ARTICLES

Congressional Descent: The Demise of Deliberative Democracy in Environmental Law

RICHARD J. LAZARUS

ABSTRACT

In recent years, the formal environmental lawmaker dimension of Congress has become effectively moribund. Earlier Congresses were, by contrast, celebrated for enacting sweeping, demanding environmental laws and for passing significant and increasingly detailed amendments in response to subsequent developments in executive branch agencies, federal courts, and the states. Now, Congress passes almost no coherent, comprehensive environmental legislation and displays no ability to deliberate openly and systematically in response to changing circumstances and new information. Instead, when Congress does exercise its lawmaker authorities to influence environmental protection policy, it does so primarily through the appropriations process: the sphere of its responsibility that, ironically, has proven to be the least conducive to the kind of deliberative democracy that justifies legislative supremacy in environmental lawmaker. This Article describes the ascent and descent of Congress in environmental law, discusses the troublesome implications for environmental law due to the increasing dominance of the appropriations process in congressional lawmaker, identifies the major causes of these developments, and concludes by offering some possibilities for congressional reform.

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INTRODUCTION

Congress is the “First Branch” under the Constitution,¹ but it exhibits little capacity to engage in the kind of deliberative democracy that underlies its top billing. Members of Congress vote on and pass bills without any knowledge—or sometimes even an opportunity to know—the language in the bills under consideration.² Members repeatedly reject legislative proposals on the merits only to have those proposals reintro-

² In November 2004, lawmakers were embarrassed to discover that they had passed a statutory provision that none of them in fact supported or even knew existed at the time they voted. Buried in a 3000-page omnibus spending bill that Congress enacted without any opportunity to review its contents, the controversial provision authorized House committee chairs to obtain from the Internal Revenue Service copies of income tax returns of individual private citizens. See David E. Rosenbaum, Panel Chief Denies Knowing About Item on Inspecting Tax Returns, N.Y. TIMES, Nov. 23, 2004, at A22.
duced repeatedly until the majority opposition is effectively worn down and the proposal is combined with another for which immediate passage is required. Finally, Congress has fostered a practice that allows language contained in a committee report, never voted on by the full Congress, to override the clear instructions set forth in statutory language that received favorable votes by both legislative chambers and was signed into law by the President.

The role of Congress in the making of environmental law is emblematic of the demise of deliberative democracy in Congress in recent years. The emergence of modern environmental protection law in the United States in the 1970s and its subsequent evolution have ranked among Congress’s great success stories. Largely because of those ambitious laws, the nation has enjoyed extraordinary economic growth during the past several decades while improving environmental quality in many significant respects, maintaining ecosystems in many others, and generally avoiding the environmental catastrophes that have befallen other industrialized and developing nations. Congress proved in the 1970s and 1980s that it could effectively rise above the always powerful political pressures generated by short-term and narrow factional interests and produce a series of extraordinarily ambitious and far-reaching environmental protection laws designed to address the interests of the nation as a whole, including future generations. These laws could be justly seen “as an authentic expression of the public interest and an appropriate consequence of the national government’s superior performance in promoting that interest.”

But, as much as the 1970s and 1980s constituted an ascent in Congress’s wielding of lawmaking authority, more recent years may best be characterized as a congressional descent. Between 1970 and the early part of the twenty-first century, Congress’s ability to serve a constructive role in the ongoing process of

3. In December 2004, several prominent members of Congress publicly condemned their own inability, even as members of the Senate Intelligence Committee, to stop a wasteful expenditure of billions of taxpayer monies for a secret spy satellite system. They described how Congress passes such spending proposals, regardless of their merits and notwithstanding repeated rejections by the congressional authorization committee primarily responsible for assessing the proposal’s wisdom, because legislative proponents effectively wear down the opposition through the appropriations process. David Johnston, Justice Dept. May Explore Leak on Spy Satellites, N.Y. TIMES, Dec. 15, 2004, at A28; Dana Priest, New Spy Satellite Debated on the Hill; Some Question Price and Need, WASH. POST, Dec. 11, 2004, at A1.


5. For the purposes of this Article, the term “deliberative democracy” is intended to embrace the general values of enacting generally applicable laws based upon sincere and reasoned argument, deliberations, and debate in the public arena by democratically elected lawmakers. The term is not, accordingly, used in any stricter sense or otherwise intended to enter into the ongoing debate between commentators concerning either the precise meaning of deliberative democracy or the extent to which it is possible (or wise) to achieve deliberative democracy in its purest form. See generally Deliberative Democracy (Jon Elster ed., 1998); Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996); Christopher H. Schroeder, The Law of Politics: Deliberative Democracy’s Attempt To Turn Politics into Law, LAW & CONTEMP. PROBS., Summer 2002, at 95.


environmental lawmakers has virtually disappeared. Earlier Congresses were celebrated for enacting sweeping, demanding environmental laws and for passing significant amendments in response to subsequent developments in executive branch agencies, federal courts, and the states. 8 Now, Congress passes almost no coherent, comprehensive environmental legislation and displays no ability to deliberate openly and systematically in response to changing circumstances and new information. 9 Instead, when Congress exercises its lawmaking authority to influence environmental protection policy, it does so primarily through the appropriations process: the sphere of its responsibility that, ironically, has proven to be the least conducive to the kind of deliberative democracy that justifies legislative supremacy in environmental lawmaking and the most susceptible to the kind of narrow, special interest factionalism that the Framers sought for the national government to be able to resist. 10

The purpose of this Article is to describe how and why the branch of government arguably most suited to making the hard threshold societal choices necessary in federal environmental law has become the least suited branch of all. This Article is divided into four parts, followed by a brief conclusion. Part I describes the ascent and descent of Congress in environmental law. This includes the extraordinary role that several prominent congressional authorization committees served during the first two decades of federal environmental lawmaking, the accelerating demise of those same committees since the early 1990s, and the legislative dormancy that has since resulted. Part II describes the increasing and closely related dominance in environmental law of legislation by the appropriations process. Paralysis of the congressional authorization committees has created opportunities, often fueled by perverse political incentives, for those hoping to effectuate legal change through nondenominatable, back-door, private deal-making in appropriations legislation. Part III discusses the troublesome implications of legislation through appropriation's current dominance of environmental law both for environmental policymaking in particular and for congressional lawmaking more generally. Part IV identifies three of the major causes of the paralysis of the authorization track of lawmaking and the resulting dominance of the appropriations track. They include changes in internal congressional rules governing institutional organization and operations, the demise of bipartisanship, and increased politicization of the appropriations and budgetary processes. Finally, this Article concludes with a brief discussion of the need for a resurgence of deliberative democracy in environmental lawmaking and, to that end, of the possibility of significant institutional and procedural reforms.

