes which might prohibit expenditure. . . . [This would] lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on the appropriation . . . .[176]

Nonetheless, in reaching this conclusion the Court carefully scrutinized the legislative history of the appropriation, emphasizing that there was no evidence of congressional intent to modify the Endangered Species Act.[177]

Exclusive emphasis was placed on legislative history in *United States v. Dickerson,*[178] a 1940 Supreme Court decision that gave substantive effect to a limitations provision. Noting that there is "no doubt" that Congress could modify existing authorizations by an amendment to an appropriations bill,[179] the Court ruled that a limitation rider prohibiting the granting of statutorily authorized money bonuses to Army reenlistees[180] was intended to permanently suspend the right to such entitlements.[181] Central to this ruling was the Court's exhaustive analysis of congressional debates surrounding the rider's enactment.[182]

Andrus, Hill, and *Dickerson* highlight the confused state of Supreme Court rulings in this area. *Dickerson*'s exclusive reliance on legislative history supports an absolutist rule, ignoring the appropriations/authorizations distinction. *Andrus* is equally absolutist: by considering sacred the separation of authorizations and appropriations, no consideration would be given to evidence that Congress intended to modify existing legislation through appropriations. Finally, *Hill* used a hybrid approach, pointing both to legislative history and the traditional separation of authorizations and appropriations to support its decision. Not surprisingly, lower courts are divided on the question of whether limitation riders constitute substantive expressions of legislative intent. Leading cases on this question concern challenges to American involvement in Indo-China[183] and the Hyde anti-abortion riders.[184]

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176. *Id.* at 190.

177. *Id.* at 185-91.

178. 310 U.S. 554 (1940).

179. *Id.* at 555.

180. *See id.* at 556-57.

181. *Id.* at 561-62.

182. *Id.* at 557-61.

183. *See infra* notes 185-200 and accompanying text.

184. *See infra* notes 201-226 and accompanying text. In addition to the cases discussed in this text, the question of whether substantive meaning should be attributed to appropriations has been addressed in numerous cases. Several cases hold that appropriations may have substantive impact. *E.g.*, AFL-CIO v. Kahn, 472 F. Supp. 88, 97 (D.D.C.) (President authorized to promulgate affirmative action requirements for federal contractors because "Congress had long been aware of the program and had expressed its approval through the appropriations process"), *rev'd on other grounds.*

1. *The Vietnam Conflict.* Several court decisions have addressed the meaning of appropriations that funded the Defense Department's military activities in Indo-China during the Vietnam War.[185] In *Berk v. Laird,*[186] an enlisted member of the United States Army challenged the constitutional basis for American military intervention in Vietnam, seeking an injunction that would have prevented him from having to go there. The legal argument—supported by several scholars serving as expert witnesses[187]—was that the various appropriations did not constitute declarations of policy. Thus, the President was carrying on a war without congressional approval—in violation of the Constitution.[188] The district court rejected this claim and held that powers can be conferred on the President by appropriations acts.[189] The court held that procedural rules of the House of Representatives and Senate that were designed to prevent declarations of policy in appropriations bills were not of constitutional significance.[190] The court observed:

> That some members of Congress talked like doves before voting with the hawks is an inadequate basis for a charge that the President was violating the Constitution in doing what Congress by its words had told him he might do. . . . The entire course of legislation shows that Congress knew what it was doing, and that it intended to have American troops fight in Vietnam.[191]

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618 F.2d 784 (D.C. Cir.), *cert. denied,* 443 U.S. 915 (1979); City of Los Angeles v. Adams, 556 F.2d 40, 48-49 (D.C. Cir. 1977) (Airport and Airway Development Act of 1970 was modified by limitation rider, in spite of appropriations-authorizations distinction, because courts "are bound to follow Congress's last word on the matter even in an appropriations law."); Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973) (appropriations prohibition on expenditures overrode earlier legislative intent expressed in the Colorado River Storage Project Act of 1956), *cert. denied,* 414 U.S. 1171 (1974); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 171 (3d Cir.) (President authorized because "Congress, aware of Presidential action . . . has continued to make appropriations for [federally assisted construction] projects"), *cert. denied,* 404 U.S. 854 (1971). In contrast, some courts have held that appropriations should not be treated as authorizations. *E.g.,* Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 355 (8th Cir. 1972) (National Environmental Policy Act not modified by funding for an otherwise unauthorized project); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 785 (D.C. Cir. 1971) (same).

185. These cases are listed in Holtzman v. Schlesinger, 484 F.2d 1307, 1312-13 n.3 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). Interestingly, although there was strong disagreement over congressional funding for the war, none of these cases concluded that the war was unauthorized. Perhaps in response to these decisions, Congress approved the War Powers Resolution of 1973, Pub. L. No. 93-148, § 8(a), 87 Stat. 555, 558. This resolution expressly provides that authorization of military activity cannot be inferred from defense appropriations alone.

186. 317 F. Supp. 715 (E.D.N.Y. 1970), *aff'd sub nom.* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971).

187. 317 F. Supp. at 718-21 (Professors Richard E. Fenno, Jr.; Fred L. Israel; George McT. Kahin; Marcus Raskin; Don Wallace, Jr., testifying).

188. *Id.* at 723-24.

189. *Id.* at 727-28.

190. *Id.*

191. *Id.* at 724, 728.

In *Holtzman v. Schlesinger,*[192] the United States Court of Appeals for the Second Circuit pointed to *Berk* when it rejected efforts by members of the House of Representatives to halt American bombing in Indo-China. The court of appeals—noting that Congress had appropriated funds for these bombings—rejected the plaintiffs' charge that the President had improperly initiated a basic change in the war without first seeking legislative approval.[193] Specifically, the court used floor statements as evidence of Congress's awareness of the consequences of its appropriations decision and equated such funding with legislative authorization of the Indo-China campaign.[194]

In *Mitchell v. Laird,*[195] however, the United States Court of Appeals for the District of Columbia Circuit reached a different conclusion. In *Mitchell,* thirteen members of the House of Representatives sought an injunction to prevent the President from pressing war in Indo-China without congressional authorization. Although the court refused to decide the case because it felt the issues were really political questions and beyond the jurisdiction of the courts,[196] it did expressly recognize that congressional appropriations were not the equivalent of congressional authorizations. Disagreeing with *Berk,* the court contended that:

