

APPROPRIATIONS *REDUX*: A CRITICAL LOOK AT THE FISCAL YEAR 1988 CONTINUING RESOLUTION

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On January 25, 1988, in his State of the Union Address, President Reagan blasted Congress for the budget process culminating in the Fiscal Year 1988 (FY 88) continuing resolution.¹ Contending that “[m]ost of you in this chamber didn’t know what was in this [2100-page] catch all bill and [accompanying conference] report,” the President boldly proclaimed that he would not sign “another one of these.”² This damning statement, rather than inciting the hostility associated with unfounded accusations, provoked the wild appreciation associated with a minister preaching to the faithful. Indeed, since Congress’s passage of the resolution, pledges of support for the President’s stand have been made by enough Congressmen and Senators to sustain such a veto.³

There is good reason to dislike the FY 88 continuing resolution: the bill shattered Congress’s reputation as a deliberative body. Fearing the imminent shutdown of the government,⁴ Congress adopted internal rules to preclude debate and amendment and effectively to deny access to the final version of the bill.⁵ In essence, the resolution appears the secretive work-product of powerful legislators and their aides.

This article’s concern is the recent proliferation of continuing resolutions and the legal issues associated with that proliferation—matters that received only scant attention in my earlier piece on limitation rid-

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1. Continuing resolutions are funding devices enacted whenever Congress is unable to pass one or more of the thirteen regular appropriation bills by the end of the budget cycle. See L. FISHER, *PRESIDENTIAL SPENDING POWER* 143 (1975). Continuing resolutions are necessitated by Antideficiency Act provisions that demand that appropriated funds fuel governmental programs. See 31 U.S.C. § 1512 (1982).

2. Address Before a Joint Session of the Congress on the State of the Union, 24 WEEKLY COMP. PRES. DOC. 85, 87 (Jan. 25, 1988).

3. See, e.g., Hook, *Reagan’s Attack on Pork-Fed Mega-Bills Stakes a Responsive Chord in Congress*, 46 CONG. Q. WEEKLY REP. 190, 191 (1988).

4. Without some interim spending measure passed by the end of the fiscal year, nonessential governmental operation would cease. See 31 U.S.C. § 1512 (1982).

5. See generally *infra* notes 48-72 and accompanying text.

ers.⁶ In reviewing the causes and contents of last year's continuing resolution, this article will not altogether remove the negative cast put on continuing resolutions.⁷ At the same time, this article will pay attention to those features in the existing budget process that make continuing resolutions inevitable and somewhat beneficial.⁸ It will also explore whether omnibus legislation subverts the President's veto power⁹ and whether some notion of "due process in lawmaking" demands that lawmakers have an opportunity to read and debate a bill before they vote on it.¹⁰ Finally, this article will consider this type of single-year legislation's propensity to raise bill of attainder and equal protection problems.¹¹

I. CONTINUING RESOLUTIONS: WHY, HOW AND WHAT'S WRONG?

The awesome dimensions of the FY 88 continuing resolution have provoked a firestorm of criticism both inside¹² and outside¹³ Congress. The resolution's alleged failings include: (1) changing the balance of power within Congress,¹⁴ (2) undermining the President's veto,¹⁵ (3) en-

6. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456.

7. See *infra* notes 47-75 and accompanying text.

8. See *infra* notes 12-46 and accompanying text.

9. See *infra* notes 117-54 and accompanying text.

10. See *infra* notes 76-116 and accompanying text.

11. See *infra* notes 155-92 and accompanying text.

12. See *supra* note 3; see also HOUSE DEMOCRATIC STUDY GROUP, CONTINUING RESOLUTIONS, SPECIAL REP. NO. 30, 100th Cong., 2d Sess. (1988); HOUSE REPUBLICAN RESEARCH COMM., CRS AND OMNIBUS APPROPRIATIONS: PROBLEMS AND DEVELOPMENT (1987) (prepared by Kathy Ormiston, Senior Economics Analyst, House Republican Research Committee).

13. See, e.g., Editorial, *What a Way to Run a Government*, ECONOMIST, Dec. 26, 1987, at 31-33; Editorial, *Megabills . . .*, Wash. Post, Dec. 7, 1987, at A14, col. 1.

14. In particular, the Appropriations Committee's power is substantially augmented by continuing resolutions. As Allen Schick demonstrates in a report prepared for the Task Force on the Budget Process, the only real limit on the Appropriations Committee's role is the work previously completed on one or more of the regular appropriation bills. COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, THE WHOLE AND THE PARTS: PIECEMEAL AND INTEGRATED APPROACHES TO CONGRESSIONAL BUDGETING 37-39 (1987). When regular bills are incomplete, the Appropriations Committee has wide discretion in defining the content and scope of the resolution. *Id.* at 37. For example, in the House, members of the Appropriations Committee and the Rules Committee, working together, can fill the continuing resolution with legislation and new funding and then protect it from opponents. Members of these committees do this by writing the continuing resolution to their liking while it is with the Appropriations Committee and then restricting debate and amendment of the resolution while it is on the floor through procedural rules established by the Rules Committee. See *id.* For a description of how such rules affected the FY 88 resolution, see *infra* notes 48-51. If Rules Committee restrictions are rejected, however, floor amendments can displace Appropriations Committee control. In 1985, after the rejection of restrictive rules, the House inserted the 200-page Comprehensive Crime Control Act of 1984 into the resolution and the Senate accepted 125 of 158 amendments offered to it. COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, *supra*, at 38.

couraging special-interest legislation,¹⁶ and (4) preventing effective congressional consideration of the resolution's multifarious provisions through restrictions on amendment to, debate on, and access to the bill.¹⁷

Appropriations Committee members also wield enormous influence in conference, where reconciliation of House and Senate bills occurs. In the case of continuing resolutions, this influence is acute because fear of the imminent shutdown of the government forces the near-immediate approval of these resolutions' conference reports. *Id.* For further discussion of parliamentary conditions, see R. KEITH, AN OVERVIEW OF THE USE OF CONTINUING RESOLUTIONS 5-6 (Congressional Research Service 1980). Several members of Congress have criticized this expanded role for the Appropriations and Rules Committees. For Congressman Byron Dorgan, continuing resolutions deny each representative the chance to vote on which programs to cut, which to freeze and which to increase. That is left to a handful of members on the Appropriations Committee and I believe that abrogates both the responsibility and privilege of each Member to represent his or her constituents.

133 CONG. REC. E4688 (daily ed. Dec. 8, 1987); *see also* 133 CONG. REC. H10,907 (daily ed. Dec. 3, 1987) (remarks of Rep. Michel). For a description of Appropriations Committee Conferees' role in the FY 88 continuing resolution, *see infra* notes 60-72 and accompanying text.

15. *See infra* note 151 and accompanying text.

16. Critics of the continuing resolution claim that it is a ripe target for the inclusion of "pork barrel" projects. The Appropriations Committee's willingness to include amendments to ensure approval, combined with limitations on debate and amendment, explains this phenomenon. COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, *supra* note 14, at 38-39. Not surprisingly, the inclusion of such pork barrel projects is subject to attack. In his 1988 State of the Union Address, for example, President Reagan chastised Congress for the continuing resolution's inclusion of such projects as "cranberry research, the study of crawfish and the commercialization of wild flowers." *See* Address Before a Joint Session of the Congress on the State of the Union, *supra* note 2, at 87. Other "special interest" legislation subject to attack includes \$8 million for Parisian schools for North African Jews, \$25 million for an airport in House Speaker Wright's district, and a limitation rider forcing Rupert Murdoch to sell his newspapers in markets where he also owns television stations. *See Anti-Murdoch Provision in Funding Bill Sparks Flap*, 46 CONG. Q. WEEKLY REP. 87 (1988). For further discussion of the Murdoch rider, *see infra* notes 157-59 and accompanying text. For additional examples of pork in the 1988 continuing resolution, *see generally Congress is Out of Control*, READER'S DIG., May 1988, at 181 (compilation of newspaper reports of pork barrel projects). For an explanation of why these pork projects would be beyond the reach of an item veto, *see* L. Fisher, *Micromanagement by Congress: Reality and Mythology* (Apr. 8, 1988) (unpublished paper presented at conference sponsored by American Enterprise Institute).

The President, through the Office of Management and Budget, produced a list of "wasteful" items in the FY 88 continuing resolution. The Democrats characterize this list as an overstatement both because of its inclusion of "essential" programs and because \$970 million is less than two-tenths of one percent of the \$605 billion appropriation. HOUSE DEMOCRATIC STUDY GROUP, *supra* note 12, at 10-11.

One interesting aftershock of the State of the Union Address concerned Senator Daniel Inouye, who admitted to having made an "error in judgment" and moved to rescind the \$8 million earmarked for Parisian schools for North African Jews. 134 CONG. REC. S315 (daily ed. Feb. 1, 1988); *see* Act of Feb. 16, 1988, Pub. L. No. 100-251, 102 Stat. 17 (enacting Sen. Inouye's motion).

17. *See generally infra* notes 48-72. In this connection, concern has also been voiced about disruption of the legislative process. Typifying these remarks, Congressman Butler Derrick warned in 1984:

[W]e cannot continue to operate around here in a manner which ignores the normal legislative process—in which all our real work is done on appropriation bills and, in particular, on the continuing resolution. It is not fair to the authorizing committees which see their work go down the drain as all attention is focused on the appropriation bills . . . it is damaging to the integrity of the legislative process.

130 CONG. REC. H9895 (daily ed. Sept. 20, 1984).

These allegations have led Democrats and Republicans alike to condemn continuing resolutions.¹⁸ Yet, a confluence of phenomena make continued use of this funding mechanism likely.

A. *The Emergence of Continuing Resolutions.*

Congress passed the first continuing resolution in 1876, providing funding for certain government accounts for ten days.¹⁹ Since 1954, Congress has passed at least one continuing resolution each year.²⁰ Until 1981, continuing resolutions were confined to interim spending measures.²¹ Since then, however, the use, scope and size of these measures has dramatically expanded.²² Today, continuing resolutions provide full-year funding for many (and sometimes all) federal operations²³ and serve as a repository of unrelated legislation.²⁴

While the appropriations process²⁵ has always served as a last op-

Continuing resolutions are also problematic because they disrupt normal government operations. Federal employees left in the dark about their agency's funding frequently abandon "appropriated" work and turn their attention to a job search. See *Hearings on Continuing Resolutions Before the House Republican Research Comm.*, 100th Cong., 1st Sess. — (1987) [hereinafter *Dec. 16, 1987 Hearings*] (forthcoming) (statement of Neal Devins).

18. The Democratic Study Group and Republican Research Committee both argue for the abandonment of omnibus continuing resolutions, although the Democrats advocate self-restraint and the Republicans favor a change of House rules. See HOUSE DEMOCRATIC STUDY GROUP, *supra* note 12, at 13-14; HOUSE REPUBLICAN RESEARCH COMM., *supra* note 12, at 4.

19. Act of April 17, 1876, 19 Stat. 65. "The 1876 resolution incorporated the two basic elements found in [pre-1981] continuing resolutions: (1) a fixed duration (ten days) and (2) a maximum level of funding ('proportional' for the ten-day period to the appropriations made available the previous year)." R. KEITH, *supra* note 14, at 7. For an overview of pre-1981 practices, see *id.* at 7-11.