I. CONGRESSIONAL ASCENT AND DESCENT IN ENVIRONMENTAL LAW

Congress's role in environmental lawmaking profoundly shifted during the twenti-
eth century. During the first half of the century, Congress created the statutory precedent for its expansive exercise of authority under the Property and Commerce Clauses, but it was not until the second half of the century that Congress began to exercise that authority more fully by establishing comprehensive federal programs for natural resource management and pollution control. At first, those new statutes broadly delegated lawmaking authority to executive branch agencies. Over time, however, Congress passed more precise laws, taking over many of the substantive details, as congressional overseers learned from the successes and failures of administrative agency implementation efforts. But what seemed to be a naturally maturing process, in which the legislature was properly assuming increasing responsibility for the difficult policy choices embedded within environmental law, came to an abrupt halt as the century came to a close.

A. THE RISE OF CONGRESS IN ENVIRONMENTAL LAWMAKING

For the first twenty years of modern environmental law in the United States, the role of Congress in environmental lawmaking fairly well reflected both its theoretical institutional strengths as well as its practical weaknesses. Congress was unquestionably the most powerful of the three branches of government because its legislation established the essential substantive criteria for environmental protection standards. Congress also established the framework for the making, implementation, and enforcement of further laws necessary to translate those standards into precise requirements. Yet, by deliberately providing in that framework for the delegation of significant initial lawmaking authority to federal administrative agencies, for significant oversight from the federal judiciary, and for detailed implementation by state sovereign authorities, Congress also took account of its own institutional limitations. As a lawmaking institution, Congress incrementally involved itself in the administrative details, only after first allowing an administrative agency to flesh out those details.

Hence, the Clean Air Act of 1970, while relatively short in length, answered some of the most important questions regarding air pollution control in the United States. The Act provided for the creation of uniform national ambient air quality standards for certain kinds of pollutants and emissions standards for certain others. The law announced that the standards be risk averse (requiring an “adequate margin of safety”), identified general statutory objectives (“requisite to protect the public health” and the “public welfare”), and made no

provision for the consideration of costs in the establishment of such standards.\textsuperscript{15} The law drew distinctions between stationary sources and mobile sources and new and existing sources.\textsuperscript{16} The statute further assigned strict implementation tasks both to the Environmental Protection Agency (EPA) as well as to states and provided for the prospect of judicial oversight.\textsuperscript{17}

The Act was equally striking for what it did not purport to do. It did not declare precisely what the standards would have to be and, in fact, only gave EPA very general guidance concerning how numerical ambient standards should be determined when, as at least some members recognized, there were not necessarily clear threshold concentrations below which certain air pollutants were not harmful.\textsuperscript{18} Nor did the statute predetermine what pollution control technology was available at the time. The law further sought to carve out, at least in theory, significant areas for state autonomy, while trying to remain true to the federal government’s assumed responsibility to ensure protection of public health, welfare, and the environment nationwide.\textsuperscript{19}

The role of Congress, however, did not end upon the statute’s enactment. Congressional authorization committees, such as the Senate Committee on the Environment and Public Works, kept abreast of developments in clean air policy occurring both in the federal agencies and in the states. They held an extraordinary number of oversight hearings to learn, question, and evaluate what EPA was doing.\textsuperscript{20} When the executive branch failed to implement the statutes in a manner consistent with congressional aspirations, members of Congress sought to influence agency policy through widely publicized condemnations of agency

\textsuperscript{15} See id. §7409(b)(1)-(2); see also Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 467–68 (2001). Some commentators contend that EPA in fact considers costs implicitly in setting national ambient air quality standards and that the Agency’s claims to the contrary are a complete fiction. See Cary Coglianese & Gary Marchant, Shifting Sands: The Limits of Science in Setting Risk Standards, 152 U. PA. L. REV. 1255, 1339–47 (2004).


\textsuperscript{17} Id. §§ 7410, 7607.

\textsuperscript{18} Clean Air Act Amendments of 1977, Hearings Before the Subcomm. on Environmental Pollution of the S. Comm. on the Environment and Public Works, 95th Cong., pt. 3, 8 (1977); see Coglianese & Marchant, supra note 15, at 1286–90. The absence of more specific guidance prompted a claim that the Clean Air Act violated the nondelegation doctrine. In Whitman, 531 U.S. at 473–76, the Supreme Court rejected that constitutional claim, ruling that the statutory command that EPA promulgate uniform national ambient air quality standards “requisite to protect the public health” provided the constitutionally required “intelligible principle.”

\textsuperscript{19} See generally Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196 (1977). Professor David Schoenbrod and Ross Sandler, in their recent book, Democracy by Decree: What Happens When Courts Run Government 20, 29–31 (2003), challenge the proposition that the Clean Air Act constituted “cooperative federalism,” claiming that the states were, as a practical matter, deprived of any meaningful autonomy in the Act’s implementation.

action. 21 As Congress learned from the agency’s experience, Congress further took charge of the details of the federal air pollution control programs. Congress repeatedly enacted comprehensive amendments to the Clean Air Act, codifying some agency actions, modifying others, and rejecting some completely. 22

The upshot was lengthy and detailed statutory enactments that dramatically expanded agency jurisdiction while simultaneously narrowing agency discretion. The Clean Air Act Amendments of 1970 totaled only thirty-eight pages in the Statutes at Large (compared to ten pages for the far more general, less prescriptive Clean Air Act of 1963). 23 By contrast, the 1977 amendments to that Act totaled 112 pages, 24 and the 1990 amendments added yet another 314 pages. 25

The Clean Air Act, however, was only one of several sweeping laws that Congress enacted in the 1970s, the implementation of which Congress then closely oversaw. A simple list of the laws that Congress passed during the 1970s is, standing alone, quite overwhelming. 26

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<td>Outer Continental Shelf Lands Act</td>
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22. Id. at 340–42.
26. LAZARUS, supra note 6, at 67–75.
Congress did not slow down in the 1980s. Congress began the 1980s by passing two environmental laws that surpassed in ambition any prior federal natural resources or pollution control law: the Alaska National Interest Lands Conservation Act (ANILCA)\textsuperscript{27} and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).\textsuperscript{28} Remarkably, Congress enacted these two ambitious laws at perhaps the single most unlikely moment: December 1980. Not only was that during a lame duck session of Congress, when little if anything significant typically happens, but it was a lame duck session immediately before both the Senate and the presidency were about to switch parties from the Democrats (Jimmy Carter) to the Republicans (Ronald Reagan). Those in the Republican Party about to ascend to positions of power in the executive and legislative branches would seem to have possessed every incentive to prevent the passage of any new laws until the next Congress and Administration to preserve Republican Party authority and future lawmaking options. Congressional autonomy and authority, however, were sufficiently great in 1980 to overcome such political obstacles and to secure passage of both ANILCA and CERCLA, albeit with substantial compromises in both statutes.