> [I]n voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. . . . We should not construe votes cast in pity and piety as though they were votes freely given to express consent.[197]

Atlee v. Laird,[198] a 1972 three-judge district court decision, also held that votes on appropriations are an unreliable measure of legislative intent. The court in *Atlee* noted that "it would be impossible to gather and evaluate properly the information necessary for deciding whether Congress [through its appropriation of funds] meant to authorize the military activities in Vietnam," and concluded that it would be inappropriate for the judiciary to involve itself in this matter.[199] Such involvement—forcing Congress to abide by court-formulated rules—might impinge on the

192. 484 F.2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974).
193. 484 F.2d at 1312-13.
194. *Id.* at 1314.
195. 488 F.2d 611 (D.C. Cir. 1973).
196. *Id.* at 616.
197. *Id.* at 615.
198. 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd mem.,* 411 U.S. 911 (1973).
199. 347 F. Supp. at 706.

legislature's constitutionally designated function to declare war.[200]

2. *Abortion Funding.* Hyde anti-abortion riders have also been the subject of several court decisions. Court cases involving the Hyde amendments have addressed the question of whether these riders have, by implication, amended provisions of the Social Security Act that govern the Medicaid program. Under the Medicaid Act, federal funds are made available to states willing to comply with regulations governing medical services to the needy.[201] In the absence of Hyde riders, participating states could not limit abortion services to either life-threatening circumstances or pregnancies resulting from rape.[202] With the limitation of federal funds to such categories,[203] however, several states claimed that they were no longer generally obligated to provide abortions to the needy.[204] These states argued that the Hyde riders modified their responsibilities under the Medicaid Act.

The judiciary's resolution of this issue bespeaks the confusion over appropriations-based policymaking. On one hand, since the Hyde riders affect only federal funding of abortion, there is no reason to think that they affect the obligation of states to provide funds for abortions under the Medicaid Act.[205] On the other hand, the propensity of some courts to downplay the appropriations/authorizations distinction by immersing themselves in legislative history might lead to a quite different outcome. Court decisions support this view: courts that emphasize legislative history view the Hyde limitation riders as substantive amendments to the Medicaid Act; courts that place greater weight on the appropriations/authorizations distinction limit the Hyde amendments' effects to federal funding of abortions.

Appellate courts in the First,[206] Third,[207] Seventh,[208] and Eighth[209] Circuits held that the Hyde riders modified the Medicaid Act. *Preterm, Inc. v. Dukakis*[210] typifies these cases. In *Preterm,* the United States

200. *Id.*

201. 42 U.S.C. § 1396 (1982).

202. *See* Beal v. Doe, 432 U.S. 438, 444-45 (1977) (differentiation upon cause of medical disorder not permitted under Medicaid Act regulations as long as treatment is medical necessity).

203. *See supra* notes 63-75 and accompanying text.

204. States that ultimately defended such statutes in court included Massachusetts, Illinois, Georgia, New York, Minnesota, Pennsylvania, Ohio and New Jersey.

205. TVA v. Hill, 437 U.S. 153, 189-93 (1978) (appropriations measure should not be used to effect a change in law).

206. Preterm, Inc. v. Dukakis, 591 F.2d 121, 133-34 (1st Cir.), *cert. denied,* 441 U.S. 952 (1979).

207. Roe v. Casey, 623 F.2d 829, 833-36 (3d Cir. 1980).

208. Zbaraz v. Quern, 596 F.2d 196, 199-200 (7th Cir. 1979), *aff'd,* 448 U.S. 358 (1980).

209. Hodgson v. Board of County Comm'rs, 614 F.2d 601, 611-12 (8th Cir. 1980).

210. 591 F.2d 121 (1st Cir.), *cert. denied,* 441 U.S. 952 (1979).

Court of Appeals for the First Circuit first considered the prospect of exclusive state financing of abortions. The court claimed that the Medicaid Act ensures federal assistance in the provision of specified medical services and concluded that exclusive state financing is "a result not consonant with the basic policy of the Medicaid system."[211] The court then turned to the legislative history of the Hyde amendments and found "that Congress [was acutely conscious] that it was using the unusual and frowned upon device of legislating via an appropriations measure to accomplish a substantive result."[212] The court concluded that Congress modified the states' obligations under the Medicaid Act by excluding the states' responsibility to fund abortion services.[213]

To support this assessment, the *Preterm* court pointed to numerous statements in the legislative debates.[214] Among those statements is Congressman Stokes' characterization of the rider as "tantamount to a constitutional amendment outlawing abortions for the poor"[215] and Senator Packwood's admonition that "[i]f we do not fund abortions, these 250,000 to 300,000 women who now receive abortions, paid for by Federal or State moneys under medicaid, are either going to have babies they do not want or are going to go to backroom abortionists."[216] The court also found significant the total absence of discussion suggesting that states would assume the burden of paying for abortions.[217] The court, however, did not consider probative Congressman Dornan's statement that such an amendment "simply denies Federal funds,"[218] Congressman Edwards' observation that "the only thing over which we have any control is what we do with Federal dollars,"[219] or other similar statements.[220]

In contrast to *Preterm,* several district courts have concluded that the plain language of the Hyde riders only addresses the federal government's role in funding abortions.[221] Emphasizing the "recognized and settled policy of Congress against legislating in an appropriations context," the District Court for the Northern District of Georgia, in *Doe v.*

211. 591 F.2d at 128.
212. *Id.* at 131.
213. *Id.* at 134.
214. *Id.* at 128-31.
215. *Id.* at 130 (quoting 123 CONG. REC. H6085 (daily ed. June 17, 1977)).
216. *Id.* (quoting 123 CONG. REC. S11,031 (daily ed. June 29, 1977)).
217. *Id.* at 130-31.
218. *Id.* at 129 (quoting 123 CONG. REC. H6086 (daily ed. June 17, 1977)).
219. *Id.* at 129 (quoting 123 CONG. REC. H6090 (daily ed. June 17, 1977)).
220. *Id.* at 128-29.
221. *See, e.g.,* Planned Parenthood Affiliates v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Doe v. Mathews, 422 F. Supp. 141 (D.D.C. 1976); Doe v. Mathews, 420 F. Supp. 865 (D.N.J. 1976).