20. See R. KEITH, *supra* note 14, at 8; see also UNITED STATES GENERAL ACCOUNTING OFFICE, CONTINUING RESOLUTIONS AND AN ASSESSMENT OF AUTOMATIC FUNDING APPROACHES 14-24 (1986) [hereinafter GAO].

21. As such they were fairly simple, providing funding for a short period of time, normally less than three months, at a rate of spending usually defined as the lower of the previous year's rate, the President's rate, or the rate in the House- or Senate-passed appropriation. COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, *supra* note 14, at 34; see also L. FISHER, *supra* note 1, at 143-46 (describing complexities in determining the appropriate rate).

22. According to the GAO, from 1960 to 1985, "the amount of detail and the resulting number of pages in continuing resolutions increased at least a hundredfold." See GAO, *supra* note 20, at 14. See generally *id.* at 14-18; Keith & Davis, *Lines and Items*, PUB. BUDGETING & FIN., Spring 1985, at 97, 99 (describing growth in number of pages).

23. See generally S. STREETCAR, REGULAR APPROPRIATIONS ENACTED SEPARATELY AND IN CONTINUING APPROPRIATIONS, FISCAL YEARS 1977-1987 (Congressional Research Service 1987).

24. For a discussion of the FY 1988 continuing resolution, see *infra* notes 47-72. For a discussion of legislative amendments to the continuing resolutions for Fiscal Years 1983-1985, see Devins, *supra* note 6, at 470. Pre-1981 legislative amendments financed combat activities in Southeast Asia, the Federal Trade Commission, U.S. aid to Iran, and federally funded abortions. R. KEITH, *supra* note 14, at 17-18. Unlike post-1981 enactments, which often included free-standing substantive provisions, pre-1981 efforts were confined to limitation riders.

25. See generally COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, *supra* note 14, at 38-39; A. SCHICK, LEGISLATION, APPROPRIATIONS, AND BUDGETS: THE DEVELOP-

portunity for the enactment of substantive measures that have failed either in committee or on the floor,²⁶ post-1981 continuing resolutions starkly contrast with prior practices. The differences have resulted from the conglomeration of multiple unenacted appropriations, substantive legislation, and time pressures that severely limit congressional deliberation.²⁷ The post-1981 continuing resolutions do not reflect a considered legislative judgment. Instead, a combination of forces—most notably the 1974 Budget Act²⁸ and the Gramm-Rudman Deficit Control Act²⁹—has interacted to make “behemoth”³⁰ continuing resolutions inevitable.

The 1974 Budget Act was a response to Congress’s perceived loss of power to the President, demonstrated particularly by the Executive’s refusal to spend appropriated funds during the Johnson and Nixon administrations.³¹ Prior to the Budget Act’s enactment, Congress, upon receiving comprehensive budget recommendations from the President, was expected to coordinate its revenue and spending decisions with those

MENT OF SPENDING DECISION-MAKING IN CONGRESS 14-19 (Congressional Research Service 1984); Devins, *supra* note 6; Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U.L. REV. 51 (1979).

26. As Senator Warren Magnuson, who chaired the Senate Appropriations Committee, observed in 1979: “When you cannot get anything through a legislative committee, you tack it on an appropriation bill.” 125 CONG. REC. 25,426 (1979); *see also* 130 CONG. REC. S12,137 (daily ed. Sept. 27, 1984) (remarks of Sen. Hatfield) (“[The Senate should not] get into that interminable situation as we have in the past . . . of loading up this appropriations bill with legislative riders. . . . This is not the place to start trying to transfer all the unfinished legislative calendar to the appropriations calendar.”) Moreover, unlike the situation with regular authorizations, “extraneous provisions may bypass all or much of the normal legislative process. Committee hearings, a mark-up floor debate, and floor amendments, which temper and improve legislative proposals, might be avoided.” *The Budget Reconciliation Process; The Inclusion of Unrelated Matters: Hearings Before the Subcomm. on the Legislation Process of the House Comm. on Rules*, 99th Cong., 2d Sess. 79 (1987) (statement of Robert Reischauer); *accord* A. SCHICK, *supra* note 25, at 55-59.

27. One procedural factor contributing to this development is that, under House rules, the bar against legislation in appropriation bills does not apply to continuing resolutions. *See* A. SCHICK, *supra* note 25, at 58.

28. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297.

29. The “Gramm-Rudman Act,” the Balanced Budget Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, was invalidated by the Supreme Court in 1986. *Bowsher v. Synar*, 478 U.S. 714 (1986). The Court ruled that the Act improperly delegated to the Comptroller General—an official of the legislative branch—the responsibility of determining for the President the monies to be sequestered under the Act. This constitutional defect was addressed in the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, sec. 102, § 252, sec. 103, § 253, 101 Stat. 754, 764-75 (to be codified at 2 U.S.C. §§ 902-907, 922). For an extensive treatment of this enactment, *see* E. DAVIS & R. KEITH, *DEBT-LIMIT INCREASE AND 1985 BALANCED BUDGET ACT REAFFIRMATION: SUMMARY OF PUBLIC LAW 100-119* (JF RES. 324) (Congressional Research Service 1987).

30. This phrase is borrowed from the President’s State of the Union Address. *See* Address Before a Joint Session of the Congress on the State of the Union, *supra* note 2, at 87.

31. *See generally* L. FISHER, *supra* note 1, at 175-97.

recommendations.³² The President was supposed to be responsible for overall budget aggregates, with Congress retaining the right to set priorities within those aggregates.³³ Presidential impoundments disrupted this balance. By withholding appropriations, the President sought to control aggregates and priorities.

The Budget Act contained a number of provisions designed to strengthen congressional control over fiscal affairs. Under the Act, presidential rescissions of appropriated funds require approval by both the Senate and House.³⁴ The President could defer the spending of funds, subject to a one-house veto.³⁵ The Act also created Budget Committees in the House and Senate,³⁶ established a Congressional Budget Office to supply technical support,³⁷ and required the adoption of budget resolutions to set overall limits on budget aggregates (such as total outlays and revenues) and permit debate on spending priorities.³⁸ Since 1974, Congress, in formulating its budget resolution, has often applied policy, economic and technical assumptions different from those presented in the executive budget.³⁹

The principle consequence of this transformation proved to be fiscal irresponsibility. The 1974 Act hinged on a centralized process (the budget resolution). Congress, unlike the quintessentially centralized Executive, is strongly decentralized. Consequently, as Louis Fisher has observed, "[i]nstead of staying within the President's aggregates, Members of Congress could vote on generous ceilings in a budget resolution and then announce to their constituents that they had 'stayed within the budget.'" ⁴⁰ Furthermore, the President, by manipulating his aggregates

32. At the same time, Congress was allowed to increase or decrease the President's budget by a simple majority vote. Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20.

33. See L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 226-27 (1985).

34. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 1012, 1017, 88 Stat. 297, 333-34, 337-39.

35. *Id.* § 1013, 88 Stat. at 334-335. The Supreme Court struck down one-house legislative vetoes in *INS v. Chadha*, 462 U.S. 919 (1983).

36. Pub. L. No. 93-344, §§ 101-102, 88 Stat. at 299-302.

37. *Id.* §§ 201-203, 88 Stat. at 302-305.

38. *Id.* §§ 302, 305, 88 Stat. at 306-308, 310-312. Through the use of a congressional budget adopted in concurrent resolutions, Congress sets "macro" policy and allocates the outlays and budget authority among a number of broad categories (e.g., national defense, health, agriculture). Specific programs are still supposed to be formulated and funded through the regular appropriation bills, but within the broad outlines of the budget resolution. A. SCHICK, *supra* note 25, at 41-43.

39. A. SCHICK, R. KEITH, E. DAVIS, *MANUAL ON THE FEDERAL BUDGET PROCESS* 5 (Congressional Research Service 1987).

40. L. FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 206 (2d ed. 1987).

to accommodate policy preferences, submitted unrealistic budgets to Congress.

By 1985, budget deficits were so outrageous that Congress felt compelled to act. Its solution was the peculiar Gramm-Rudman-Hollings Deficit Control Act. Gramm-Rudman represents something of a hybrid. In enacting it, Congress was no longer willing to trust its internal budgetary process, yet it also refused to trust the President.⁴¹ Consequently, both in Gramm-Rudman's original form and in its 1987 reincarnation, an automatic sequestration procedure ensures that the budget conforms to deficit reduction targets.⁴²

This procedure makes the ongoing use of continuing resolutions a near-certainty.⁴³ Under this scheme, it is to the clear disadvantage of appropriations subcommittees to bring their bills forward. Because some cuts in a committee's appropriation may be necessitated as the committee struggles to meet deficit reduction goals in subcommittee, Gramm-Rudman sequestration may function as an additional penalty for timely action. As David Obey, chairman of an appropriations subcommittee, explained on the House floor:

I warn you, even though people will give us these pious pronouncements now supporting 13 individual appropriations bills, so long as Gramm-Rudman is on the books there is an incentive for every committee around here not to bring their bill out to floor, because even if they cut their own bill and meet the spending limitations required under a budget resolution, that does not guarantee that every other committee will perform, and so they can wind up having their bill cut twice.⁴⁴

Waiting is sensible also because economic projections that determine the size of any budget reduction may improve and therefore minimize the size of cuts or negate them altogether.

The current system therefore encourages last minute action.⁴⁵ Con-

41. See Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131, 131 (1985) (labeling Act "a wholesale abdication of constitutional responsibility").

42. See E. DAVIS & R. KEITH, *supra* note 29, at 17.

43. The following analysis parallels Fisher, *Continuing Resolutions: Can't Live With 'em, Can't Live Without 'em*, 48 PUB. BUDGETING & FIN. 101 (1988).

44. 134 CONG. REC. H68-69 (daily ed. Feb. 2, 1988).

45. The influence of Gramm-Rudman and the 1974 Budget Act procedures is not the sole explanation for the prevalence of continuing resolutions. Budgetary conflict and political advantage also contribute to the growth. See generally COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, *supra* note 14, at 35-36. Budgetary conflict—fueled from 1981 through 1987 by disagreement between the Democrat-controlled House and Republican-controlled Senate—refers to the difficulty of adopting the budget resolution that sets the guidelines for individual appropriations. *Id.* at 35. Political advantage concerns the Appropriations Committee's desire to control the exposure of its bill both to floor amendment and White House veto. *Id.* at 36. On occasion, however, the Appropriations Committee has lost control of both the floor amendment and presidential veto. In FY 88, the President's threat to veto the continuing resolution yielded the inclusion of Contra aid

gress will have to abandon Gramm-Rudman before it can get out of the continuing resolution mess.⁴⁶

B. *The FY 88 Continuing Resolution.*

The FY 88 continuing resolution exemplifies both the best and the worst features of omnibus legislation.⁴⁷ On the downside, effective deliberation was undermined by limitations on debate and amendment and by severe restrictions on opportunities to review the resolution's conference report. Moreover, a massive amount of unrelated legislation was attached to the bill. On the other hand, in light of competing interests within Congress and the executive's policy preferences, an omnibus measure was necessary to reach a compromise. Because it can paint with broad strokes, the continuing resolution yields a more "palatable" legislative work-product.