Throughout the 1980s, Congress continued to flex its political muscle without any apparent inhibition. Whenever congressional leaders, Democrat or Republican, perceived the executive branch as threatening the implementation of federal environmental protection laws, congressional committees quickly held oversight hearings. They demanded testimony of agency officials and sought agency decisionmaking documents, including by subpoena if necessary. Indeed, such a confrontation over congressional requests for agency documents is what ultimately prompted the resignation, if not firing, of President Reagan’s first EPA Administrator, Anne Gorsuch Burford.\textsuperscript{29}

Similarly unwelcome by Congress was President Reagan’s first Secretary of


\textsuperscript{28} Pub. L. No. 96-510, 94 Stat. 2767 (1980). CERCLA, popularly known as “Superfund,” literally transformed federal pollution control law. CERCLA is a strict liability statute that imposes joint and several liability on current and prior owners and operators of sites where hazardous substances were being released, as well as on those parties, including generators, who had arranged to have such wastes transported for treatment, storage, and disposal. Hardly a business or governmental agency fell outside CERCLA’s scope.

the Interior, James Watt. His Senate confirmation was controversial and almost as soon as Secretary Watt took office, Congress subjected the Secretary to a series of critical oversight hearings, at which individual members questioned his judgment, integrity, and commitment to adhere to congressional intent as reflected in the federal natural resources statutes that the Department of the Interior was responsible for implementing.30

Congressional action, however, was not confined to oversight hearings. Congress repeatedly passed significant legislation aimed at reigning in federal agency discretion by amending existing laws. Sometimes, Congress acted to statutorily codify agency regulations, which, while endorsing administrative efforts, effectively prevented the agency from adopting a different approach in the future. Other times, Congress acted directly to repudiate what the federal agency was doing or, even more likely, failing to do.

For instance, Congress enacted in 1984 comprehensive, detailed, and highly prescriptive amendments to the Resource Conservation and Recovery Act (RCRA),31 the leading federal hazardous waste law. The original 1976 law, which covered forty-seven pages in the Statutes at Large,32 had authorized EPA in the most general terms to develop regulations designed to govern the treatment, storage, and transportation of hazardous wastes. RCRA instructed EPA to promulgate such regulations “as may be necessary to protect human health and the environment.”33 But, as amended in 1984, adding another seventy-three pages in the Statutes at Large,34 the new law imposed sixty additional deadlines on the Agency and extended jurisdiction to 130,000 businesses that had previously been exempted from federal regulation because they produced only small volumes of hazardous waste and 1.4 million underground tanks that stored hazardous substances, especially petroleum.35 The law prescribed exactly when each of a series of regulations had to be published and permits had to be issued, and announced the substantive criteria that the permits had to contain. The amendments also imposed a series of default prohibitions on the disposal of specified categories of hazardous wastes should EPA fail to meet certain deadlines.36

Congress likewise amended both CERCLA and the Clean Water Act, and to


33. Id. § 3002, 90 Stat. 2806–07.
similar ends. In the Superfund Amendments and Reauthorization Act of 1986, Congress added 170 additional pages in the Statutes at Large to a statute that, as originally passed, constituted only forty-five pages in the Statutes at Large. The new law substantially increased the size of the “Superfund” for hazardous waste cleanup from $1.4 billion to $4 billion and also conferred on EPA heightened administrative enforcement authority. The 1986 amendments, however, also included many detailed prescriptions on the President’s and EPA’s exercise of their respective CERCLA authorities. The Water Quality Act of 1987 (eighty-four pages in the Statutes at Large) similarly imposed an additional, thick layer of executive branch authority and prescription on top of those already imposed by Congress in 1977 in the Federal Water Pollution Control Act Amendments of 1972.

Congress began the 1990s in a similar vein. With the enactment of the Clean Air Act Amendments of 1990, Congress passed that year an even more ambitious air pollution control law than contemplated by the Clean Air Act of 1970 and the lengthy amendments to that law passed in 1977. The 1990 law included several very detailed provisions that dramatically restructured and, to a certain extent, reoriented much of the statute’s primary focus. The new law included a generally applicable permit provision for major pollution sources such as power plants, an ambitious tradable emissions program for the control of interstate transport of sulfur oxides that created a market for the buying and selling of the right to emit pollutants, and an exceedingly detailed set of measures for the achievement of national air quality public health standards for those parts of the nation not yet achieving those standards.

Finally, Congress in 1990 also enacted a significant new oil spill pollution control law: the Oil Pollution Act of 1990. The Act both established detailed liability provisions applicable to oil spills and imposed technology requirements

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39. Under CERCLA, EPA is generally authorized to spend monies in the “Superfund” to clean up hazardous substances, the release of which into the natural environment presents imminent and substantial endangerments to human health and the environment. The Superfund is created in the first instance by an environmental tax on corporations, but it can also be replenished by cost recovery actions brought by EPA against the parties responsible for the creation of the hazards to which the Superfund responds. See 42 U.S.C. §§ 9607, 9611 (2000 & Supp. II 2002); 42 U.S.C.A. § 9604 (West Supp. 2005).
42. For instance, Congress added a new provision that required the submission by states and review by EPA of “individual control strategies” for the control of toxic pollutants in navigable waters for which application of the Act’s technology-based effluent limitations proved insufficient to meet state water quality standards. 33 U.S.C. § 1314(d) (2000).
on oil tankers to be phased in over time. Congress did not, therefore, simply create a federal regulatory program with a few broad, sweeping, and undefined strokes. The ambitious new law included much detail as Congress sought to strike the balance between competing concerns in the statute’s drafting.

In sum, Congress demonstrated in the 1970s and 1980s an impressive ability to oversee and remain fully engaged in the implementation of the ambitious environmental protection laws that it had enacted. Congress did not passively stand aside. Lawmakers, led by authorization committees with substantive expertise, held oversight hearings and passed increasingly precise statutory provisions. Congress, in effect, disproved the Wilsonian notion that separation of powers makes lawmaking in the face of the complexities of the modern world too difficult.\footnote{46} Congress demonstrated that even in one of the most technically complex and politically controversial areas of law, it could effectively delegate authority in the first instance, yet still stay actively engaged using its oversight and statutory amendment authorities.

**B. THE DEMISE OF CONGRESS IN ENVIRONMENTAL LAWMAKING**

Since 1990, however, congressional passage of new significant environmental authorization legislation has virtually ground to a halt. As described by one Senator, “To be able to move a major bill dealing with environmental law, or any adjustment to the law, is very difficult. Congress doesn’t want to focus on it, doesn’t want to put up with the heat.”\footnote{47}

Within the ambit of pollution control law, Congress has not significantly amended in any comprehensive manner the Clean Air Act since 1990, the Clean Water Act since 1987, the Comprehensive Environmental Response, Compensation, and Liability Act since 1986, or the Resource Conservation and Recovery Act since 1984. Relatively narrow exceptions include the Food Quality Protection Act of 1996 and amendments Congress passed to the Magnuson Fishery Conservation and Management Act and to the Safe Drinking Water Act a few weeks before the fall of 1996 mid-term elections\footnote{48} and the Small Business Liability Relief and Brownfields Revitalization Act of 2002.\footnote{49} Congress even proved unable to pass legislation necessary to reauthorize the tax that funds federal Superfund cleanups nationwide. The tax lapsed in 1995 and, in the

\footnote{46. Very soon after receiving his Ph.D., Woodrow Wilson published \textit{Congressional Government} in 1885, which expressed his view that the kind of strong separation of powers principles reflected in the U.S. Constitution may have once worked well, but were increasingly dysfunctional in more modern times. Wilson favored a lawmaking system more like that in the British Parliamentary system. \textit{See Jessica Korn, The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto} 22–25 (1996).}


absence of the necessary reauthorization, federal funds for cleaning up inactive and abandoned hazardous wastes sites are diminishing.\textsuperscript{50}