Busbee,[222] concluded that the plain language of the Hyde amendments—if clear—should be put into effect without resort to legislative history.[223] The court also criticized *Preterm* for ignoring the fact that rider sponsors were unable to enact legislation that would "change substantive law on abortions."[224] The court characterized *Preterm*'s analysis of the Hyde amendments' legislative history as an effort to "make [ ] self-fulfilling prophecies" of the amendments sponsors' efforts to stop public funding of abortions.[225]

Like court challenges to the Vietnam War, court interpretations of the Hyde riders reflect the split over whether substantive effect should be given to appropriations legislation. This division, most likely, will continue.[226]

222. 471 F. Supp. 1326 (N.D. Ga. 1979). Subsequent to *Doe,* the Supreme Court, in Harris v. McRae, 448 U.S. 297 (1980), ruled that states participating in the Medicaid program are not required to fund abortions which are ineligible for federal funds. For an assessment of *Harris,* see *infra* note 226. By holding that the Hyde amendment did not affect the states' obligation, *Doe*—and cases like it—are invalid. *See, e.g.,* Georgia v. Heckler, 768 F.2d 1293, 1297 (11th Cir. 1985) ("Doe v. Busbee thus relied on a wrong interpretation of the law in ordering the State to assume obligations . . . ."), *cert. denied,* 474 U.S. 1059 (1986).

223. 471 F. Supp. at 1332-33. The *Doe* court, in reaching this holding, argued that the language of the Hyde amendment was clear. *Id.* at 1333. The *Preterm* court, on the other hand, concluded that a review of the congressional debates was necessary because the language of the Hyde amendment was clearly inconsistent with the policy of the Medicaid Act. 591 F.2d at 1332-33.

224. 471 F. Supp. at 1333.

225. *Id.* at 1334.

226. In resolving whether the Hyde riders and related state legislation were constitutional, the Supreme Court avoided the issue of whether the Hyde amendments should be reviewed as substantive legislation or as money bills. In Harris v. McRae, the Court held that the Medicaid Act itself "provides for variations in the required coverage of state Medicaid plans depending on changes in the availability of federal reimbursement, we need [therefore] not inquire . . . whether the Hyde Amendment is a substantive amendment to [the Act]." 448 U.S. 297, 310 n.14 (1980). In other words, *Harris* ruled that, by its own terms, the Medicaid Act—because it emphasizes cooperative federal-state funding—"does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable." *Id.* at 309. For an identical holding, see Williams v. Zbaraz, 448 U.S. 358, 369 (1980).

The Court's reasoning in *Harris* is spurious. Granted, Medicaid is a cooperatively funded program. But the terms of voluntary state participation are not defined by specific levels of federal funding; instead, the Medicaid Act specifies a list of demands with which states must comply to receive available federal funds. If these Act-specified demands are perceived as too costly, states may either opt out of the program or modify the types of care provided in a nondiscriminatory manner. Consequently, since the Hyde riders did not specifically amend (or even refer to) the Medicaid Act, states providing some abortion services should be required to fund all therapeutic abortions. If Congress is dissatisfied with this outcome, it should explicitly amend the Medicaid Act.

B. *Resolving the Conflict: Toward an Understanding of Limitation Riders Governing Internal Revenue Service Nondiscrimination Standards.*

From 1979 to 1981, Congress enacted limitation riders governing Internal Revenue Service (IRS) enforcement of nondiscrimination requirements. Federal courts, on at least three occasions, were called upon to consider the significance of these riders. These decisions provide an excellent point of reference for understanding the benefits and pitfalls of viewing such riders as substantive legislative amendments. As is shown below, Congress's purpose varied each of the four years these riders were enacted. Such variance demonstrates the indeterminacy of legislative intent in this area and, with it, the perils of viewing limitation riders as substantive enactments.

1. *Background and the 1979 Riders.* Since 1970, the IRS, has denied tax-exempt status to private schools that discriminate on the basis of race.[227] From 1971 to 1975, the IRS established procedures governing the implementation of this policy. Private schools under these guidelines were required to adopt formally nondiscriminatory policies and publish annual notice of such policies in a local newspaper.[228] In 1978, the Carter IRS, dissatisfied with these guidelines, introduced a proposed revenue practice which would deny tax-exempt status to private schools which had an insignificant number of minority students.[229]

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227. *See* IRS News Release (July 10, 1970), *reprinted in* [1970] 7 Stand. Fed. Tax Rep. (CCH) ¶ 6,790. The Service argued that educational organizations—entitled to tax-exempt status under the Code—must further a public purpose and therefore cannot engage in invidious discrimination. *See Equal Educational Opportunity: Hearings before the Select Comm. on Equal Educational Opportunity of the United States Senate,* 91st Cong., 2d Sess. 1995 (1970) (statement of Randolph Thrower, Commissioner of Internal Revenue). For a general description of IRS practices, see Devins, *Tax Exemptions for Racially Discriminatory Private Schools: A Legislative Proposal,* 20 HARV. J. ON LEGIS. 153, 155-61 (1983); Galvin & Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353, 1358 n.23 (1983).

228. For further discussion, see Devins, *supra* note 227, at 156-57; McCoy & Devins, *supra* note 8, at 459-60.

229. Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37,296 (1978). These procedures would have denied tax-exempt status to private schools that (1) had been found by a court or agency to be racially discriminatory or (2) had an insignificant number of minority students and were formed or substantially expanded at or about the time of the desegregation of the public schools in the community. *Id.* at 37,296-97. The Service proposed to utilize a numerically based definition of significant minority enrollment: a school would be nonreviewable as a potential discriminator if at least 20 percent of school-age minorities of the community were enrolled in the school. *Id.* at 37,298. Following receipt of a record number of hostile comments, the Service modified this proposal. *See, e.g.,* Wilson, *An Overview of the IRS's Revised Proposed Revenue Procedure on Private Schools as Tax-Exempt Organizations,* 57 TAXES 515 (1979). The Service did not, however, drop its numerically-based definition of discrimination. Proposed Revenue Procedure on Private Tax-Exempt Schools, 44 Fed. Reg. 9451-53 (1979).