1. *Limitations on Deliberation and Legislative Provisions.* The threat of an imminent shutdown of the federal government that makes continuing resolutions "must pass" legislation also gives rise to numerous irregularities in the enactment of such measures. House and Senate consideration of the FY 88 continuing resolution exemplifies this problem.

The process by which the measure was to be handled in the House was a substantial bone of contention, particularly for minority Members.⁴⁸ Enactment of the so-called "CR Rule"⁴⁹ limited general debate to one hour and placed extreme limits both on the number of amendments and on debates concerning those amendments.⁵⁰ Only seven amend-

and the exclusion of the fairness doctrine. See *infra* notes 61-62 and accompanying text; see also COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, *supra* note 14, at 38 (discussing FY 85 resolution, where floor amendments subverted Appropriations Committee control).

46. For a discussion of reform proposals, see E. DAVIS & R. KEITH, CONGRESSIONAL BUDGET PROCESS REFORM (Congressional Research Service 1987); HOUSE REPUBLICAN RESEARCH COMM., *supra* note 12, at 4; Fisher, *supra* note 43, at 104.

47. The FY 85 continuing resolution is also instructive. 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 (Congressional Research Service 1984); see also Devins, *supra* note 6, at 469-70.

48. Republican opposition is exemplified by statements made at the December 1987 hearings of the House Republican Research Committee. For example, Congressman Mickey Edwards complained that "[u]nder continuing resolutions, [] regular order is suspended and replaced by something akin to ideological martial law, in which only a handful of elite decisionmakers fully understand which programs and special projects get funded, and why." *Dec. 16, 1987 Hearings*, *supra* note 17, at 2.

49. See 133 CONG. REC. H10,900-10 (daily ed. Dec. 3, 1987) (debates on H.R. Res. 321, 100th Cong., 1st Sess., 133 CONG. REC. H10,900 (daily ed. Dec. 3, 1987)).

50. Three amendments were considered to have been approved upon adoption of the rule: (1) an exemption for members of Congress from the pay increase for federal employees; (2) a prohibition

ments could be considered for adoption, and these amendments were “not amendable except as specified in the report and [were] not subject to a demand for a division of the question.”⁵¹ The subject-matter and time restrictions on these amendments included:

- 1) two versions of an amendment to delay imposition of sanctions under the Clear Air Act (30 minutes of debate each); 2) the fairness doctrine (30 minutes of debate); 3) prohibiting assistance to Haiti (30 minutes of debate); 4) prohibiting funds from being used to have Japanese contractors on public works or public building jobs (30 minutes of debate).⁵²

In light of the significance of these amendments, the time restrictions seem remarkable.

Needless to say, there was considerable opposition to the CR Rule. As Congressman Lawrence Coughlin remarked: “[W]ith the rule just adopted we have effectively refused to consider spending reductions but have ensured . . . a full platter of other legislative initiatives that should be considered separately and on their merits . . .”⁵³ Further, as revealed by the following statement by Congressman Silvio Conte, some Members opposed the inclusion of new legislation:

What especially troubles me, is that the continuing resolution also contains reference to three bills . . . that have not previously been before the House. In this resolution, there will be no opportunity for amendments to those three bills—just one vote, up or down, on some of the most controversial issues in the Federal budget.⁵⁴

The Senate, unencumbered by the CR Rule,⁵⁵ considered seventy-seven amendments to the bill. Senate amendments ranged from the obscure—permitting Southwest Airways to provide service between Love Field, Texas and Wichita, Kansas—⁵⁶ to the monumental—Contra

of transportation regulation calling for foreign repair stations for U.S. airlines; and (3) a provision stating that amounts provided for defense and nondefense domestic spending could be adjusted to accord with the outcome of the budget summit. *Id.* at H10,900 (remarks of Rep. Derrick). For a description of the budget summit, see *infra* note 74.

51. 133 CONG. REC. H10,900-901 (daily ed. Dec. 3, 1987) (remarks of Rep. Derrick).

52. *Id.* at H10,901.

53. *Id.* at H10,916 (remarks of Rep. Coughlin); see also *id.* at H10,907 (remarks of Rep. Michel); *id.* at H10,909 (remarks of Rep. Frenzel).

54. *Id.* at H10,914 (remarks of Rep. Conte); 133 CONG. REC. E3713 (daily ed. Sept. 29, 1987) (remarks of Rep. Jeffords) (characterizing continuing resolution as “an abdication of our fiscal responsibility”).

55. In explaining differences between House and Senate procedures, Janet Hook of *Congressional Quarterly* notes: “Designed to be the deliberative body that counterbalances the impetuous House, the Senate gives its leaders few of the tools for managing debate that the House’s rules gives its Democratic leadership.” Hook, *G.O.P. Chafes Under Restrictive House Rules*, 45 CONG. Q. WEEKLY REP. 2449, 2450 (1987).

56. Amend. No. 1331, *discussed in* 133 CONG. REC. S17,886 (daily ed. Dec. 11, 1987).

aid.⁵⁷ Unlike the House, where abuse of process concerns dominated debate, the Senate focused primarily on expediting the process so as not to interfere with Congress's Christmas adjournment. Typifying this sentiment is Senator Bennett Johnson's comment that

we simply, if we are going to get out of here by Christmas, cannot take every amendment that comes along We simply cannot allow unending debate so that every Senator who wants to make statement [sic] on any amendment can go on to his heart's content. Either we leave by Christmastime and curtail this debate and curtail the amendments or we do not.⁵⁸

In order to meet their objective of streamlining and expediting the process, the Senators unanimously agreed to a series of devices that enabled them to consider all seventy-seven amendments in one day.⁵⁹

After Senate and House action, the bill went into conference, where House and Senate Appropriations Committee members resolved differences between Congress and the White House.⁶⁰ The critical battles at the conference stage involved Contra aid and the fairness doctrine. The President insisted that he would sign the bill only after the inclusion of Contra aid and the exclusion of the fairness doctrine.⁶¹ By standing firm on both matters, the President prevailed.⁶² The President also used his

57. Amend. No. 1339, *discussed in* 133 CONG. REC. at S17,910. Other amendments include: No. 1280, *discussed in* 133 CONG. REC. at S17,808 (regarding funding for the development of a permanently manned civilian space center); No. 1283, *discussed in* 133 CONG. REC. at S17,814 (allowing certain associations of football coaches to have a qualified pension plan); No. 1299, *discussed in* 133 CONG. REC. at S17,854 (clarifying the count of children under the Education of the Handicapped Act); No. 1281, *discussed in* 133 CONG. REC. at S17,811 (extending time for imposing sanctions under the Clean Air Act).

58. 133 CONG. REC. at S17,798.

59. *See id.* at S17,799 (remarks of Sen. Byrd); *id.* at S17,805 (remarks of Sen. Johnston).

60. *See Calmes, Reagan Wins Concessions in Final Funding Bill*, 45 CONG. Q. WEEKLY REP. 3185, 3186 (1987).

61. *See id.* at 3185.

62. As summarized by Jacqueline Calmes: "On both issues an exhausted Congress, led by Democrats but squeezed between the president's veto threats and the approach of Christmas, retreated from confrontations." *Id.* at 3185. For further discussion of the fairness doctrine, see *The Rise and Fall of the Fairness Doctrine, Part III: The President Stands Firm*, BROADCASTING, Dec. 28, 1987, at 31.

While the President was quite successful in his use of the veto power, a resolution designed to preserve the veto was introduced on the Senate floor. S. Res. 1835, 100th Cong., 1st Sess., 133 CONG. REC. S15,584 (daily ed. Oct. 30, 1987); *see also* 133 CONG. REC. S17,846-47 (daily ed. Dec. 11, 1987) (same resolution proposed as amendment to continuing resolution). Titled the Individual Appropriations Act, this resolution called for separating appropriations bills tied together in a continuing resolution into individual titles before sending them to the President. In support of this resolution, Senator Daniel Evans commented:

No one, either the current President or future Presidents, could afford to engage in a veto knowing that the Government of the United States would literally come to a halt if he exercised that veto. . . . With [this resolution,] we address . . . the constitutional imbalance

veto threat to preserve funds for anti-abortion counseling⁶³ and for foreign assistance.⁶⁴ The President, however, did have to swallow \$23 billion in tax increases.⁶⁵

Conferees also negotiated a ban on smoking on domestic flights of two hours or less,⁶⁶ a plan to allow states to raise the speed limit on rural highways to 65 miles per hour,⁶⁷ an extension of the Clean Air Act,⁶⁸ and a limitation rider (introduced in conference) prohibiting the FCC from inodifying its cross-ownership regulations.⁶⁹ Finally, House conferees agreed to put off discussion on farm subsidies and Senate amendments concerning Medicare payments.⁷⁰ In short, to keep the government funded for another year, a handful of conferees settled a wide spectrum of policy issues in eight days.

The final product included \$603.9 billion in appropriations and was more than 2100 pages long (comprising a 1057-page bill and a 1053-page conference report). Completed at 10:45 p.m. on December 22, "[t]he bill was lugged in boxes to the House floor first, and then to the Senate."⁷¹ Within five hours, the Senate and the House agreed to the measure.⁷² In light of these time constraints, Members—despite the massive changes made to the bill in conference—did not have an opportunity to read the bill. The President signed the bill the following morning.

2. *The Need for Compromise.* Policymaking without the benefit of review by authorizing committees with appropriate subject-matter expertise, displacement of critical fiscal policy issues by substantive policy concerns, extraordinary limitations on legislative debate and amendment, and the conferral of enormous power on conferees suggest that the FY 88 continuing resolution is at least undemocratic and may well represent

created by sending the President a \$500 billion-plus continuing resolution and saying "take it or leave it."

133 CONG. REC. at S15,584. On the other hand, this proposal—by increasing the likelihood of selective vetoes—threatens the delicate balance critical to the creation of the continuing resolution. See Fisher, *supra* note 43, at 101-02.

63. See Rovner, *Many Labor-HHS Programs Win Fund Increase*, 46 CONG. Q. WEEKLY REP. 10, 11 (1988) (Contra aid).

64. See Calmes, *supra* note 60, at 3186.

65. See Hook, *Budget Deal Enacted at Last, Congress Adjourns*, 45 CONG. Q. WEEKLY REP. 3183 (1987).

66. See Starobin, *Rural Speed Limit Can Be Raised: Transportation Spending Plan Bans Smoking on Brief Flights*, 46 CONG. Q. WEEKLY REP. 14 (1988).

67. See *id.*

68. Pub. L. No. 100-202, 101 Stat. 1329-199 (1987).

69. See *infra* note 157.

70. See Hook, *supra* note 65, at 3184.

71. See Calmes, *supra* note 60, at 3186.

72. See *id.* at 3185.

poor policy.⁷³ Nevertheless, there is a silver—if not entirely redeeming—lining to this black cloud. In light of this year's deficit reduction goals,⁷⁴ an omnibus measure might have been the only compromise vehicle available to Congress. As Louis Fisher observes:

Think of the alternative. Could the agreement have been implemented by passing 13 regular appropriations bills and perhaps another dozen bills to replace the giant reconciliation measure? Would that have been manageable in Congress? . . . [Moreover,] sending Reagan two dozen bills would have increased his opportunity to veto them. That sounds good for presidential prerogatives, but it would have threatened the [needed] cooperation⁷⁵

Until the budget process is reformed, continuing resolutions—aside from being inevitable—force conferees to play the necessary leadership role that the 1974 Act divests from the President. These continuing resolutions, unfortunately, come at an enormous cost. Centralization in budgeting must be accomplished without the helter-skelter and undemocratic process that pushes omnibus continuing resolutions forward.