Within the field of natural resource management law, efforts to amend statutes pertaining to rangelands, energy exploration and development, and mining law have routinely flagged for lack of sufficient momentum. There has been no significant natural resources legislation since the Energy Policy Act of 1992.\textsuperscript{51} Left untouched are mining laws needing reform to prevent abuses such as foreign corporations’ securing property rights to millions of dollars of valuable minerals on public lands at a fraction of their cost.\textsuperscript{52} Possible reforms of federal grazing laws or endangered species protections have similarly been unsuccessful because Congress has been unable to provide the necessary fora for a constructive dialogue between competing interests.\textsuperscript{53}

The lack of congressional engagement is not merely reflective of a corresponding absence of any need for new environmental legislative initiatives. Significant reforms are warranted, just as they were during the 1970s and 1980s. Environmental law is notoriously experimental in nature, constantly needing revision in light of new information from both successful and unsuccessful regulatory experimentation.\textsuperscript{54} Yet, except for congressional passage of the Safe Drinking Water Act Amendments and the Food Quality Protection Act a few weeks before the fall of 1996 mid-term elections,\textsuperscript{55} there were only minor statutory amendments of any of the domestic environmental laws during the 1990s. The “Clear Skies” legislation, which would amend the Clean Air Act and which is currently stalemated in Congress, is simply the latest instance of congressional failure to forge a consensus position.\textsuperscript{56}

Many pressing environmental issues have not been addressed by new legislation. The phenomenon of global climate change and the corresponding need for control of carbon dioxide emissions are not seriously disputed.\textsuperscript{57} What is missing is the initiative necessary to begin to address the problem. There is little question that the Endangered Species Act’s narrow focus on individual species


\textsuperscript{53} The one piece of potentially significant legislation that Congress was able to pass recently was the Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 (2003).


does not provide a sensible basis for biodiversity preservation from either an environmental or an economic perspective,58 but no meaningful legislative reforms have been possible. Renewable energy resources are now, in light of rising prices and increased demand, becoming viable, potentially significant sources of energy.59 But here too, Congress has been unable to pass comprehensive legislation capable of promoting these new opportunities. The maintenance of the legislative status quo, notwithstanding the need for statutory revisions, underscores the depth of legislative paralysis.

Finally, congressional inactivity cannot be justified on the ground that the legal issues Congress faced grew more difficult over time. Under this view, in the early years, Congress addressed the easy issues—the proverbial “low-hanging fruit”—and the legislators are stumbling now, decades later, only because they can no longer avoid the hard choices. This explanation is doubly flawed.

First, there was nothing “easy” about the policy choices that Congress made in enacting the first generation of environmental laws. To be sure, Congress passed the buck in terms of much of the regulatory detail, but the legislators were well aware of what they were trying to accomplish, and the changes they mandated in industrial practices were no less than revolutionary in their impact. Moreover, as the regulatory programs matured, Congress did not shy away from engagement in those details, as witnessed by the passage of ever-more-detailed laws through the 1980s up to the Clean Air Act Amendments of 1990.

The second flaw is that low-hanging fruit remain in many areas of pollution control and natural resources conservation law. The opportunities for innovative federal legislation capable of yielding significant improvements in environmental quality are no fewer now by orders of magnitude than in the 1970s. New scientific information, changing technologies, and the changing nature of the U.S. and world economy all create new opportunities and support reforms in existing programs established based on now-outdated assumptions.

For instance, our economy is no longer so exclusively driven by the kind of traditional industry and manufacturing facilities that served as and remain the primary focus of federal pollution control laws. Ours is an economy that is increasingly dominated by the service industry, and driven by consumer demand. This pronounced shift makes existing regulatory approaches misdirected in certain respects and creates new opportunities, such as widespread use of eco-labeling laws to help inform (and sway) consumer demand.60 Existing information technology, beyond contemplation by legislators in the 1970s, produces extraordinary opportunities for new, creative approaches, including

58. See Bruce Babbitt, Bush Isn’t All Wrong About the Endangered Species Act, N.Y. TIMES, Apr. 15, 2001, § 4, at 11.
those designed to influence consumer demand. 61 Likewise bolstered by technological innovation are tradable emission programs that, when carefully and appropriately targeted, offer the possibility of significant improvements in environmental quality at lower economic cost. 62 Yet, unlike earlier, fully engaged Congresses, no reforms or creation of new approaches have been forthcoming. What is currently missing from the lawmaker equation is congressional capacity.

II. ENVIRONMENTAL APPROPRIATIONS LAW

The legislative paralysis that shut down what had been an exceedingly constructive lawmaking dialogue between the authorization committees in Congress and the executive branch did not, however, result in a complete legislative vacuum. With the stalling of Congress’s normal avenues for environmental lawmaking, a second type of legislation has quietly established its dominance over environmental law: appropriations legislation. As described by one lobbyist, appropriations legislation “has become the vehicle of choice for passing major policy decisions that could not otherwise get through Congress.” 63 But, rather than a cause for celebration based on its potential to fill a troublesome lawmaking gap, the rise of environmental lawmaking by appropriation is better perceived as a cause for concern.

Simply stated, the legislative process surrounding appropriations legislation does not provide for the kind of meaningful public debate and deliberation that proved so important in the fashioning of the comprehensive environmental protection laws of the 1970s and 1980s. Indeed, the very reason appropriations legislation has risen in significance is its ability to feed off the perverse political incentives created when Congress is otherwise incapable of passing needed laws through the normal authorization committee lawmaking processes. The upshot has been the kind of ad hoc, incoherent lawmaking resulting from closed-door appropriations deal-making that is of questionable efficacy for any area of law, but especially for environmental law because of its widespread distributional consequences. Congress has displayed no ability to engage in the deliberate policymaking essential to thoughtful resolution of the difficult eco-


63. Pope, supra note 47, at 872 (quoting Chip Dennerlein, Alaska Regional Director for the National Parks and Conservation Association).
nomic, social, and moral issues raised by environmental lawmaker.

A. TWO LAWMAKING TRACKS

Since the Civil War, Congress has had two distinct tracks for enacting legislation: the authorization track and the appropriations track. The theory behind the distinction is clear even if it has not survived in actual practice. Authorization legislation is what creates a federal program, while separate appropriations legislation is what is needed to fund the program’s actual operation.64

Congressional authority over appropriations is firmly grounded in Article I, Section 9 of the Constitution, which expressly confers on Congress the power over the purse: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”65 The Framers’ decision to confer such extraordinary power on Congress was deliberate and has far reaching policy implications. No matter how otherwise plenary the executive branch authority, including the President’s role as Commander-in-Chief, only Congress can provide that separate branch with the necessary monies. The Framers’ clear aim was to guard against executive branch overreaching in any respect.66

Ever since the creation of the two tracks, however, there has been a constant tug-of-war for legislative dominance between the appropriations and authorization committees. Each has, at varying times, prevailed over the other.67 The

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64. For example, Congress can enact legislation authorizing the Pentagon to develop a new weapons system, but whether that weapons system is actually developed will depend on Congress’s subsequent passage of the annual appropriations legislation necessary to fund the production process. See Renae Merle, Military Jet Faces a Fight to Fit In; Changing Defense Needs Likely to Limit F/A-22 Raptor Production, WASH. POST, Apr. 19, 2005, at E1. Similarly, Congress can pass legislation authorizing the Department of the Interior’s Fish and Wildlife Service to develop programs for the recovery of endangered species, see 16 U.S.C. § 1533(f) (2000), but unless Congress also enacts annual appropriations necessary to fund those programs, the recovery efforts will not, in fact, occur.