Congress, satisfied with existing standards and critical of the severity of those proposed by the IRS, delayed implementation of the proposed IRS standards by denying appropriations for its formulation or enforcement. Amendments to the Treasury Appropriations Act of 1980 introduced by Congressmen Dornan[230] and Ashbrook[231] provided that funds under the Act could not be used either to implement the 1978 proposal or to enforce guidelines not already in place.

This legislation, enacted in the summer of 1979, initially served as a stop-gap measure designed to prevent the IRS from implementing its announced rule change. Shortly before the passage of these riders, the House Appropriations Committee in its report of the 1980 Appropriations Act expressed concern over the IRS's proposed initiatives:

> The issue of tax exempt status of private schools is a matter of far reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit. The Appropriations Committee is unsure that the proposed revenue procedures . . . are the proper expression of that legislative intent. The Committee believes that the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them . . . .[232]

Congressmen Ashbrook and Dornan echoed these concerns when they introduced their riders. Congressman Ashbrook claimed that the IRS "confuse[d] its own role as tax collector with that of legislator, jurist, or policymaker."[233] Congressman Dornan characterized the IRS proposal as a "unilateral usurp[ation of] Congress's constitutional authority to define tax policy."[234] Moreover, although congressional debate on these riders did consider the appropriateness of the IRS procedures,[235] rider sponsors did not claim that they were amending the tax code; instead, they argued that they were "just saying do not go for-

230. Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979), provided that "[n]one of the funds available under [the] Act may be used to carry out [the IRS proposals]."

231. Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979), provided that no funds may be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools."

232. H.R. REP. NO. 248, 96th Cong., 1st Sess. 15 (1979). *But see* SUBCOMMITTEE ON OVERSIGHT, HOUSE COMMITTEE ON WAYS & MEANS, 96TH CONG., 1ST SESS., STAFF REPORT ON IRS'S PROPOSED REVENUE PROCEDURE REGARDING THE TAX-EXEMPT STATUS OF PRIVATE SCHOOLS 10-11 (Comm. Print 1979) (arguing that IRS was on firm legal ground in concluding that its existing procedures were inadequate).

233. 125 CONG. REC. 18,444 (1979).

234. *Id.* at 18,813.

235. Witness the following colloquy: on the House side, Representative Mitchell asked Representative Dornan whether his amendment would "give tax-exempt status to those schools that were deliberately set up to avoid any form of desegregation." *Id.* To this, Dornan replied, "that the way

ward with these [IRS procedures] . . . until the Congress or a court affirmatively acts on that subject."[236]

In November 1979 and May 1980, the District Court for the District of Columbia considered the possible impact of these riders on the Code's tax-exemption provision. The first case, *Wright v. Miller,*[237] involved efforts by a nationwide class of black students and their parents to force the IRS to adopt standards similar to those proposed by the Carter administration. The district court rejected these efforts because it felt that the Ashbrook and Dornan amendments functioned as substantive legislation, precluding judicial intervention.[238] According to the district court, these riders were "the strongest possible expression of the Congressional intent" and a "complete and total refutation of [the plaintiffs'] contention."[239]

A diametrically opposite result was reached by the court in its May 1980 decision in *Green v. Miller.*[240] At issue in *Green* was the enforcement of a 1971 permanent injunction that required the IRS to deny tax-exempt status to racially discriminatory private schools in Mississippi.[241] The district court in *Green,* without considering the possible substantive effect of the riders, required the IRS to adopt procedures that were fundamentally equivalent to those proposed by the Carter IRS.[242]

[to stamp out racism] . . . is not to play mischief with every decent religious organization around the country that has a school set up for good purposes." *Id.*

On the Senate side, the chief antagonists were Senator Javits and Senator Helms. For Senator Javits, absent an adequate and well-defined enforcement procedure "these segregated academies will continue to flourish with taxpayer assistance." *Id.* at 22,907. Senator Helms countered by claiming that the "people who have built these schools . . . are interested in . . . education . . . not race. For the IRS to step in and arbitrarily say 'Because you do not have x numbers of whatever race enrolled in this school, your tax exemption is eliminated,' is tyranny." *Id.*

Despite this recognition, neither House nor Senate debates suggest that Congress intended to affirmatively amend the Code through these riders. In fact, House and Senate parliamentarians both refused to sustain points of order that these riders were impermissible legislation on an appropriations bill.

236. *Id.* at 18,447 (remarks of Rep. Ashbrook).

237. 480 F. Supp. 790, 792 (D.D.C. 1979). The plaintiffs further alleged that current IRS procedures constituted government support for discrimination and therefore violated federal civil rights statutes. *Id.* For a detailed discussion of *Wright,* see McCoy & Devins, *supra* note 8, at 465-68.

238. 480 F. Supp. at 798-99. The district court also ruled that the plaintiffs were without standing because they did not allege that any private school had actually discriminated against any of the plaintiffs. *Id.* at 794. Finally, the court found that the doctrine of nonreviewability of administrative action prevented it from reversing the IRS Commissioner's decision. *Id.* at 797-98.

239. *Id.* at 798-99.

240. 80-1 U.S. Tax Cas. (CCH) ¶ 9401, 45 A.F.T.R.2d (P-H) ¶ 80-650 (D. Colo. 1980). For further discussion, see McCoy & Devins, *supra* note 8, at 457-62.

241. Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (per curiam).

242. The court characterized as presumptively discriminatory Mississippi private schools that (1) had been adjudged to be racially discriminatory or (2) were established or expanded at the time

Wright and *Green,* while reaching opposite conclusions, both misconstrued the meaning and effect of the Ashbrook and Dornan riders. *Wright*'s holding that these riders somehow permanently amended the tax code is erroneous. Granted, Congress was displeased with the IRS proposal; the riders' chief purpose, however, simply was to prevent such IRS activity while Congress considered its options.[243]

At the other extreme, *Green* errs by ordering the IRS to implement Carter-like standards in Mississippi—even though the Ashbrook and Dornan riders were in effect. Congress, by denying the IRS funds to implement the Carter proposal, prevented the Service from using the proposed procedure during FY 1980. As demonstrated earlier, congressional authorization of a specific enforcement scheme does not mean that Congress must appropriate funds to put that scheme into place.[244] *Green,* therefore, should have accorded the 1980 appropriations bill respect equivalent that given to other legislative enactments.[245]

2. *1980 Riders.* In the summer of 1980, Congress again approved restrictions on IRS nondiscrimination enforcement.[246] Unlike the preceding year, *Green v. Miller* served as a backdrop to floor debates on this matter. In introducing his rider, for example, Congressman Dornan stated:

> It is the Congress who controls the national purse—it is not the courts—and it is not the Internal Revenue Service. . . . The IRS already has sufficient authority to deal with private tax-exempt schools which discriminate because of race. The proposed IRS regulations, and [*Green*'s] unconstitutional usurpation of Congressional taxing and

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of public school desegregation and could not demonstrate that they did not practice racial discrimination. Green v. Miller, 80-1 U.S. Tax Cas., ¶ 9401 at 84,089, 45 A.F.T.R.2d, ¶ 80-650, at 80-1567.