II. DUE PROCESS IN LAWMAKING

The idea of lawmakers voting on megalegislation without full knowledge of its content is (to say the least) disquieting. Aside from good government objections,⁷⁶ this practice pierces the post-*Lochner*⁷⁷ veil of legislative validity. The question remains, however, whether the Constitution mandates some minimal safeguards to ensure the trustworthiness of the legislative process.

The presumptive validity of legislative decisionmaking in the social

73. These complaints parallel criticism of policymaking through limitation riders. See Devins, *supra* note 6, at 464-65.

74. After the October 1987 stock market crash, White House and congressional negotiators agreed to reduce the deficit by \$76 billion over FY 88 and 89. See Hook, *supra* note 65, at 3183. This so-called "budget summit" contributed to the need to enact an omnibus continuing resolution. First, since the summit did not conclude until November 20, there simply was not enough time to enact separate bills. Second, the enactment of separate bills would have encouraged the President's veto of both nonfavored legislation (for overexpenditure) and favored legislation (for underexpenditure).

75. Fisher, *supra* note 43, at 101-02. For similar reasons, Senator Mark Hatfield endorsed this year's continuing resolution: "[T]his year it may be just as well [that we not enact separate bills], for now we have before us a single omnibus bill to implement the discretionary spending provisions of the joint leadership agreement on the budget." 133 CONG. REC. S17,797 (daily ed. Dec. 11, 1987).

76. See *supra* note 73 and accompanying text.

77. *Lochner v. New York*, 198 U.S. 45 (1905). The practice also makes a mockery of assertious in *Chadha* that "legislation by the national Congress [must] be a step-by-step, deliberate and deliberative process" because the Framers insisted that "the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

and economic spheres is well known. *Williamson v. Lee Optical*⁷⁸ and *Railway Express Agency, Inc. v. New York*⁷⁹ reveal the Court's willingness to ascribe legitimating rationales to seemingly arbitrary classifications.⁸⁰ *Minnesota v. Clover Leaf Creamery Co.*⁸¹ emphasizes that incorrect legislative fact-finding and suspect legislative purposes do not render a statute unconstitutional, as long as the legislature's stated rationale is legitimate. *United States Railroad Retirement Board v. Fritz*⁸² is even more striking. In *Fritz*, a congressional commission prepared model legislation that undercut a stated purpose of Congress in its reform of the railroad retirement system. Although Congress was unaware of this failing when it enacted the "model" legislation, the Court nonetheless upheld the law. Accepting post hoc justifications as "plausible reasons" for the inequities created by the law,⁸³ the Court found unconvincing Justice Brennan's assertion that "[a] challenged classification may be sustained only if it is rationally related to achievement of an actual legitimate governmental purpose."⁸⁴ The current court, bent on val-

78. 348 U.S. 483, 487 (1955) (validating law requiring optometrist's prescriptions for opticians to fit old glasses into new frames while exempting sellers of ready-to-wear glasses).

79. 336 U.S. 106, 110 (1949) (approving ordinance allowing commercial entities to advertise only on their own vehicles and disallowing the placement of identical ads on for-hire vehicles).

80. See generally Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1070-88 (1979) (arguing that so-called minimum rationality analysis has some bite); Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1, 20-21, 44-48 (1972) (criticizing mere rationality as without necessary "bite" to ensure legislative deliberation); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 197-222 (1976) (examining "rationality" as a premise for judicial review).

81. 449 U.S. 456, 464, 469-70 (1981) (upholding "environmental" law prohibiting sale of milk in plastic nonreturnable containers despite evidence both of intent to harm out-of-state producers and of harmful environmental effects of legislation). For further discussion of the role of motive in equal protection review, see Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (criticizing failure of Court to recognize that legislators sometimes do act out of illicit motivations); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (arguing that while legislative motivation is cognizable, proof of illicit motive merely shifts burden to legislature to proffer a legitimate motive). But see Linde, *supra* note 80, at 220-21 (legislative motive impossible to ascertain). See generally Synposinm, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

82. 449 U.S. 166 (1980).

83. *Id.* at 179; see *id.* at 178 (summarizing the inequity and giving possible reasons for it).

84. *Id.* at 188 (Breunan, J., dissenting). In support of this proposition, Justice Brennan referred to *Weinberger v. Wiesenfeld*, in which the Court held that "in equal protection cases [the Court need not] accept at face value assertions of legislative purposes, when an examination . . . demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* at 187 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)). Unlike *Fritz*, which involved social and economic legislation, *Wiesenfeld* invalidated a gender-specific provision of the Social Security Act. 420 U.S. at 653; see also *Califano v. Goldfarb*, 430 U.S. 199, 221 (1977) (Stevens, J., concurring) (finding that "respect for the legislative process precluded the assumption that . . . statutory discrimination is the product of . . . irrational lawmaking").

idating legislative judgments, eschews the notion that Congress must mean what it says.⁸⁵

Why is there such a strong presumption of constitutionality? Commentators have advanced two conflicting lines of reasoning, both of which have found their way into Supreme Court decisionmaking. Under one view, lawmakers seek to further some "social good" through their enactments.⁸⁶ As Professor Michelman describes the "social good" model, the legislature is the "forum for identifying or defining [objectives], and acting towards those ends. The process is one of mutual search through joint deliberation Moral insight, sociological understanding, and goodwill are all legislative virtues."⁸⁷ The classic Supreme Court statement on this point is *Vance v. Bradley*:⁸⁸ "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."⁸⁹

Court opinions that speak of Congress as a "deliberative"⁹⁰ body and recognize that the "nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication"⁹¹ also conform to this model. These opinions suggest that the legislature is the branch of government constitutionally best equipped to establish social objectives through law.⁹²

85. See Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 (1972) ("It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it. . . . The nature of the burdens or benefits created by a statute and the nature of the chosen class's commonality will always suggest a statutory purpose").

86. See generally Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977-1978).

87. Michelman, *supra* note 86, at 149.

88. 440 U.S. 93 (1979) (upholding mandatory retirement rules for Foreign Service employees).

89. *Id.* at 97 (footnote omitted).

90. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 472-73, 490-91 (1980) (upholding minority business set-aside provision enacted by Congress).

91. *Oregon v. Mitchell*, 400 U.S. 112, 247-48 (1970) (Brennan, J., concurring in part and dissenting in part) (upholding Congress's power to lower the voting age in federal elections but rejecting such power with respect to state elections).

92. Special deference is accorded to congressional judgments, even when fundamental rights or suspect classifications are involved. See, e.g., *Mathews v. De Castro*, 429 U.S. 181, 187-89 (1976) (suspect class); *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 103 (1973) (fundamental rights). For example, in *Fullilove v. Klutznick*, Chief Justice Burger argued that—even under strict scrutiny review—Congress was empowered to set aside for minority businesses 10 percent of a local public works act program. 448 U.S. at 492 (plurality opinion). In reaching this conclusion, the Chief Justice blandly stated: "Although the Act recites no preambule-

The second view depicts the legislative process as a battle of political interest groups⁹³ that culminates in a "public choice."⁹⁴ This view leads Judge Posner to conclude that "it would be a mistake to require that legislation . . . be reasonably related to some general social goal. The real 'justification' for most legislation is simply that it is the product of the constitutionally created political process of our society."⁹⁵ Granted, the Supreme Court's ostensible insistence on legitimate ends deviates from this model.⁹⁶ The Court's recognition that "due regard [should be accorded to] the decision of the body constitutionally appointed to decide,"⁹⁷ however, smacks of the public choice model. Consequently, once the Court finds that there are "plausible reasons for Congress' action, [the Court's] inquiry is at an end."⁹⁸

The "social good" and "public choice" models involve presumptions, i.e., that the choices made serve socially important goals and that the political process legitimizes the choices. The question whether the Constitution establishes some minimum of fair procedures in lawmaking is irrelevant to these formulations. Some commentators, most notably Laurence Tribe and Hans Linde, have urged that attention be paid to the lawmaking process.⁹⁹ Linde, in his seminal *Due Process of Lawmaking* article, argues that the impossibility of ascertaining legislative intent¹⁰⁰ necessitates the use of procedural safeguards as the *sole* means of ensur-

lary 'findings' on the subject, we are *satisfied* that Congress had abundant historical basis from which it *could* conclude that traditional procurement practices . . . *could* perpetuate the effects of prior discrimination." *Id.* at 478 (emphasis added). Critical to this deferential stance is the Court's regard for congressional action in this field. *See, e.g., id.* at 472-73, 490-91. For a quasi-critical look at *Fullilove*, see Days, *Fullilove*, 96 YALE L.J. 453 (1987).

93. *See generally* T. LOWI, *THE END OF LIBERALISM* (1969).

94. This phrase is borrowed from Bice, *supra* note 86, at 19.

95. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 28-29; *cf.* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1984) (arguing that heightened rationality is required for precisely this reason).

96. With respect to congressional enactments, this demand now appears to be merely pro forma. In its recent *Lyng v. UAW* decision, the Court remarked: "We have stressed that this standard of review is typically quite deferential; legislative classifications are 'presumed to be valid,' largely for the reason that 'the drawing of lines that create distinction is peculiarly a legislative task and an unavoidable one.'" 108 S. Ct. 1184, 1192 (1988) (citations omitted).

97. *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part).

98. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

99. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1673-87 (2d ed. 1988); Linde, *supra* note 80, at 199, 222-35; Tribe, *Policy Science: Analysis of Ideology*, 2 PHIL. & PUB. AFF. 66 (1972). *But see* Brillnayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986) (arguing that process and substance cannot be separated in a meaningful way).

100. According to Linde, "a law will push toward a goal only within the limits of objectives that may or may not be apparent in retrospect. Legislative declarations and legislative history cannot be relied on to reflect the actual balance of considerations that shaped the law." Linde, *supra* note 80, at 220.

ing legislative rationality.¹⁰¹ Tribe, in contrast, views the examination of process as an *additional* judicial check on the legislative enterprise.¹⁰²

Supreme Court decisions are not particularly helpful here. The Court has demanded that Congress abide by its own rules in conducting investigations,¹⁰³ that the presence of a quorum and the vote required for passage are essential to legislative validity,¹⁰⁴ and that Congress must abide by constitutional specifications in unseating members.¹⁰⁵ But the Court has never come close to suggesting that Congress adopt procedures to ensure due deliberation in lawmaking. Indeed, in *Field v. Clark*,¹⁰⁶ the Court did not bat an eyelid when confronted with a piece of legislation that—despite signatures by the President, the Speaker of the House of Representatives and the President of the Senate—deviated from the legislation actually passed by both Houses of Congress. While recognizing that there is “no authority [to view] as a legislative act, any bill not passed by Congress,”¹⁰⁷ the Court without hesitation held that the signatures of the Speaker of the House and the President of the Senate constitute a “declaration” that a bill has received “the sanction of the legislative branch of the government.”¹⁰⁸

This constrained view of judicial authority is at once sensible and disconcerting. Take the case of the FY 88 continuing resolution: the limitations on floor debate, the proliferation of amendments in conference, the all-or-nothing stakes of omnibus legislation, the threatened shutdown of the government, and especially the denial to most Members of Congress of access to the conferees’ final work-product, all speak to the need for the judiciary to take a “hard look” at this type of legislation.¹⁰⁹ In short, when only a handful of legislators exercise control over

101. *See id.* at 238-45; *see also* Van Alstyne, *A Critical Look at Marbury v. Madison*, 1969 DUKE L.J. 1, 20 (arguing that “acts of Congress might be judicially reviewable as to their procedural integrity, but not as to their substance”).