66. See Kate Stith, Congress’s Power of the Purse, 97 YALE L.J. 1343, 1344 (1988). But see Gregory C. Sidak, The President’s Power of the Purse, 1989 DUKE L.J. 1162, 1163 (arguing that the Constitution provides the President with the authority to “obligate the Treasury provided that Congress has failed to appropriate the minimum amount necessary for him to perform the duties and exercise the prerogative given him by Article II of the Constitution”).

67. There are four different kinds of appropriations bills. The “regular appropriations bill” includes appropriations for the upcoming fiscal year. There are thirteen regular appropriations bills, covering the appropriations for different parts of the federal government. The budget for EPA, for instance, is included in the regular appropriations bill for “Veterans Affairs, HUD-Independent Agencies.” When the amounts appropriated by a regular appropriations bill prove insufficient for a particular program or activity, then Congress may decide to enact a different kind of appropriations bill, called a “supplemental appropriations bill,” to provide additional funding. A third type of legislation, “continuing appropriation” or “continuing resolution,” is the name used to refer to a bill that Congress passes not because a regular appropriations bill was too little but instead because Congress has failed altogether to pass a regular appropriations bill in a timely fashion. The continuing bill therefore provides stopgap funding necessary to avoid the shutdown of agency operations or programs until Congress can act on the regular bill under consideration. Finally, a “permanent appropriations bill” is money that funds governmental activities on a permanent basis without the need for new congressional action each year. Such an appropriation is typically contained within substantive legislation. See ALLEN SCHICK, THE FEDERAL
primary authorization committees in the House over federal environmental law and policy matters currently include the House Committees on Agriculture, on Energy and Commerce, on Resources (previously Interior and Insular Affairs), and on Transportation and Infrastructure. The primary authorization committees in the Senate include the Senate Committees on Agriculture, Nutrition and Forestry, on Energy and Natural Resources, on Environment and Public Works, and on Commerce, Science, and Transportation. These committees (along with their differently named predecessor committees) are the committees that historically have been responsible for considering legislation intended to create federal environmental law and policy, holding hearings on such legislation, and reporting back to the full Congress any bills the committee favors for passage. They drafted and orchestrated the passage of laws such as the Clean Air Act; Clean Water Act; Surface Mining Control and Reclamation Act; Comprehensive Environmental Response, Compensation, and Liability Act; and Endangered Species Act.

In both the Senate and House, however, there is a distinct legislative track for appropriations that falls within the jurisdiction of a Committee on Appropriations in each chamber and a Committee on the Budget for each chamber. The appropriations committees are responsible for reviewing executive branch requests for budgetary appropriations needed to carry out the laws of the United States, including federal environmental protection laws; the budget committees are responsible for establishing the total amount of discretionary spending. For obvious reasons, the amount of money that Congress budgets and then appropriates for a particular program, as a practical matter, determines the extent to which that program is implemented. By eliminating funding, Congress can effectively eliminate a program without changing the underlying substance of the law authorizing the creation of the program in the first instance.

The political dynamics surrounding the two types of legislation—authorization and appropriations—are very different. The decision whether to pass authorizing legislation, such as the Clean Air Act, its detailed amendments, or any other kind of substantive legislation, is almost always entirely discretionary. Because relatively few federal statutes, including environmental laws, have sunset provisions, congressional failure to pass a new authorization statute preserves the status quo. The absence of legislative action does not create a disruptive legal vacuum. Congress need not formally reauthorize either the

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68. In 1974 the appropriations committees' domination of the appropriations track was reduced when Congress established a distinct set of House and Senate "budget" committees concerned with budget preparation. The practical effect of the budget committees' work is to constrict the authority of the appropriations committees by fragmenting authority between the two sets of committees. See ASNER J. MIKVA & PATTI B. SARRIS, THE AMERICAN CONGRESS: THE FIRST BRANCH 270 (1983); SCHICK, supra note 67, at 189–92.
Clean Water Act or the Clean Air Act after a statutorily prescribed number of years for those laws to remain in effect. Hence, those seeking to pass a new authorization statute invariably face the heavy burden of demonstrating why a change is necessary.

Precisely the converse is true when appropriations legislation is at stake. There is enormous political pressure to pass annual appropriations legislation because, absent its passage, the status quo is not maintained. Instead, there is a very real threat of a complete shutdown of the federal government. If the deadline for the annual appropriations bill is not met, then to avoid a shutdown Congress must at a minimum pass a continuing resolution to appropriate funds for a few more weeks or months as necessary to keep an agency in operation until passage of the annual appropriations bill.69

The settled political wisdom is that the voters tend to blame members of Congress for such an obvious failure of the legislative process.70 Legislators cannot, therefore, so easily avoid a difficult issue by letting a legislative proposal before them lapse without any formal action. Constituents need federal programs to be funded and would likely be displeased with Congress and their elected representatives should a logjam cause Congress to miss a deadline for the passage of necessary federal appropriations legislation. For this reason, the normal option available to legislators to avoid passing a controversial measure, delaying formal congressional action, is not readily available or at least politically palatable when appropriations are at issue.71

But for that same reason, appropriations legislation presents a lawmaking opportunity to legislators who are nonetheless willing to hold such legislation hostage in a game of legislative “chicken” with their colleagues. Because everyone knows that Congress must pass such legislation, it is tempting to try to attach incidental provisions that otherwise might lack the political momentum (or even majority support) necessary for passage. These so-called “appropriation riders” can be variously targeted. The classic appropriation rider is negative in its thrust and strictly pertains to the expenditure of funds. It declares that the agency may not spend any of the monies Congress is appropriating to engage in a specific activity described in the legislation. This type of rider is often described as a “limitation rider” because it limits the executive branch from

69. On rare occasions, such temporary shutdowns have in fact occurred. See Martin Tolchin, How the Federal Budget Was Shaved by $4 Billion, N.Y. Times, Dec. 13, 1981, § 1, at 40 (describing the threat of a government shutdown averted through compromise between President Reagan and congressional leaders). During the 104th Congress in 1995, the federal government was compelled to shut down repeatedly until November because the White House and the congressional leadership were at loggerheads over the budget. Government offices were closed, including the national parks. The provision of essential government services was disrupted. See David E. Sanger, Government Shutdown Cost Is Estimated at $700 Million, N.Y. Times, Nov. 23, 1995, at B20.
engaging in certain activity by denying the funds necessary for its undertaking. For instance, a rider may provide that an agency cannot spend money to buy equipment or to hire personnel for a particular office. More substantively, a rider may provide that the agency cannot spend money to prepare a study on a specific topic, to propose a rule on a specific topic, to make final a pending proposed rule, to implement a final rule, to make a legal argument in court, or to appeal a pending case.\textsuperscript{72}