243. Moreover, since the *Wright* action was based on statutory and constitutional prohibitions of federal funding of racial discrimination, the *Wright* court *sub silentio* viewed these riders as both an amendment to federal antidiscrimination laws and a restriction on federal court jurisdiction. No statement in the legislative debates remotely suggests such an expansive reading of these riders.

244. *See supra* notes 109-115 and accompanying text.

245. Of course, if *Green* was based on the fifth amendment's equal protection component, see Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (incorporating fourteenth amendment's equal protection standards into the fifth amendment), the Dornan and Ashbrook riders could have been deemed an unconstitutional restriction on IRS authority. *See* Tribe, *supra* note 118, at 366. The district court did not reach this issue. Instead, it treated a congressional funding bill as meaningless. The District of Columbia Circuit, in its review of *Wright,* considered this issue. Wright v. Regan, 656 F.2d 820, 832-34 (D.C. Cir. 1981).

246. Joint Resolution of Dec. 16, 1980, Pub. L. No. 96-356, § 101(4), 94 Stat. 3166, 3166, extended through the end of the fiscal year by Supplemental Appropriations and Recissions Act, 1981, Pub. L. No. 97-12, § 401, 95 Stat. 14, 95 (1981). For 1980 debates, see 126 CONG. REC. 21,978-90, 22,166-70 (1980).

> appropriations powers—thinly disguised as a court order—should be rejected by this body . . . .[247]

At the same time, supporters of these riders did not seek to nullify *Green,* for they claimed that the IRS was still bound to follow court orders.[248]

Another distinction to the legislation in 1979 was that congressional sponsors considered the 1980 measures an alternative to legislation, not a stop-gap measure permitting further study on the issue. Congressman Ashbrook, explaining why he introduced his rider rather than support the enactment of an amendment to the Code, stated that "the appropriations process offers us the only practical way to resist the Internal Revenue Service's direct assault on private and religious schools."[249] Despite the raising of points of order,[250] the recognition that—under *Green*—Mississippi might have different nondiscrimination enforcement standards than the rest of the nation,[251] and complaints that the appropriations process should not be used to circumvent "things which the courts have directed that the executive branch should have the constitutional responsibility to carry out,"[252] virtually identical versions of the Ashbrook and Dornan riders were enacted into law.[253]

Legislative reenactment of the Ashbrook and Dornan riders in the wake of *Green v. Miller* strongly supports the view that Congress now

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247. 126 CONG. REC. 21,981 (1980). *See also id.* at 22,169 (statement of Rep. Ashbrook) ("The power of the purse, which many of us have thought to be an important part of the Constitution, just a few months ago was upheld in [*Harris v. McRae*], the so-called abortion case. No federal judge really has the power to decide what [enforcement effort] Congress shall or shall not fund.").

248. For example, Congressman Dornan, noting that the *Green* decision was only binding in Mississippi, argued that his amendment could stand so long as it recognized the legitimacy of *Green. Id.* at 21,983. For further discussion, see Wright v. Regan, 656 F.2d 820, 835 n.48 (D.C. Cir. 1981).

249. 126 CONG. REC. 22,167 (1980). *See also id.* at 21,986 (remarks of Rep. Symms, quoting column by Rep. Crane in *American Conservative Union*) ("[T]he IRS proposal usurps power that rightfully belongs to Congress. By this action, the revenue-collection arm of the federal government casts itself in the role of social engineer and policy maker, a role clearly not intended for it.").

250. Points of order were raised to both the Dornan and Ashbrook riders. Congressman Dornan successfully defended his amendment, *Id.* at 21,984 (1980) (ruling by chair), by referring to House precedents which recognize that "by refusing to recommend funds for all or part of an authorized executive function, [the House] thereby effect[s] a change in policy." *Id.* at 21,984. A point of order was successfully raised against the Ashbrook rider by Congressman Stokes, however. *Id.* at 21,979. Stokes claimed that the amendment was improper legislation on an appropriation because it compelled the IRS to apply standards in existence prior to August 1978, thus creating a conflict with subsequent court rulings, such as *Green. Id.* at 21,978. To compensate for this, Congressman Ashbrook modified his amendment so that the IRS would be restricted from promulgating or carrying out standards not required by law at the present date of the enactment. *Id.* at 22,160.

251. *See id.* at 21,983 (remarks of Rep. Dornan). *See also id.* at 15,382 (statement of Rep. Stokes) (noting irrationality of utilizing two sets of standards: one for Mississippi, one for the rest of the country). Of course, as long as the Ashbrook and Dornan riders were in place, the IRS lacked the funds necessary to implement *Green. See supra* notes 244-245 and accompanying text.

252. *Id.* at 21,983 (statement of Rep. Rangel).

253. The Ashbrook amendment was modified slightly to respond to a point of order. *See supra* note 250.

viewed these amendments as substantive legislation. First, rather than viewing them as a temporary stop-gap measure, the sponsors of these amendments considered the appropriations forum the only available route to enact such substantive limitations on the IRS. Second, Congress's overwhelming approval[254] of these measures in the face of *Green* suggests that Congress intended to exercise its legislative authority to prevent both the administration and the courts from initiating rigid enforcement standards. Third, Congress recognized both the effect of its decision and the fact that it used the disfavored technique of legislating on an appropriations measure.