102. Tribe, *supra* note 99, at 83 (“[T]he processes and rules that constitute the enterprise and define the roles of its participants matter quite apart from any identifiable ‘end state’ that is ultimately produced.”).

103. *Christoffel v. United States*, 338 U.S. 84, 89-90 (1949).

104. *United States v. Ballin*, 144 U.S. 1, 7-9 (1892).

105. *Powell v. McCormack*, 395 U.S. 486, 547-48 (1969); *see also* Linde, *Comment on Powell v. McCormack*, 17 UCLA L. REV. 174 (1969).

106. 143 U.S. 649 (1892). A section of the enacted bill was omitted from the enrolled bill that was authenticated by the appropriate signatures. *Id.* at 668-69.

107. *Id.* at 669.

108. *Id.* at 672.

109. In administrative law, a court will occasionally overturn an agency decision if it “becomes aware . . . that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Supreme Court used this approach in the “air bag” case, *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983). Finding the National Highway Traffic Safety Administration’s rescission of its air bag re-

the final version of a bill, judicial speculation about what Congress might have thought seems a little far-fetched.

At the same time, heightened judicial review is an unsatisfactory solution. Congress, whatever its faults, is the branch of government that makes laws. To find in the Constitution some demand that the lawmaking process operate either fairly or efficiently is to lay waste the basic assumption of legislative reasonableness. Challenges concerning the length of legislative debates or procedures governing legislative factfinding merely cloak the real battle over means/ends scrutiny. Presumptions applied to validate legislative means/ends determinations must therefore extend to the legislative process that defines means and ends.

Hans Linde suggests otherwise:

Of course, our lawmaking process is not about to become perfectly responsible, perfectly accountable, perfectly democratic The point is, rather, that the process everywhere is governed by rules, that these rules are purposefully made and from time to time changed, and that most of them are sufficiently concrete so that participants and observers alike will recognize when a legislative body is following the due process of lawmaking and when it is not. . . . What the due process clauses add to such rules is . . . a federal floor under law making [sic] processes¹¹⁰

Linde's insistence that Congress conform to specific constitutional requirements and internal rules seems quite reasonable.¹¹¹ His notion that due process limits internal House and Senate rules is more troublesome.

The FY 88 continuing resolution exemplifies this difficulty. Undoubtedly, the legislative process "broke down" with this enactment. Although no internal rules were violated, the fact that legislators were denied access to the final bill and other "irregularities" would presumably violate Linde's conception of due process.¹¹²

Nevertheless, there is good reason to retain the presumption of institutional capacity and not utilize due process to invalidate this legislation.

quirement "arbitrary and capricious," the Court concluded that an agency must supply a reasoned analysis before rescinding a rule. *Id.* at 46, 57. For a defense of this doctrine, see Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51 (1984); cf. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984) (broad deference accorded to agency rulemaking, including recognition of propriety of politically influenced rulemaking). For a defense of executive enforcement discretion, see Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 237-42 (1987).

110. Linde, *supra* note 80, at 242, 245.

111. There are even problems here, however. Because the Senate Majority Leader can effectively waive all rules through a unanimous consent motion, an argument can be made that courts should be circumspect in this area.

112. Linde, of course, would insist that, as a prerequisite to litigant standing, there be some alleged injury to "life, liberty or property." Linde, *supra* note 80, at 245.

First, there is the notion—a notion that in part underlies minimal rationality analysis—that Congress will fix that which is broken.¹¹³ Presumably, bad features of legislation will be repealed and bad procedures will be amended. Events subsequent to the enactment of the FY 88 continuing resolution lend credence to this premise. Some offensive portions of the statute have been repealed¹¹⁴ and a serious effort is afoot to prevent future debacles.¹¹⁵

Second, drawing a principled line between necessary safeguards and desirable practices seems impossible. For example, do rules limiting debate and amendment violate due process? What about ideologically skewed witness lists at hearings? What about legislation that does not originate in committee? The answers to these questions are value-laden. Due process in lawmaking therefore is only as sensible as active judicial review of *all* legislative decisionmaking.

In the end, we are left with the sinking feeling that legislative control over lawmaking means legislative control over both good and bad lawmaking. While the FY 88 continuing resolution approaches lawmaking that “shocks the conscience,”¹¹⁶ Congress seems the branch of government best equipped to correct this deficiency. Aside from insisting that Congress conform to explicit constitutional mandates and its own procedures, the judicial role in the lawmaking process should be de minimis.

III. THE PRESIDENT'S VETO

The veto power that the Constitution gives the President is limited to discrete enactments, not portions of a bill.¹¹⁷ Common sense suggests that this power is threatened by omnibus legislation. By parlaying several separate bills and a host of limitation riders into a single “bill,” Congress presumably shields its decisionmaking from the Executive's scrutiny. Supporters of the item veto and critics of omnibus legislation portray the current state of affairs as a legislative power grab that is fundamentally inconsistent both with Congress's obligation to enact single-subject legislation and with the President's veto.¹¹⁸ Their argument finds little support in the text of the Constitution, the historic uses of the veto,

113. See *supra* notes 88-89 and accompanying text.

114. See *supra* note 16.

115. See *supra* notes 3, 18 and accompanying text.

116. *Rochin v. California*, 342 U.S. 165, 172 (1952).

117. The Constitution provides: “Every Bill . . . before it becomes a law [shall] be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it.” U.S. CONST. art. I, § 7, cl. 2.

118. See generally *Line-Item Veto: Hearing on S.J. Res. 26, S.J. Res. 178, and S. 1921 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 1-2 (1984)

or President Reagan's use of the veto power in the face of omnibus legislation.

A. *Omnibus Legislation and the Constitution.*

Article I, section 7 simply provides that *every bill* "shall have passed the House of Representatives and the Senate" and shall be "presented to the President" before it becomes law. It is preposterous to suggest that omnibus legislation runs afoul of this requirement. The words "every bill" in the presentment clause cannot be read to refer solely to single-subject enactments.¹¹⁹ Article I, section 7 specifies a process: bills must pass both chambers and be presented to the President. If the process takes place, presentment concerns are satisfied, irrespective of how much or how little the bill contains.

Furthermore, article I, section 5 grants each House the power to "determine the rules of the proceedings." This power presumably includes the authority to define the germaneness of legislative provisions. Consequently, as Professor Tribe suggests, "the President may wield his veto on the legislative product *only* in the form in which Congress chooses to send it to the White House: be the bill small or large, its concerns focused or diffuse, the form particular or omnibus, the President must accept or reject the entire thing, swallowing the bitter with the sweet."¹²⁰

All of this may sound rather obvious. Nevertheless, contentious debate has emerged on this question.¹²¹ Critics of the current practice argue that "a 'bill,' in the constitutional sense should be held to be an

(statement of Sen. Hatch (quoting President Eisenhower)); *id.* at 42 (statement of Sen. Mattingly); Best, *The Item Veto: Would the Founders Approve?*, 14 PRES. STUD. Q. 183, 187 (1984).

119. In litigation between Rupert Murdoch (News America) and the Federal Communications Commission, the FY 88 continuing resolution had been challenged on precisely these grounds. Attorneys for Murdoch characterized the continuing resolution as "an all-or-nothing omnibus appropriations package that reduced the President's veto power to a nullity" and violated the presentment clause. Brief for Appellant at 48, 49, *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (No. 88-1037). Murdoch therefore argued that provisions in the continuing resolution that prohibit the cross-ownership of a television station and newspaper in the same market are unconstitutional. For further discussion of this case, see *infra* notes 156-90 and accompanying text. Murdoch's "presentment clause" argument is without merit. The Constitution only guarantees the President a right to veto legislation. It does not demand that Congress present legislation to him in a form that makes him feel comfortable with his exercise of the veto. See *infra* note 120 and accompanying text.

120. L. TRIBE, *supra* note 99, at 265.

121. See, e.g., *Line Item Veto: Hearings on S. 43 Before the Senate Comm. on Rules and Administration*, 99th Cong., 1st Sess. 19 (1985) [hereinafter *S. 43 Hearings*] (statement of Johnny Killian) ("[W]hen the framers drew up the veto clause, they assumed the word 'bill' meant a legislative instrument setting forth one or more propositions of law, all related, however, to a single subject matter."); Best, *supra* note 118; Givens, *The Validity of a Separate Veto of Nongermane Riders to Legislation*, 39 TEMP. L.Q. 60, 62 (1965).

interconnected piece of legislation concerned with one or more related subjects."¹²² This position is based on a combination of intuition and the improbability of the Framers foreseeing such modern creations of omnibus legislation and limitation riders.¹²³

The argument behind the position proves unsatisfactory on at least two counts. First, even if the Framers did not foresee omnibus legislation, the same cannot be said of congressional control over the legislative process or the limitation of the veto power to an up-or-down decision by the President. Second, as demonstrated by Louis Fisher¹²⁴ and others,¹²⁵ "we have had omnibus bills from the start."¹²⁶ In fact, the first three appropriations bills passed by Congress were omnibus measures.¹²⁷

Judicially requiring single-subject bills, moreover, is impracticable. It asks the courts to undertake an unmanagable task; determining the relatedness of bill provisions seems particularly within the domain of the legislature. For example, environmental and trade legislation, while concerning different subject areas, may affect the same industry; a reviewing court would be hard-pressed to determine whether the relatedness requirement is met by legislation that addresses both of these subject areas. More significantly, legislation is frequently the by-product of compromise. Superimposing a relatedness requirement would severely disrupt existing legislative practices.

The critics would be no better served by a mathematical device, such as limiting bill length or the number of amendments. How many amendments, for example, are "too many?" One? Four? One thousand? The bottom line is that for constitutional purposes a bill "denotes a singular piece of legislation in the form in which it was approved by Congress."¹²⁸

B. *The Purposes of the Veto Power.*

Omnibus legislation might also run afoul of the Constitution by displacing the President's veto power. The contours of the veto power are

122. Givens, *supra* note 121, at 62; see Gressman, *Is the Item Veto Constitutional?*, 64 N.C.L. REV. 819, 921 (1986) ("[T]he decision whether to adopt and then present one of 300 bills is a matter of legislative choice."); Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 840 n.11 (1987).

123. See *S. 43 Hearings*, *supra* note 121, at 19; Best, *supra* note 118, at 187.

124. See *S. 43 Hearings*, *supra* note 121, at 192 (statement of Louis Fisher); Fisher, *supra* note 16, at 25-26.

125. See, e.g., Note, *supra* note 122, at 840-43.

126. *S. 43 Hearings*, *supra* note 121, at 192.