Appropriation riders may strive, however, to be more affirmative in their substantive reach. The terms of such a rider, sometimes referred to as a "legislative" rider, may instruct an agency to take a certain implementing action. They may also amend existing law in some respect. By directing certain agency action, the amendment may curb agency discretion that otherwise existed. By requiring agency action to satisfy some existing statutory standard, the substantive amendment basically provides that, as a matter of law, the extant legal standard is satisfied, even if absent that amendment, the agency plainly would not be fairly deemed to be in compliance.\textsuperscript{73}

Finally, riders may be simultaneously more substantive and more detached from any pretense of a relationship to the appropriation bill and the expenditure of funds. The only thing that is "appropriations" about them is that they are attached to an appropriations bill. A rider can, in effect, be nothing less than authorization legislation attached to appropriations legislation. Such a rider may confer on an agency authority to initiate activities and programs that the agency previously lacked authority to undertake.\textsuperscript{74} In other words, the legislation may in every respect be the kind of law traditionally considered the province of an authorization committee. Yet, it becomes law once Congress passes the appropriations legislation to which it is attached and the President signs it into law (or Congress overrides a presidential veto).

Appropriation riders are not, strictly speaking, supposed to be substantive at all. Both the House and Senate have rules that are designed generally to prevent appropriations legislation from being substantive in nature.\textsuperscript{75} This procedural bar, however, does not apply to continuing appropriations resolutions and is subject to congressional waiver.\textsuperscript{76} It is not easy for Congress to tie its own hands. Where there is a political will, which appropriations

\textsuperscript{72} See infra text accompanying notes 105–37.

\textsuperscript{73} See infra text accompanying notes 99–101.

\textsuperscript{74} See infra text accompanying notes 138–41.


\textsuperscript{76} See Walter J. Oleszek, Congressional Procedures and the Policy Process 736 (5th ed. 2001); Patti A. Goldman & Kristen L. Boyles, Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy, 27 Envtl. L. 1035, 1037 (1997); Sandra Beth Zellmer, Sacrificing Legislative
proposals invariably supply, members of Congress will work hard to find a political way.

Because of the deeply entrenched nature of the perverse political incentives created by appropriations legislation, it is not surprising that the controversy surrounding them is longstanding and certainly not unique to contemporary areas of law like environmental law. Their history, and associated controversy, can be traced back to the early days of the Republic, while their use to dictate substantive policy has significantly increased in recent decades in both number and intrusiveness. No one political party and no particular ideology have been more likely to promote or to reject the use of appropriations riders. All appear to have willingly embraced the strategy when it has served their purposes, whether Republicans or Democrats, liberals or conservatives. Each has also condemned the other for doing the same. The precise identity of the condemnor or the condemnee has turned on whose political ox is being gored at the moment rather than on the willingness of anyone to adhere to a principled approach to lawmaking over the longer haul.


77. The potential for such circumvention of the normal lawmaking processes has long been present, which is no doubt why there were complaints about the tendency of appropriators to legislate as long ago as the early nineteenth century by John Quincy Adams. Adams argued in favor of restricting appropriations committees to simple appropriations, without any accompanying substantive baggage. See Oleszke, supra note 76, at 735; see Zellmer, supra note 76, at 486 & n.162.

78. During the nineteenth century, appropriation riders concerned matters such as war powers, federal election supervision, and the potential extension to U.S. territories of the U.S. Constitution and federal revenue laws. See Neal Devins, Regulation of Government Agencies Through Limitation Riders, 1987 Duke L.J. 456, 462. In the twentieth century, the use of appropriation riders increased significantly. In the 1940s, there was sufficient concern about riders that the Joint Committee on the Organization of Congress recommended their cessation. Their use, however, steadily increased during the 1960s and 1970s, prompting Congress in 1983 to adopt some procedural hurdles aimed at making congressional adoption of riders harder, but those hurdles have largely proved ineffective. See id. at 462–71. The subject matter of appropriation riders during the 1960s and 1970s and early 1980s was far flung. They pertained to abortion services, military policy, school busing, legal aid, school prayer, and worker safety standards. Riders, including both funding limitation riders and substantive policy riders, were not the exclusive province of any one area of the law, political power, or ideology. See id. at 463, 466–68, 488–93.

79. For instance, while in contemporary times it is liberal Democrats who complain the most about Republican Party use of riders, some of the more extraordinary riders were those that Democrats, when they controlled Congress, inserted into appropriations legislation during the Reagan Administration in the 1980s. These riders sought to limit internal deliberations on certain topics within the executive branch and to bar government officials from publicly advocating certain policy positions. These riders, described by one commentator as "muzzling laws," included prohibitions on various agency officials advocating or even studying proposals such as the sale of the Bonneville Power Administration, and a bar on the expenditure of funds for a Justice Department official to present oral argument in the Supreme Court consistent with an amicus brief that the Solicitor General had already filed with the Court in an antitrust case. A series of three riders that Congress enacted in 1988 denied the Federal Communications Commission the use of any funds for the agency's reconsidering or modifying policies pertaining to the availability of racial and gender preferences in broadcast licensing. See J. Gregory Sidak, The Recommendation Clause, 77 Geo. L.J. 2079, 2080, 2128–89 (1989).
B. THE RISE OF ENVIRONMENTAL APPROPRIATIONS LEGISLATION

As the lawmakers efforts of the authorization committees stalled starting in the early 1990s, environmental appropriations legislation has effectively supplanted authorization legislation in Congress. The gap created by the inability of the authorization committees to craft legislation susceptible to congressional enactment has, not coincidentally, prompted its filling by riders attached to appropriations legislation. This phenomenon of environmental appropriations legislation grew slowly at first, but has more recently increased exponentially in size, reach, and substantive ambition.

1. Environmental Riders and TVA v. Hill

In the 1970s and 1980s, the appropriations committees often played significant roles, but the authorization committees almost always dwarfed them. They worked in the shadow of the authorization committees, which set the substantive agendas by enacting new laws that were increasingly detailed and prescriptive over time. The appropriations committees operated mostly at the margins of those agendas, creating tension whenever they denied or restricted funds for statutorily authorized programs.

EPA’s budgets for its first decade of existence are illustrative. EPA commenced operations in December 1970 and the entire EPA budget for Fiscal Year 1972 is reproduced in less than one page in the Statutes at Large. The congressional budget provides EPA, with almost no elaboration at all, with $441,400,000 for operations, research, and facilities and an additional $2 billion for the Federal Water Pollution Control Act’s construction grants program. The same is true ten years later for EPA’s budget for Fiscal Year 1982. EPA’s budget was reproduced on little more than one page. Almost completely absent from the language of either of these two early appropriations laws is any congressional effort to micromanage or otherwise revisit the propriety of the agency activities previously authorized by legislation drafted by congressional authorization committees and enacted by Congress.