The United States Court of Appeals for the District of Columbia Circuit, however, when reviewing the district court decision in *Wright v. Miller,* concluded that these riders should be read as no more "than a temporary stop order on IRS initiatives."[255] The appellate court focused its attention on floor debates surrounding the *initial* enactment of the Ashbrook and Dornan riders.[256] The court was virtually silent with respect to the 1980 reenactment of these measures, noting in a footnote that Congress did not intend to disrupt court orders.[257] This reading is woefully inadequate, for Congress—while recognizing the force of *Green*—clearly intended to prevent judicial usurpation of its lawmaking authority. Moreover, unlike its initial enactment of these measures, Congress viewed its 1980 reenactment as an alternative to authorizing legislation. Because the court of appeals did not recognize that Congress sought to accomplish different objectives in 1980 than it did in 1979, it misinterpreted the Ashbrook and Dornan riders.[258]

3. *1981 Riders.* Six weeks after the court of appeals' decision in *Wright v. Regan,* Congress expanded the scope of these riders to preclude

254. The House voted 308 to 85 in favor of the Dornan rider, 126 CONG. REC. 21,990 (1980), and 300 to 107 in favor of the Ashbrook rider, *Id.* at 22,170.

255. Wright v. Regan, 656 F.2d 820, 835 (D.C. Cir. 1981). *Wright,* however, is primarily concerned with standing. For a discussion of this aspect of the case, see Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985). *See also* McCoy & Devins, *supra* note 8, at 465-68.

256. 656 F.2d at 834-35.

257. *Id.* at 835 n.48. The appellate court also referred to the 1980 debates to demonstrate the inconsistency of the district court's rulings in *Green* and *Wright*. *Id.* at 835 & nn.50-51.

258. The appellate court was correct, however, in rejecting the district court's position that the riders somehow prevented federal courts from enforcing either the Constitution's equal protection guarantee or federal antidiscrimination laws. 656 F.2d at 835 (riders do not purport to control judicial dispositions). But in reaching this conclusion, the court erroneously set up the 1979 legislative history as a strawman. A forthright evaluation of the 1980 floor debates would have yielded the same results. Congress's substantive objectives in reenacting Ashbrook and Dornan were never designed to undercut the statutory and constitutional proscriptions against government assistance for race discrimination.

enforcement of court orders that required stricter nondiscrimination enforcement standards than those in place at the time of the Carter IRS proposal.[259] Congressman Ashbrook explained the rider as a proposal to oppose "this judicial power-grab . . . by the fundamental building block of our system of representative government: The power of the purse."[260] Congressman Dornan was equally critical of the courts. For him, "under the guise of interpreting 'public policy,' [the courts] have, in fact, been acting totally contrary to law and public policy by usurping Congress' constitutional authority to define the tax policy of this Nation."[261] Proponents of the 1981 rider did not, however, intend to make *Green v. Miller* unenforceable. Rather, rider sponsors claimed that judicially-mandated procedures ordered in *Green* must be respected, but that "this cancer should not spread to the other 49 States" as a result of the *Wright* decision.[262]

This action represents as clear a statement as Congress can make—through the appropriations process—that it disapproved of the expansive nondiscrimination enforcement standards proposed by the Carter IRS. Indeed, when this limitation was extended in 1981, there was no threat of IRS encroachment on this matter.[263] Moreover, sensing that the courts, not the Executive, would be the likely source of such requirements, Congress took the unprecedented step of severely limiting judicial authority. The 1981 enactment therefore raises significant issues regarding both congressional preclusion of judicial review and the force and effect of *Wright v. Regan.*

4. *1982 Proposal.* In January 1982, President Reagan concluded that the IRS was without statutory authority to deny tax-exempt status to racially discriminatory private schools.[264] Immediately following this

259. Joint Resolution of Oct. 1, 1981, Pub. L. No. 97-51, § 101(a), 95 Stat. 958, 958-59; Joint Resolution of Dec. 15, 1981, Pub. L. No. 97-92, § 101(a), 95 Stat. 1183, 1183-85. For legislative debates on this measure, see 127 CONG. REC. 18,789-96 (1981).

260. 127 CONG. REC. 18,790 (1981).

261. *Id.* at 18,791.

262. *Id.* (remarks of Rep. Ashbrook). Various members of Congress also expressed dissatisfaction with the manner in which the Carter administration handled the *Green* and *Wright* lawsuits. Indeed, Congressmen Dornan and Crane each introduced into the Congressional Record "evidence" of collusion between the Carter White House and civil rights litigants in these cases. *See id.* at 18,791-92 (remarks of Rep. Dornan); *id.* at 18,793-94 (remarks of Rep. Crane). For further discussion of this issue, see McCoy & Devins, *supra* note 8, at 461-62.

263. The Reagan IRS, in fact, had formally withdrawn the 1978 proposal. *See* 128 CONG. REC. H8616 (daily ed. Nov. 30, 1982) (statement of Rep. Roybal).

264. Specifically, the President directed that "[w]ithout further guidance from Congress, the Internal Revenue Service will no longer deny tax-exempt status for . . . organizations on the grounds that they don't conform with certain fundamental public policies." IRS News Release, at 1 (Jan. 8, 1982).

reversal of the long-standing IRS policy, the administration became the object of a barrage of criticism from the news media[265] and civil rights groups.[266] Against the backdrop of this activity, the Supreme Court was preparing to hear *Bob Jones University v. United States.*[267] This case, involving a challenge by a racially discriminatory religious university whose tax-exempt status was denied several years earlier, squarely raised the statutory issue that was the basis of the Reagan IRS's policy directive: whether the IRS's denial of tax-exempt status to discriminatory educational institutions was permissible under the Internal Revenue Code.[268] The Supreme Court's willingness to resolve this issue figured prominently in subsequent deliberations over the Ashbrook-Dornan riders.[269]

Congressman Dornan[270] reintroduced the riders, arguing that "as a result of [*Wright*], the way has been paved for a possible ruling . . . which would implement significant parts of the . . . procedures forbidden by my amendment."[271] Notwithstanding that Congressman Dornan's words were no less valid in 1982 than they were in the three prior years in

265. *See, e.g., Race Bias Won't Bar Tax-Exempt Status For Private, Religious Schools, U.S. Says,* Wall St. J., Jan. 11, 1982, at 12, col. 2; *U.S. Drops Rule on Tax Penalty for Racial Bias,* N.Y. Times, Jan. 9, 1982, at 1, col. 2.