127. See Fisher, *supra* note 16, at 25-26. Because several of the Framers served in the First Congress, this historical evidence is especially probative.

128. L. TRIBE, *supra* note 99, at 266.

difficult to glean from the Constitution. Article I, section 7 only tells us that if the President "approves" of legislation "he shall sign it, but if not he shall return it." The Constitution does not specify whether the President may appropriately exercise this power whenever he disagrees with a legislative judgment, or only in matters of significant constitutional dimension.

The presentment clause and pocket veto provisions provide some guidance on this point. These provisions reveal that at the very least the veto power encompasses the right to review congressional action that is "legislative in effect."¹²⁹ The pocket veto specifically provides that Congress cannot nullify the veto by preventing the President's return of legislation through adjournment.¹³⁰ In a similar vein, the presentment clause—as interpreted by the Supreme Court in *Immigration and Naturalization Service v. Chadha*¹³¹—preserves the President's veto:

[T]he President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.¹³²

To say that the President shall have "suitable opportunity to consider"¹³³ congressional decisionmaking is not to say much. Is this power limited to decisionmaking that curtails constitutionally designated executive functions? What then of legislation that the President finds clearly unconstitutional? Finally, what of legislation that is merely inconsistent with the President's policy views? The Supreme Court has not devoted much attention to this matter, but its decisions suggest that the veto power extends to all three categories of cases. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court described the President's lawmaking powers as encompassing "the recommending of laws he thinks wise and the

129. See S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897), discussed in L. FISHER, *supra* note 33, at 162-64.

130. Under article I, the President is obligated to return unsatisfactory laws to Congress within 10 days. U.S. CONST. art. I, § 7, cl. 2. The bill, however, does not become law if "the Congress by their Adjournment prevent its return." *Id.* Instead, the bill is a nullity. Rather than override the President's inaction, Congress must repass the legislation. The "pocket veto" has generated substantial litigation and commentary. See generally L. FISHER, *supra* note 33, at 150-54; (1985); Kennedy, *Congress, the President, and the Pocket Veto*, 63 VA. L. REV. 335 (1977); McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 817-20 (1986).

131. 462 U.S. 919 (1983).

132. *Id.* at 957-58; see also *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.").

133. *Wright v. United States*, 302 U.S. 583, 596 (1938).

vetoing of laws he thinks bad."¹³⁴ More recently, in *Chadha*, the Court proclaimed that "[t]he President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact *oppressive, improvident, or ill-considered measures*."¹³⁵

This broad understanding is not universally shared. Most notably, Professor Charles Black has argued that the "original understanding [was] that the veto would be used only rarely" and used mainly to defend either the Presidency itself or the Constitution.¹³⁶ Otherwise, Professor Black—pointing to the difficulty of legislative overrides of presidential vetoes¹³⁷—feels that the veto will be transformed into a "means of systematic policy control [by the President] over the legislative branch."¹³⁸ The language and historical uses of the veto, however, run contrary to Professor Black's interpretation.

The Constitution does not limit the veto power to certain categories of presidential objections. Instead, the Constitution only obligates the President to sign those bills that he "approves." Indeed, the perception that the President would use the veto to oppose laws on policy grounds led to the Framers' adoption of a qualified veto (subject to a supermajority override) rather than an absolute veto.¹³⁹ This understanding is exemplified by statements by James Madison and Alexander Hamilton. Madison claimed that the veto existed "to restrain the legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form."¹⁴⁰ Hamilton similarly characterized the veto as "an additional security against the enactment of improper laws."¹⁴¹

This broad view of the veto power gains additional support from the historical record. Presidents Washington and Madison both vetoed legislation that they simply found unsatisfactory.¹⁴² The early prevalence of

134. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (emphasis added).

135. 462 U.S. at 947-48 (emphasis added).

136. Black, *Some Thoughts on the Veto*, LAW & CONTEMP. PROBS., Spring 1976, at 87, 90. In a similar vein, Justice White argued in *Buckley v. Valeo* that "the major purpose of the veto power appears to have been to shore up the Executive Branch and to provide it with some bargaining and survival power against what the Framers feared would be the overweening power of legislators." 424 U.S. 1, 285 (1976) (White, J., concurring in part and dissenting in part).

137. Black, *supra* note 136, at 92-94.

138. *Id.* at 90.

139. See McGowan, *supra* note 130, at 794-96.

140. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 586 (1937); see 1 *id.* at 139.

141. THE FEDERALIST No. 73, at 375-76 (A. Hamilton) (M. Beloff ed. 1987).

142. See L. FISHER, *supra* note 33, at 144-45. Professor Black, however, characterizes these early vetoes as bearing some connection to essential executive functions. Black, *supra* note 136, at 90-91. I find Louis Fisher's depiction more persuasive. More significantly, the disagreement be-

policy-based vetoes is exemplified by John Tyler, who exercised his veto power so often that a frustrated Congress charged him "with the high crime and misdemeanor of withholding his assent to laws . . . which involved no constitutional difficulty on his part."¹⁴³ This charge, however, was mere symbolism. The policy-based veto was already well-accepted.

Just as Congress is free to determine the contours of "a bill," the President is unrestrained in his ability to veto such bills. While the criminal abuse of this power might constitute an impeachable offense, Congress must generally resort to its override power or the political process if it wants to curb the presidential veto.

This state of affairs is not at all troublesome. The veto power checks legislative excess; the veto override checks executive excess.¹⁴⁴ A meaningful veto prevents Congress from using its power to determine enforcement goals and enforcement mechanisms through legislation¹⁴⁵ to place the Executive at peril. On the other hand, Congress's power to make laws and override vetoes preserves legislative supremacy in lawmaking. The veto power should function as a moderating device, preserving the independence of each branch and encouraging effective lawmaking. It should also encourage dialogue and cooperation between Congress and the Executive; presumably neither branch wants a veto controversy either to precipitate conflict with the other or to undermine its version of the public good.

The existing system, of course, does not yield a perfect equipoise between executive and legislative power. The President's use of the veto power is potentially unwieldy, since Congress (through 1980) has over-

tween Fisher and Black points to the malleability of the Black test. The determination of what bears a nexus to core executive functions is an open invitation to a value-based sliding-scale inquiry. For further criticism of Black, see L. FISHER, *supra* note 33, at 142-43; McGowan, *supra* note 130, at 803. Indeed, if Black's notion of core executive functions is extended to the concept of preserving a balance of power between the President and Congress, his underlying concern with the aggrandizement of executive power may be satisfied by the occasional use of the policy veto. See generally Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 515 (1962) ("[The veto] functions to preserve and strengthen that equilibrium of power between the branches which lies at the heart of the separation of powers principle."); Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 212-13 (1952) ("[The veto] is his most potent weapon . . . It was given to him to enable him to protect himself from the encroachment of the legislature.").

143. CONG. GLOBE, 27th Cong., 3d Sess. 144 (1843).

144. This is Alexander Hamilton's vision of the veto. As described by Judge McGowan: Alexander Hamilton . . . [defended] the veto by arguing that the veto also served the salutary purpose of preventing unwise laws. The President could use the veto to block laws precipitously enacted in the heat of factionalism. The people would be protected against abuse of this power because the President would rarely hazard a test of power with the Congress if not backed by the popular will. This was especially so when the veto could be overridden by the Congress. When the President vetoes an act, he risks public political rejection by Congress.

McGowan, *supra* note 130, at 797.

145. See Rabkin & Devins, *supra* note 109, at 234-42.

ridden less than seven percent of vetoes.¹⁴⁶ In the early 1970s, this prospect led commentators to bemoan the "Imperial Presidency"¹⁴⁷ when Presidents Nixon and Ford used the veto power and the impoundment device to frustrate congressional initiatives.¹⁴⁸ On the other side, several political scientists have concluded that it is too costly for the President to veto major legislation.¹⁴⁹ Clinton Rossiter, for example, suggests that

The President often feels compelled to sign bills that are full of dubious grants and subsidies rather than risk a breakdown in the work of whole departments. While it salves his conscience and cools his anger to announce publicly that he would veto these if he could, most Congressmen have learned to pay no attention to his protests.¹⁵⁰

While each of these competing views is supported by ample evidence, I suspect that the truth lies somewhere in the middle: the President vetoes legislation that he finds sufficiently offensive to justify the political price tag associated with a veto; Congress overrides vetoes when it finds its enactment sufficiently compelling to justify to pay the political price tag associated with an override (which usually requires some members of the President's party to vote against him). This formulation seems somewhat of a tautology, for it presumes that the President and Congress have sufficient free will to protect their independence through their respective use of the veto and veto overrides.

C. *The Veto and Omnibus Legislation.*

Omnibus legislation allegedly disturbs this delicate balance. Omnibus bills have been labeled veto-proof: by conglomerating legislative offerings in a single measure and then presenting this package to the President one day before the end of an appropriations cycle, Congress supposedly can make the veto power too painful to exercise.¹⁵¹ Con-

146. See L. FISHER, *THE POLITICS OF SHARED POWER* 30 (2d ed. 1987); *PRESIDENTIAL VETOES, 1789-1976*, at ix (1978) (compiled by Senate Library).

147. See, e.g., A. SCHLESSINGER, *THE IMPERIAL PRESIDENCY* (1973).

148. Ford administration vetoes are discussed in Black, *supra* note 136, and Ressen, *The Arrogant Veto*, *NATION*, Aug. 30, 1975, at 133-37. The Nixon impoundment controversy is comprehensively discussed in L. FISHER, *supra* note 1, at 147-201. See also Abscal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 *GEO. L.J.* 1549 (1974).

149. See generally Robinson, *Public Choice Speculations on the Item Veto*, 74 *VA. L. REV.* 403 (1988). Through 1980, Presidents have vetoed less than three percent of the bills presented to them. Copeland, *When Congress and the President Collide: Why Presidents Veto Legislation*, 45 *J. POL.* 696, 697 (1983).

150. C. ROSSITER, *THE AMERICAN PRESIDENCY* 254 (1956).

151. Correlatively, a movement is afoot among those who believe in an effective veto either to enact legislation or to amend the Constitution to provide the Executive with item-veto authority. The item veto is a horrendous idea. As Louis Fisher and I have discussed elsewhere, the item veto, among other failings, threatens the original design of legislation (whether it be single or multi-subject) and undermines congressional control over the lawmaking process. See Fisher & Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?*, 75 *GEO. L.J.* 159 (1986). In

gress, of course, cannot legislate away the veto power. At the same time, nothing in the text of the Constitution mandates that the President's exercise of the veto power be palatable. As long as it is properly presented to the President, omnibus legislation, as "bills" subject to the President's veto, satisfies article I, section 7's literal requirements. The question remains, however, whether omnibus continuing resolutions violate the spirit of the Constitution.

The answer is no. Although omnibus legislation changes the nature of the exchange between the White House and Congress, the veto still functions as a mediating device. For example, with respect to the FY 88 continuing resolution, the White House and Congress undertook extensive negotiations to ensure that the bill was satisfactory to both sides.¹⁵² In the end, Congress abandoned the fairness doctrine and included Contra aid to stave off a threatened veto.¹⁵³ If anything, such legislative compromises reveal that a President who is willing to use his veto wields enormous power in such negotiations.¹⁵⁴ At the same time, legislative control over the lawmaking process is not undermined by omnibus measures, since only Congress can decide to enact a megabill.