The Department of the Interior’s appropriations bill for the Fiscal Year ending in 1972 was likewise exceedingly short compared to modern Interior appropriations bills—numbering only ten and one half pages. It included a handful of isolated riders, as individual members of Congress sought to influence Interior’s management of discrete parcels of public lands in response to the requests of specific constituents. These kinds of appropriations riders were fairly modest in their reach. They adhered strictly within the bounds of a traditional rider provision that purports to say how money should be spent. They

81. See id.
84. See id.
made no effort to change or otherwise modify in any respect substantive law.

By the mid-1970s, however, pressure began to build on the appropriations side of Congress to assert itself more aggressively in environmental lawmaking. No doubt one of the most famous early efforts to affect substantive environmental policy through the appropriations process involved the efforts of both the House and Senate Appropriations Committees to allow for completion of the Tellico Dam Project in Tennessee, although the dam’s operations would cause the extinction of an endangered species, the snail darter, in violation of the Endangered Species Act of 1973 (ESA).85

In *Tennessee Valley Authority v. Hill*, 86 however, the Supreme Court rejected the efforts of the House and Senate Appropriations Committees to override what the Court concluded was the clear intent of Congress, as expressed in the Act’s plain language, to forbid the Tellico Dam’s completion.87 The Court ruled that several pieces of legislation that purported to appropriate funds for an activity could not render lawful an activity that otherwise violated federal law. Such repeal by implication was always disfavored, the Court reasoned, but especially inappropriate when the basis of the claimed repeal is appropriations legislation.88

While “recogniz[ing] that both substantive enactments and appropriations measures are ‘Acts of Congress,’” the Court stressed that the “latter have the limited and specific purpose of providing funds for authorized programs.”89 The Court elaborated that “[w]hen voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden.”90 Otherwise, the Court continued, “every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure.”91 According to the Court, “[n]ot only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need” by making clear that no provision in any appropriation bill “changing existing law” shall “be in order.”92

Neither Congress nor the Court, however, has since emulated the purist approach to substantive legislation that the Court expressed in *TVA v. Hill*. Indeed, Congress ultimately provided for completion of the very water project

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87. See id. at 189–93.
88. See id. at 190.
89. Id.
90. Id.
91. Id.
92. Id. at 190–91 (quoting RULES OF THE HOUSE OF REPRESENTATIVES, supra note 75, at 33 (Rule XXI(2)), citing STANDING RULES OF THE SENATE, supra note 75, at 11 (Rule XVI (4))).
at issue in *TVA v. Hill* with an appropriations rider that arguably raised all the problems highlighted by Chief Justice Burger's opinion. After efforts to obtain a substantive exemption through authorization legislation failed, the House passed the Tellico Dam Rider with a voice vote and without any explanation or reading of its contents. Although members of both the House and the Senate subsequently expressed their outrage at the tactic after learning of its passage and the Senate refused to pass the rider, the Conference Committee added it back in and the Congress ultimately enacted the legislation with the rider intact. Notwithstanding widespread opposition to the rider, once it was just a small part of a much larger appropriations bill needed to fund programs across the government, the political cost of its removal was too high because of the need to achieve passage of the rest of the bill.93

2. The Expansion of Environmental Appropriations Legislation

The environmentalists' most famous win in the Supreme Court perversely established an effective legislative roadmap for those seeking exemptions from the nation's environmental laws. Environmental appropriation riders proliferated in the years after Congress effectively overrode the strict application of the Endangered Species Act to the Tellico Dam as mandated by the Supreme Court. Quite often, those seeking to enlist riders to pursue their political ends were those who, like in the Tellico Dam controversy, hoped to procure an exemption from or at least to delay a pollution control or natural resource preservation requirement.94 But sometimes environmentalists also took advantage of riders to promote their goals. For instance, during the early 1980s, members of Congress initiated a practice (still repeated more than twenty years later) of including riders in Interior's appropriations bills that restricted and/or barred oil and gas leasing of specified areas of the Outer Continental Shelf by then-Secretary of the Interior James Watt.95

Although sides representing opposing ideologies perceived the political opportunities presented by appropriations riders, those in Congress who favored relaxation of environmental restrictions were the more successful over time.

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95. See id. § 109, 95 Stat. at 1404 ("No funds provided in this title may be expended by the Department of the Interior for the procurement, leasing, bidding, exploration, or development of the Point Arena, Bodega, Santa Cruz, or Eel River basins of the Outer Continental Shelf Lease Sale numbered 53."); see also Philip Shabecoff, *Wilderness Area Battle*, N.Y. TIMES, Jan. 27, 1983, at D23. No less than the Office of Management and Budget was another target of a threatened appropriations rider promoted by environmentalists and their supporters in Congress. See Judith Havemann, "Defunding" OMB's Rule Reviewers: Hill Panel Deletes $5.4 Million Budget, WASH. POST, Jul. 18, 1986, at A17; Judith Havemann, *House Moves to Wipe Out OMB Unit: Review Staff Accused of Second Guessing Agencies*, WASH. POST, Jul. 31, 1986, at A23.
Senator Mark Hatfield of Oregon championed the effort in the mid-1980s and early 1990s by promoting a series of riders providing for increased timber harvesting in old-growth forests.96 The riders became bolder and more direct over time. A 1990 appropriations rider went so far as to identify by name a district court ruling that had enjoined old-growth timber harvesting based on several environmental laws. The rider sought, in practical effect, to overturn that court ruling.97 Although the Ninth Circuit struck down the rider as an unconstitutional usurpation by Congress of judicial power,98 the Supreme Court unanimously reversed. In Robertson v. Seattle Audubon Society,99 the Court held that Congress had not unconstitutionally usurped the judicial function by enacting the appropriations rider because that rider did not purport to define existing law but instead merely to amend it, which is entirely within the legislature’s prerogative.100 The Court also rejected the lower court’s alternative ruling that an appropriations rider could not accomplish such a substantive change.101 The practical effect of the Court’s ruling in Seattle Audubon Society was to provide promoters of appropriations riders with yet another roadmap, this time for ensuring their constitutional validity.

The potential made possible by Seattle Audubon Society soon began to be realized when, following the mid-term congressional elections in November 1994, the Republican Party suddenly found itself in leadership positions in both congressional chambers for the first time in four decades. At first, the Republican Party leadership sought to seek substantive reform of federal environmental law through the authorization committees,102 but it fairly quickly learned that its majorities were too thin and its own political party too split to succeed in that


97. The rider both directed timber harvesting in the Pacific Northwest and further provided that its directive “is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al. v. F. Dale Norton . . . and the case Portland Audubon Society et al. v. Manuel Lujan . . . .” The rider even provided that the guidelines adopted pursuant to the rider “shall not be subject to judicial review by any court of the United States.” See Robertson v. Seattle Audubon Soc’y, 503 U.S. 429, 435 n.2 (1992).

98. See Seattle Audubon Soc’y v. Robertson, 914 F.2d 1311, 1317 (900).


100. See id. at 438–40.

101. See id. at 440.

manner. Those early efforts at authorization legislation became bogged down in lengthy hearings at which members of Congress in the Democratic minority sought to assert their prerogatives as committee members, including the presentation of competing witnesses.