266. *See* Lawyers' Committee for Civil Rights Under Law Press Release, at 2 (Jan. 13, 1982) ("[T]he announced shift violates the court orders against IRS and Treasury in the Green Case."). *See also Exemptions Bill Assailed at Hearing,* N.Y. Times, Feb. 5, 1982 at A12, col. 1. In the wake of criticism, the President—in order to show his unalterable opposition to racial discrimination in any form—sent Congress legislation that would have prohibited the granting of tax exemption to racially discriminatory educational organizations. Letter from President Ronald Reagan to the President of the Senate and the Speaker of the House Transmitting Proposed Legislation, 1982 PUB. PAPERS 34 (Jan. 18). Congress, however, refused to enact the legislation claiming that its position was already well settled. *See* 128 CONG. REC. 366 (1982) (statement of Sen. Bradley); *id.* at 363 (statement of Sen. Hart). *See also* Devins, *supra* note 227, at 161-63.

267. The Supreme Court granted certiorari in *Bob Jones University* on Oct. 13, 1981, well before the Reagan IRS policy directive was issued. 454 U.S. 892 (1981).

268. Because the Reagan policy shift would have restored Bob Jones University's tax-exempt status, the Justice Department, on the day the policy shift was announced, petitioned the Supreme Court to dismiss as moot the *Bob Jones University* case. *See* Bob Jones University v. United States, 461 U.S. 574, 585 n.9 (1983). After the backlash following the announced policy shift, however, the administration returned to the Supreme Court and requested that the case be decided. *See Administration Asks High Court to Settle School Exemption Issue,* Wash. Post, Feb. 26, 1982, at A3, col. 4. Because the administration still maintained that the IRS was statutorily required to grant tax exemptions to discriminatory schools, it suggested that the Court appoint "counsel advisory" to Bob Jones University. *See id.* The Court complied with this unorthodox request, appointing William T. Coleman, Jr., to argue the "government's side." Bob Jones University v. United States, 456 U.S. 922 (1982).

269. For a critique of the Court's decision to hear this case, see McCoy & Devins, *supra* note 8, at 463-64.

270. Congressman Ashbrook died in the intervening year.

271. 128 CONG. REC. H8615 (daily ed. Nov. 30, 1982).

which his amendment was passed,[272] the House of Representatives declined to reenact the measure.[273] Pointing to the pendency of *Bob Jones University,* the tax-exemption issue was perceived to be beyond the scope of legislative power. Representative Rangel, for example, argued that "this very sensitive constitutional question is presently before the U.S. Supreme Court [and members of Congress who want to enact the Dornan amendment], are extending this question beyond the scope of this Congress."[274]

This explanation is utter nonsense. A question of statutory interpretation was at issue in *Bob Jones University.* Congress would have been more than justified to clarify its understanding of the Code's tax-exemption provision. Moreover, *Bob Jones University*'s concern was the threshold issue of whether discriminatory private schools were entitled to tax-exempt status. The Ashbrook-Dornan riders never questioned the propriety of a nondiscrimination requirement.[275] Instead, the sole purpose of those riders was to foreclose one type of nondiscrimination enforcement scheme. Finally, by this time, the underlying purpose of Ashbrook-Dornan was to curtail judicial action of the kind in *Wright.*[276]

Congress's stated reasoning therefore is better understood as a subterfuge to Congress's *true* motivation.[277] In November 1982, when this matter was under consideration, the private school tax exemption issue had become a major embarassment to the Reagan administration. Consequently, had Congress reenacted the riders, it would have appeared to have aligned itself with the administration—even though the Ashbrook-Dornan riders, rather than extend tax-exempt status to all private schools, merely sought to prevent the imposition of quota-like enforcement standards.

It is next to impossible to discern what Congress intended by not acting on these riders. On one hand, there is no reason to think that congressional opposition to the Carter proposal had dissipated. On the other hand, by deferring to the courts, Congress conceded the possible adoption of Carter-like standards in the *Wright* litigation.

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272. At the time of those legislative debates, a petition for certiorari had been filed in the *Wright* litigation. In June 1983, the Supreme Court accepted that petition. Allen v. Wright, 464 U.S. 888 (1983).

273. *See* 128 CONG. REC. H8615-23 (daily ed. Nov. 30, 1982).

274. 128 CONG. REC. H8616 (daily ed. Nov. 30, 1982). Representatives Roybal, Matsui and Fazio voiced similar objections to the proposed riders. *Id.* at 8616-18.

275. *See supra* notes 230-236 and accompanying text.

276. *See supra* notes 255-262 and accompanying text.

277. *See* Devins, Bob Jones University v. United States: *A Political Analysis,* 1 J.L. AND POL. 403 (1984).

5. *Subsequent Developments.* Congress has not reenacted or reconsidered the Ashbrook-Dornan riders. The Supreme Court, however, has twice considered the significance of those measures—in *Bob Jones University v. United States* and in its review of *Wright v. Regan.*

In May 1983, the Supreme Court ruled, in *Bob Jones University,*[278] that racially discriminatory schools are statutorily prohibited from receiving federal tax-exempt status. The Court referred to the Ashbrook-Dornan riders, but only to note that the measures in no way challenged the propriety of a nondiscrimination requirement.[279] The question of whether the lapsed riders somehow defined the parameters of appropriate enforcement of this nondiscrimination requirement was not considered.[280] To the contrary, the majority noted that "ever since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws."[281] Furthermore, pointing to Congress's repeated failure to clarify its position on the nondiscrimination issue by amending the Code, the Court remarked, "Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS [nondiscrimination] rulings."[282]

The Court thus rejected petitioners' argument, based in part on the Ashbrook-Dornan riders, that IRS rulemaking on tax exemptions is "a plain usurpation of Congressional law-making powers by the non-elected public servants of the Internal Revenue Service."[283] Consequently, although the Reagan administration will not introduce such standards, nothing in *Bob Jones University* will necessarily prevent subsequent administrations from introducing Carter-like standards.

The Ashbrook-Dornan riders appear to have played a more significant role in the Supreme Court's resolution of the *Wright* litigation. In its July 1984 decision, *Allen v. Wright,*[284] the Court ruled that civil rights plaintiffs lacked standing to pursue their efforts to persuade the courts to impose Carter-like nondiscrimination enforcement standards. Although the Court referred to the Ashbrook-Dornan riders only to explain the

278. 461 U.S. 574, 595 (1983).