To say that omnibus legislation is consistent with the veto power and the policies that underlie it is not to say that veto power concerns

a recent article, Professor Glen Robinson argues that the item veto is a worthwhile experiment because a host of disincentives limit the effective exercise of the veto power. In particular Robinson is concerned that "public good" legislation "encumbered" by "private good" pork projects will not be vetoed because of the valuable "public" features of such legislation. Robinson, *supra* note 149, at 410-11; *see also* Clineburg, *The Presidential Veto Power*, 18 S.C.L. REV. 732, 737 (1966) (Veto power, in part, is designed for the President's "use against legislation that would serve provincial interests at the expense of the national interest."). This view presupposes that the President is better equipped than Congress to ascertain the national interest and that the costs of undermining legislative compromise are worthwhile. Robinson, moreover, makes the curious argument that the item veto will not aggrandize executive power because practical constraints will limit the President's use of the item veto. Robinson, *supra* note 149, at 417, 418; *see also* Mikva, *Symposium on the Theory of Public Choice—Foreword*, 74 VA. L. REV. 167, 172 (1988) (Pork-barrel projects allow "even the poorest regions of America to feel that they can get to the table where goodies are distributed" which lessens "regional resentment and suspicion of the national legislature.").

152. *See supra* notes 60-65 and accompanying text.

153. *See supra* notes 61-62 and accompanying text.

154. Despite his protestation, President Reagan has been well served by omnibus legislation. Aside from his effective use of the veto threat in the FY 88 continuing resolution, President Reagan's principal legislation initiative—the 1981 Omnibus Reconciliation Act—was a megabill of the first order. As Louis Fisher notes:

The size of the bill did not offend him at all. Instead, the complaints came from legislators who were forced to act within a short time on a bill no one could possibly grasp. More than 250 members worked in 58 sub-conferences to produce the measure. Programs were cut without hearings and with little time for floor debate or amendment. The reconciliation bill became a freight train, racing through at high speeds, subject only to an up-or-down vote. The omnibus nature of the bill was championed by the White House and presidential supporters as the only way to make cuts in popular programs.

Fisher, *supra* note 43, at 103.

would not be better served by narrower legislation. Because it contains a host of measures that otherwise would function as independent enactments, omnibus legislation is necessarily high-stakes legislation. The stakes make Congress and the President willing to make concessions that they would not ordinarily make on single-subject bills. In FY 88, for example, both sides compromised to ensure enactment. Although it is often sensible to compromise, omnibus legislation limits the opportunity both for Congress to push its legislative agenda forward (since it will make concessions to avoid a veto) and for the President to check legislative excess (since he too will compromise to avoid having to use his veto). Although the changing function of the veto in an era of megabills is a phenomenon worthy of careful study, the altered process does not necessarily yield a deficient legislative work-product.

IV. THE OBLIGATION TO ABIDE BY THE CONSTITUTION REVISITED: RUPERT MURDOCH VS. THE FCC

In my earlier article, I spoke briefly of instances when Congress—through the appropriations process—has enacted legislation that directed the Executive to act in a manner forbidden by the Constitution.¹⁵⁵ In litigation involving the 1988 continuing resolution, *News America Publishing, Inc. v. Federal Communications Commission*,¹⁵⁶ the limited duration of appropriations measures and the problems of legislative intent surrounding continuing resolutions combined to underscore the constitutional problems with achieving policy objectives through the appropriations process.

News America involved the constitutionality of a limitation rider that prohibited the Federal Communications Commission (FCC) from “extend[ing] the time period of current grants of temporary waivers” of Commission regulations prohibiting the co-ownership of a television station and newspaper in the same market.¹⁵⁷ The only “current grants of

155. Devins, *supra* note 6, at 474-75.

156. 844 F.2d 800 (D.C. Cir. 1988).

157. Pub. L. No. 100-202, 101 Stat. 1329-32 (1987). *News America* also challenged a limitation rider prohibiting the FCC from reconsidering its cross-ownership prohibition. Brief for Appellant at 37-45, *News America* (No. 88-1037). In *FCC v. National Citizen's Comm. for Broadcasting*, however, the Supreme Court upheld the constitutionality of this FCC regulation. 436 U.S. 775 (1978). In distinguishing *National Citizen's Comm.*, *News America* claimed that the availability of waivers—undermined here by the “no extension” language—was a critical element of the Court's holding. See Brief for Appellant at 39. The correctness of this claim is irrelevant to the case at hand. First, the freeze on the cross-ownership prohibition is only relevant insofar as the FCC is also prohibited from extending the *News America* waiver. Consequently, the validity of the “no extension” language remains the critical question. Second, since limitation riders are best understood as single-year appropriations measures, the underlying FCC regulation upheld by the Supreme Court remains intact. See Devins, *supra* note 6, at 461-62. The FCC made this point claiming that, “[i]n essence,

temporary waivers” apply to the *New York Post* and *Boston Herald*, both owned by Rupert Murdoch. Murdoch’s publishing firm (News America) claimed that this provision violated the equal protection guarantee and amounted to a bill of attainder.¹⁵⁸ The D.C. Circuit agreed with Murdoch’s claim that the “no extensions” rider was too limited in effect and struck down the provision.¹⁵⁹

The prohibition against bills of attainder reflects “the Framers’ belief that the Legislative Branch is not so well suited as [the judiciary] to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.”¹⁶⁰ As a result, congressional acts that punish an identifiable person or persons are unconstitutional. Punishment, however, is not the mere imposition of “burdensome consequences.”¹⁶¹ Rather, punishment comprises historical statutory punishment, penalties that evince malicious legislative intent, or burdens that are simply too severe to be consistent with nonpunitive legislative purposes.¹⁶²

Congress has codified the Commission’s rule by locking it into place, in its statute, until September 30, 1988.” Corrected Brief for the Federal Communications Commission at 15, *News America* (No. 88-1037).

158. Murdoch also argued that the continuing resolution violated: (1) the first amendment because it was motivated by a desire to censor News America’s views, Brief for Appellant at 19-22, and (2) the FCC’s right to control the manner in which it administers its responsibilities, *id.* at 27-30. As to the second argument, the FCC—by viewing the “no extension” language as a legislative “ban on the extension of temporary waivers”—characterized the rider as a substantive amendment within Congress’s lawmaking power. Corrected Brief for the Federal Communications Commission at 43. The FCC argued, however, that the “no extension” language cannot stand as a temporary restraining measure, for that “kind of congressional control over the execution of the laws . . . is constitutionally impermissible.” *Id.* at 45 (quoting *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986)). The FCC and News America were clearly incorrect on this point. Appropriations are as much acts of Congress as are authorizations. Congress is therefore unencumbered in its ability to set policy through appropriations. See Devins, *supra* note 6, at 471-74. Recent separation of powers decisions, *INS v. Chadha*, 462 U.S. 919 (1983) (presentment/veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (appointment/removal); *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (appointment/removal), are not to the contrary. All of these cases involved the displacement of core executive power. The “no extension” rule, on the other hand, is the simple exercise of Congress’s power over the purse.

159. *News America*, 844 F.2d at 815.

160. *United States v. Brown*, 381 U.S. 437, 445 (1965) (law barring Communist party members from offices in labor unions violates bill of attainder prohibition). Bills of attainder are prohibited by article I, section 9, clause 3 of the Constitution because they deprive the person or persons singled out for punishment of the safeguards of a trial by jury.

161. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 472 (1977). In this case, the Supreme Court upheld provisions of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 note (1982) (current version), that specifically required former President Nixon to cede control of his papers. In holding that Mr. Nixon was not “punish[ed]” by this law, the Court noted that the Act provided for just compensation. 433 U.S. at 475. For further discussion, see *infra* note 171.

162. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984) (rejecting bill of attainder challenge to statute denying federal financial aid to male students who failed to register for the draft).

The equal protection guarantee likewise protects against overly narrow classifications and improper motives. Equality demands that likes be treated alike. Governmental action that affects only a narrow class is problematic; it may unnecessarily impose burdens or extend benefits. As Justice Jackson recognized in *Railway Express v. New York*:¹⁶³

[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be vested upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹⁶⁴

Traditional equal protection analysis, however, pays little attention to these concerns. Unless illegitimate purpose is shown, the presumption of legislative reasonableness empowers lawmakers to cast a narrow net. Yet, when a fundamental right (such as speech) is involved, specificity concerns loom much larger. In these fundamental rights equal protection cases, traditional deference is not accorded; instead, government must demonstrate the reasonableness of its actions.¹⁶⁵

Appropriations are a likely target for specificity-based challenges.¹⁶⁶ The single-year nature of appropriations narrows such measures' affected field and thereby suggests pernicious legislative intent, especially when a bill works to the disadvantage of an identifiable group. The "no extensions" rider at issue in *News America* illustrates the thin line that separates "legitimate" policy-based riders from unconstitutional government action.

Specificity proved to be the critical concern in *News America*. Murdoch made the common sense argument that because Congress knew he was the only "current recipient" to whom a temporary waiver could be extended, the "no extensions" language was written with him in mind.¹⁶⁷ According to Murdoch, "[i]f the draftsmen had intended to encompass any newspaper owner other than News America . . . they would have deleted the word 'current' or inserted the word 'future' in the continuing resolution."¹⁶⁸ The FCC responded that Congress's "current recipient" limitation is irrelevant, because the continuing resolution's limited life

163. 336 U.S. 106 (1949).

164. *Id.* at 112-13 (Jackson, J., concurring).

165. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

166. For example, with respect to bills of attainder, in *United States v. Lovett*, the Court struck down legislation prohibiting the use of federal funds for salaries of named federal employees accused of engaging in "subversive activity." 328 U.S. 303, 308 (1946).

167. Brief for Appellant at 20-21, *News America* (No. 88-1037).

168. Reply Brief for Appellant at 8, *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (No. 88-1037).

cycle makes it impossible to grant extensions to entities that have not already received a temporary waiver.¹⁶⁹ Because Congress is concerned with the use of temporary waivers to frustrate the cross-ownership prohibition,¹⁷⁰ the FCC argued, Murdoch is a "legitimate class of one."¹⁷¹

The FCC's and News America's arguments both misconstrued the "typical" and "atypical" aspects of appropriations. News America undermined its case because, as the FCC recognized, News America's version of acceptable "general" language would have the same impact as the challenged provision. News America thus neglected to consider the "atypical" aspect of appropriations, i.e., their one-year duration. The FCC, on the other hand, erred in failing to consider the "typical" aspect of appropriations, i.e., that appropriations are statutes. The fact that the continuing resolution expired on September 30, 1988, does not mean that Congress could not have enacted general legislation prohibiting consecutive temporary waivers. Instead, by enacting a statute of limited duration, Congress chose a legislative device whose impact could only be felt by a single entity. The failings of FCC and News America both point to the same conclusion, however: the "no extensions" provision triggers the specificity concern associated with bills of attainder and fundamental-rights-type equal protection.

The decision in *News America* is sensitive to these concerns. Emphasizing that "only" News America could not "seek an extension during the fiscal year,"¹⁷² the D.C. Circuit concluded that the no extensions rider poorly served Congress's purported goal of preserving the cross-ownership prohibition. Since any other entity remained eligible for a temporary extension, the court found the rider grossly underinclusive.¹⁷³ To protect the cross-ownership rule, the FCC should treat initial grants of temporary extensions and extension renewals alike.

The court undertook this demanding means/ends analysis because

169. Corrected Brief for the Federal Communications Commission at 34-35.

170. *Id.* at 31.

171. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 472 (1977). In *Nixon*, the Court concluded that it was appropriate for the legislation to address only Mr. Nixon's record because when the law was enacted, "only his materials demanded immediate attention." *Id.* The Act did, however, establish a special commission to recommend legislation for the preservation of future Presidents' records. This "wider net" ostensibly convinced the Court that the legislation was of a general character. *Id.*

172. *News America*, 844 F.2d at 814.

173. As the *News America* court put it, "every publisher in the country other than Murdoch can knock on the FCC's door and seek the exercise of its discretion to secure . . . a period of exemption from the cross-ownership restrictions." *Id.* Yet, since a temporary waiver could only be available to Murdoch, no other publisher was "similarly situated" to News America during the rider's life cycle.

fundamental speech rights were involved in the case.¹⁷⁴ If heightened review were not triggered, the rider would have survived traditional equal protection review. As the *News America* dissent pointed out: "If the aim is to preserve the cross-ownership rule, and waiver extensions endanger the rule, then a prohibition on [current] extensions . . . does serve the purpose."¹⁷⁵

News America's importance therefore should not be overstated. Attention must also be paid to whether Congress's motivations were impermissible, a critical element of both bill of attainder¹⁷⁶ and traditional equal protection review.¹⁷⁷ Equal protection clause cases, however, demonstrate that proof of discriminatory intent is extremely difficult.¹⁷⁸

174. See *id.* at 810-14. But cf. *id.* at 816-23 (Robinson, J., dissenting) (criticizing majority's overextension of first amendment as applied to broadcast media).

175. *Id.* at 820.

176. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 475-76 (1977)). If legislation "falls within the historical meaning of legislative punishment," it too will be struck down as an unconstitutional bill of attainder. *Id.* Legislative punishment comprises imprisonment, banishment, punitive confiscation of property, and legislative bars to employment. *Nixon*, 433 U.S. at 474-75. Murdoch claimed that "[t]he Continuing Resolution has, in effect, imposed a multi-million dollar fine upon *News America* by reducing its ability to sell the *New York Post* at a reasonable price." Brief for Appellant at 26 n.7, *News America* (No. 88-1037). Claiming that there is no right to an administrative hearing, the FCC argued that Congress has plenary authority to eliminate a procedural ability to seek extensions of waivers, and that any such congressional actions do not violate the bill of attainder prohibition. Corrected Brief for the Federal Communications Commission at 38-39. The FCC has the better argument. Laws that cause economic disadvantage are not necessarily legislative punishment, for the bill of attainder clause "does not . . . limit[] Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." *Nixon*, 433 U.S. at 471.

The "reasonableness" inquiry also limits bill of attainder actions. "Reasonableness" means that there are "legitimate justifications for passage of the Act." *Id.* at 476. The fact that more general legislation could have been crafted is irrelevant. In *Nixon*, the Court did not find the legislation's uncertain impact on future Presidents problematic. See *supra* note 171. Here, the fact that the "no extensions" measure can only apply to Murdoch does not necessarily mean that it is punitive. With respect to repeated temporary extensions undermining the cross-ownership prohibition, Murdoch—for the time being—is a class of one. Congress's concern over the cross-ownership rule is also reflected in its general prohibition of FCC reconsideration of the rule. See *supra* note 157. Finally, although bill of attainder concerns are heightened when Congress legislates through the appropriations process, the difficulty of enacting more general substantive legislation may be a partial explanation for this phenomenon. See generally Devins, *supra* note 6, at 464.

177. Traditional equal protection review makes the minimalist demand that social and economic legislation further a less legitimate governmental purpose. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-40 (1985).

178. See, e.g., *McCleskey v. Kemp*, 107 S. Ct. 3199 (1987) (limiting statistical proof of discriminatory intent); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker [selected] or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effect upon an identifiable group."); *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters.") The proof of intent inquiry in bill of attainder cases parallels this approach. See *infra* note 189.

These proof problems were exacerbated in the *News America* situation, in which the "no extensions" rider was an eleventh-hour addition to the omnibus continuing resolution. Indeed, Congress did not formally discuss provision, and the conference report accompanying the continuing resolution fails to address the provision's underlying rationale. The legislative record reveals only that the "no extensions" rider was inserted in conference. In fact, strong evidence suggests that most of the conferees were unaware of the rider.¹⁷⁹

If the provision were merely a secret amendment, the intent analysis would be fairly straightforward: because the insertion of amendments in conference is part and parcel of the legislative process,¹⁸⁰ the "no extensions" amendment, if it is reasonably subject to a nonpunitive interpretation, is nonpunitive. This formulation is not particularly appealing, however, because it renders intent analysis a nullity when Congress, following internal procedures, does not create a legislative record. But intent cannot be created out of thin air. Continuing resolutions, which often contain secretly inserted amendments, thus can undermine meaningful intent inquiry.

Newspaper interviews by the admitted sponsors of the amendment and post-enactment statements on the Senate floor complicate the intent inquiry in *News America*.¹⁸¹ These statements reveal clear animosity toward Murdoch by, among others, the amendment's chief architects, Ernest Hollings and Edward Kennedy.¹⁸² Hollings spoke of "this sneaky operation of Rupert Murdoch"¹⁸³ and Kennedy claimed that the rider would ensure "that [Murdoch] wasn't going to be able to abuse the process anymore."¹⁸⁴ On the other hand, Kennedy characterized the rider as a neutral measure designed to prevent anyone from evading the cross-ownership rule by "obtaining a permanent exemption in the guise of a series of temporary waivers."¹⁸⁵

179. See Jones, *Hollings Says He Originated Murdoch Curb*, N.Y. Times, Jan. 1, 1988, at 33, col. 5.

180. *News America*, noting the "highly irregular manner in which the Continuing Resolution was enacted," argued that the bill should be invalidated on due process grounds. Brief for Appellant at 21, 45-49. Yet, when there is technical compliance with internal legislative procedures, concerns with due process in lawmaking are not triggered. See *supra* notes 103-08 and accompanying text.

181. See generally 134 CONG. REC. S138-47 (daily ed. Jan. 27, 1988); 134 CONG. REC. S54-69 (daily ed. Jan. 26, 1988); Brief for Appellant at A30-A70 (compendium of newspaper articles discussing cross-ownership riders).

182. Kennedy and Hollings have both admitted their role in crafting the "no extensions" rider. See Jones, *supra* note 179; Kurkjian, *Kennedy Defends Move on FCC Rule*, Boston Globe, Jan. 4, 1988, at 42, col. 2.

183. 134 CONG. REC. S59 (daily ed. Jan. 26, 1988) (remarks of Sen. Hollings).

184. Williams, *Jerry Williams, Sen. Kennedy Clash on Radio*, Boston Herald, Jan. 8, 1988, at 59, col. 1.

185. 134 CONG. REC. S59 (daily ed. Jan. 26, 1988) (remarks of Sen. Kennedy).

Determining these statements' significance is problematic.¹⁸⁶ First, the Supreme Court has frequently stated that it is "normally hesitant to attach much weight to comments made after the passage of legislation."¹⁸⁷ In the *News America* situation, however, the comments were made by the rider's sponsors only a month after the rider's passage¹⁸⁸ and are the only available evidence of legislative intent. Second, even if considered probative, isolated hostile statements "do not constitute 'the unmistakable evidence of punitive intent which . . . is required before a congressional enactment of this kind may be struck down' [under the bill of attainder clause]."¹⁸⁹ In view of some of the statements of nonpunitive purpose made in support of the "no extensions" rider, *News America* did not adequately demonstrate that it was singled out for punishment. But since these statements of neutral purpose are irrelevant in the case of an appropriation of limited duration,¹⁹⁰ hostile statements by legislative sponsors take on added weight. In short, the atypical feature of appropriations—their limited duration—complicates the search for the general purposes of legislation that can only affect a narrow class during its life cycle.

Because temporary extensions of the cross-ownership rule last eighteen months, the parties to be affected by the annual reenactment of the "no extensions" rider are necessarily known to Congress. This fact is troublesome. On the one hand, Congress should be able to define the contours of the cross-ownership rule so long as the rule means the same thing to similarly situated publishers. On the other hand, the limited duration of the "no extensions" rider raises the specter of selective enforcement of the cross-ownership rule based on legislative tastes.

186. In fact, although deeply disturbed by these post-enactment statements, the *News America* court "pass[ed] over petitioner's claim of illicit purpose." 844 F.2d at 810.

187. *Washington County v. Gunther*, 452 U.S. 161, 176 n.16 (1981). *But cf.* *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980) (post-enactment statements "should not be rejected out of hand").

188. Post-enactment statements made by the same Congress may be accorded more weight because the "oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one' " is not applicable. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960) (emphasis added)). Moreover, post-enactment statements by a bill's sponsor are accorded special deference. *See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 203-06 (1982); *see also Brock v. Pierce County*, 476 U.S. 253, 262 (1986); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-31 (1982).

189. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 856 n.15 (1984) (quoting *Flemming v. Nestor*, 363 U.S. 603, 619 (1960)). This standard is reminiscent of the "but for" test in equal protection jurisprudence. *See supra* note 178; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of [an impermissible purpose].").

190. *See supra* note 157.

In the end, while appropriations riders may not violate the bill of attainder clause, the image of governmental fairness and neutrality is undermined by such short-term enactments. Appropriations are one-year statutes that can cause identifiable groups to suffer relative harms. Limitation riders that alter or freeze executive rulemaking schemes therefore can raise both specificity and intent-to-punish concerns. Because Congress cannot effectively debate riders included in last-minute continuing resolutions,¹⁹¹ limitation riders included in such measures give the appearance of a legislative star chamber inflicting secretive, unconditional punishment. Congress, to cure this defect, should—to the extent practicable¹⁹²—make policy by enacting authorizations of general applicability.

CONCLUSION

This article has been something of a whirlwind tour of legal and practical problems raised by continuing resolutions. The bottom line is that Congress should disfavor continuing resolutions. While the broad scope of recent continuing resolutions allows congressional leaders to make necessary compromises across the range of government spending issues, the continuing resolution funding device is undemocratic and therefore comes at too high a price. Moreover, continuing resolutions disrupt the balance of power between Congress and the President, and dispel the essential fiction of fair governance.

The confluence of Gramm-Rudman and 1974 Budget Act procedures, unfortunately, makes the continued use of this funding device all too likely. To eliminate existing incentives for omnibus resolutions, Congress must reexamine the federal budget process itself.

191. Limitation riders enacted in regular appropriations are often subject to contentious debate. See Devins, *supra* note 6, at 464-65.

192. On occasion, limitation riders may be the only legislative means available to Congress to further its policymaking agenda. See *id.*