279. *Id.* at 602 n.27.

280. The Court's failure to consider this issue was appropriate because *Bob Jones University* addresses the threshold issue of whether racially discriminatory institutions are entitled to tax-exempt status. *Id.* at 577.

281. *Id.* at 596. For a critique of this ruling, see Galvin & Devins, *supra* note 227, at 1371-74.

282. 461 U.S. at 601. For a critique of this holding, see Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U.L. REV. 737 (1984).

283. Brief for Petitioners at 22, Bob Jones University v. United States, 461 U.S. 574 (1983) (No. 81-3).

284. 468 U.S. 737, 740 (1984). For a critical review of *Allen,* see Nichol, *supra* note 255.

case history,[285] congressional concerns that prompted enactment of these riders were reflected in the Court's reasoning: "[Civil rights plaintiffs'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary . . . ."[286] This language, while approving of appropriations-based oversight, does not signal what effect should be given to limitation riders.

6. *Summary and Analysis.* In Congress's consideration of the Ashbrook-Dornan riders, congressional objectives were ever-changing. When first enacted in 1979, these riders served a stop-gap function, allowing Congress to determine whether it should amend the Internal Revenue Code.[287] In 1980, however, Congress perceived these riders as a substantive limit on Carter IRS initiatives.[288] The very next year, the riders were expanded to prevent judicial imposition of Carter-like standards in the Reagan era.[289] And in 1982, Congress flip-flopped for the last time, refusing to reenact these measures precisely because the Supreme Court was set to rule on this issue.[290]

This chain of events highlights a simple fact often overlooked by the courts: appropriations riders are single-year measures—necessarily susceptible to changing circumstances. Although the courts have tended to provide substantive interpretations of appropriations by looking to legislative history[291] and by recognizing that Congress often legislates in the appropriations process, such interpretations are suspect and should not be undertaken. Otherwise, courts, in the name of legislative intent, will create binding precedents[292] that may ultimately frustrate Congress's ability to express its desires.[293] Judicial misinterpretations of the Ash-

285. 468 U.S. at 737, 748 n.16.

286. *Id.* at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

287. *See supra* notes 229-232 and accompanying text.

288. *See supra* notes 249-254 and accompanying text.

289. *See supra* notes 259-262 and accompanying text.

290. *See supra* notes 272-274 and accompanying text.

291. *See, e.g.*, Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretations in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975) (evaluating courts' use of plain meaning rule rather than analysis of legislative history); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983) (analyzing Court's increased use of legislative history in 1981 term).

292. Congress's refusal to question the validity of Green v. Miller supports this conclusion. *See supra* notes 246-248 and accompanying text.

293. For this reason, some courts have refused to explore legislative history to determine the substantive meaning of an appropriation. For example, a three judge district court concluded that "it would be impossible to gather and evaluate properly" whether congressional funding of Indo-China military activities should be equated with congressional authorization of such activities. Atlee

brook-Dornan riders support this proposition.

At the same time, courts simply cannot ignore limitation riders.[294] Appropriations are legislative enactments and, if constitutional,[295] must be enforced. The Ashbrook-Dornan riders, therefore, should have been considered a series of single-year restrictions prohibiting the IRS from using Carter-like nondiscrimination enforcement standards.

Such an approach might displease Congress, however, for Congress often intends to accomplish policy objectives through appropriations.[296] Congress itself can remedy the situation through the enactment of substantive legislation. Perhaps Congress has forgotten that authorizing legislation is the most effective form of oversight. Or perhaps Congress has grown accustomed to judicial acquiescence to back-door legislation. These reasons for giving substantive effect to appropriations, however, ignore the problems of interpretation encountered by the courts and the effects that misinterpretation is likely to produce. Viewing appropriations as single-year enactments is much less likely to create these problems, even if the courts, in so interpreting appropriations, do not give full effect to legislative intent.

CONCLUSION

The primary purpose of this article has been to discuss the frequency of appropriations-based oversight and legal issues associated with such oversight. In doing so, this article has been critical both of the use of appropriations as an alternative to substantive legislation and of the

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v. Laird, 347 F. Supp. 689, 706 (E.D. Pa. 1972). Noting that the Constitution entrusts the war declaration power to Congress, the court in *Atlee* concluded that judicial involvement in this matter would violate the political question doctrine. *Id.* This political question ruling comports with the view that judicial power should not be exercised over matters that the Constitution has committed to another branch of government. *See, e.g.*, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam) (refusing to consider legality of President's activities in El Salvador); Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959). The *Atlee* court's recognition of the indeterminacy of legislative intent in appropriations comports with a second basis for invoking the political question doctrine, namely, that courts are justified in ducking issues incapable of principled judicial resolution. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 183-98 (1962); Redish, *Judicial Review and the "Political Question,"* 79 NW. U.L. REV. 1031, 1043-55 (1985).

The prospect that judicial consideration of appropriations-based decisionmaking might be a nonreviewable "political question" was presented to the Supreme Court by members of Congress in Harris v. McRae. *See* Brief of Rep. Jim Wright et al., as amici curiae, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268). These representatives argued that Hyde limitations must be accepted because the power to appropriate funds lies solely with the legislature. *See id.* at 24-32. In this view, courts cannot insist that funds be spent in a manner at odds with congressional intent. *See id.* The possibility that courts are incapable of accurately interpreting limitation riders was not raised by congressional amici. The Supreme Court, in *Harris*, did not confront the political question issue.

294. *See* discussion of Green v. Miller, *supra* notes 240-247 and accompanying text.

295. *See supra* notes 116-129 and accompanying text.

296. *See supra* notes 22-29 and accompanying text.

courts' willingness to view single-year appropriations as enduring policy directives. This article, however, should not be viewed as an absolute condemnation of the practice of attaching legislation to an appropriations bill. When Congress must respond to an emergency, such as the Vietnam War, short-term appropriations-based oversight seems sensible. Furthermore, if the appropriations process is the only available vehicle to enact legislation, Congress might be better served by enacting flawed legislation than no legislation. There are, however, significant risks associated with this practice. While growing concerns over the budget deficit strongly suggest the increasing confluence of fiscal and substantive policy, it is hoped that this article will make Congress more sensitive to the implications of appropriations-based oversight with respect to the administration of laws and the adjudication of claims arising under them.