In 1995, seventeen appropriations riders tied to EPA's budget became a major focal point of controversy. These riders sought, among other restrictions, to "prevent the agency from enforcing or implementing storm water permits, combined sewer overflows permits, wetlands rules, effluent limitation guidelines, pretreatment standards, new source performance standards, or new or revised water quality standards under the Clean Water Act", "suspend EPA rule-makings [under the Clean Air Act] that would have affected refineries, the oil and gas industries, and the incineration of hazardous waste", and prevent EPA "from requiring facilities to submit data under the Emergency Planning and Community Right-to-Know Act of 1986." Although most of those proposed riders did not become law, they dominated the environmental law debate in both chambers, and Congress ultimately did pass several significant riders during the 1990s.

103. Environmentalists then had the advantage that the senior Republican on the powerful Senate Committee on the Environment and Public Works who succeeded to become Chair of that Committee under the 104th Congress was Senator John Chafee (R-RI). Senator Chafee hailed from Rhode Island and represented a tradition of Republicans who were staunch supporters of demanding environmental protection requirements. See Adam Clymer, John Chafee, Republican Senator and a Leading Voice for Bipartisanship, Dies at 77, N.Y. TIMES, Oct. 26, 1999, at B10.


107. Id.

108. Id.

109. See In the Senate, Cleanup Time ..., WASH. POST, Sept. 9, 1998, at A18; Legislation by Stealth, N.Y. TIMES, Aug. 2, 1999, at A14; Sly Riders, WASH. POST, Jul. 7, 1998, at A12; Tim Weiner, Battle Waged in the Senate Over Royalties on Oil Firms, N.Y. TIMES, Sept. 21, 1999, at A20. One rider, included in emergency supplemental appropriations "for the Department of Defense to Preserve and Enhance Military Readiness," rescinded $1.5 million from amounts available to the Department of the Interior under the Endangered Species Act for making determinations that a species is endangered or threatened or for designating its critical habitat. The same rider also broadly provided that none of the remaining appropriated funds may be made available for "making a final determination that a species is threatened or endangered or that habitat constitutes critical habitat." Finally, guarding against the possibility that a court order might, in effect, result in Interior's taking such action, the rider instructed that "[t]o the extent that the Endangered Species Act of 1973 has been interpreted or applied in any
Likely the most controversial rider of the mid-1990s was the so-called “Timber Salvage Rider,” which Congress enacted in 1995. That rider effectively suspended the application of environmental laws such as the National Forest Management Act and Endangered Species Act and required the harvesting of healthy and ecologically important timber on public lands. The nominal stated purpose was the prevention of fire and insect infestation, but the rider’s actual reach was far broader in geographic and substantive scope. The rider was deliberately written and presented in a manner that prompted considerable confusion regarding its precise legal effect. According to some reports, members of the House had to vote on the legislation even before the full text was available. But even once known, the import of the rider’s language was not clear. Some in Congress—and even in the White House when the President signed the legislation after initially vetoing it—thought the rider affected only a relatively small amount of national forest. Once construed by the courts, however, the rider’s impact was in fact quite sweeping, indeed devastatingly so for environmentalists, because it resurrected previously cancelled timber sales. The title of the relevant legislation to which the Timber Salvage Rider was attached—the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act—also underscores the political impracticability of a presidential veto, even when there was such uncertainty about the rider’s adverse environmental consequences. Those supporting a suspension of environmental restrictions on timber harvesting had strategically linked its passage with relief for the victims of the Oklahoma City bombing.

110. Goldman & Boyles, supra note 76, at 1043–48; Zellmer, supra note 76, at 476.
111. See N.W. Forest Res. Council v. Pilchuck Audubon Soc’y, 97 F.3d 1161, 1165 (9th Cir. 1996) (holding that Timber Salvage appropriations rider effectively resurrected previously cancelled timber sales); N.W. Forest Res. Council v. Glickman, 82 F.3d 825, 835–36 (9th Cir. 1996) (holding that Timber Salvage appropriations rider did not require the release of sales for only fiscal years 1989 and 1990, but extended the sales over a larger time frame).
112. See Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City,
Not surprisingly, the success enjoyed by the proponents of the Timber Salvage Rider further accelerated the use of riders in environmental appropriations legislation during the remainder of that decade and since. The Defenders of Wildlife, a national environmental public interest organization dedicated to the protection of native wild animals and plants in their natural communities, has compiled since 1998 a list of what it describes as "Anti-Environmental Riders" on appropriations bills. According to that compilation, in 1998, Congress considered fifty-five and enacted forty-two anti-environmental riders for fiscal year 1999; in 1999, Congress considered seventy-two and enacted fifty-three anti-environmental riders for fiscal year 2000; and in 2000, Congress considered seventy and enacted forty-eight anti-environmental riders for fiscal year 2001.

The riders in both 1998 and 1999 covered a wide range of pollution...
control and natural resource management matters. But it was in 2000 that the use of environmental appropriations riders reached unprecedented heights in number, reach, and substantive import as members of Congress sought to rein in what they perceived to be attempts by Clinton Administration appointees to push regulations through before leaving office.\textsuperscript{120}

Congress responded, for example, with appropriations riders applicable to fiscal year 2001 that placed substantive limits on Interior’s promulgation of final rules pertaining to hard rock mining,\textsuperscript{121} restricting the agency’s ability to establish a new national wildlife refuge in a given location,\textsuperscript{122} barring the use of funds to study or implement any plan to drain Lake Powell or otherwise reduce it to a level below that necessary to operate the Glen Canyon Dam,\textsuperscript{123} denying the Secretary funds to implement a final rule that would have revised the formula for determining fair market value for rental fees for fiberoptic communications rights of way on federal lands,\textsuperscript{124} and directing the Secretary to designate Anchorage, Alaska, as a “port of entry” for the purpose of Section 9(f)(1) of the Endangered Species Act, “[n]otwithstanding any other provision of law.”\textsuperscript{125} There were similar appropriations riders aimed at efforts by the Forest Service to regulate national forests and by EPA to regulate air and water

contemplated by the federal grizzly bear recovery plan. Other riders effectively granted permits to certain activities, such as one rider that reissued some grazing permits in the absence of NEPA analysis and another that granted fishing permits. Finally, Congress further passed riders that allowed specific roads to be constructed on public lands including wilderness areas and forests; impeded acquisition of parkland in Alaska; relaxed high occupancy vehicle restriction on New Jersey highways; and eliminated environmental reviews for specific federal highway construction projects. See Sly Riders, supra note 109, at A12; ANTI-ENVIRONMENTAL RIDERS ON FY 1999, supra note 117.

119. In 1999 Congress enacted riders to Interior’s annual appropriations primarily applicable to agency operations during fiscal year 2000. These riders largely relaxed and otherwise modified environmental protection restrictions. For instance, some riders allowed for grazing without environmental review, facilitated the dumping of mining wastes on federal lands, limited the need for surveys of wildlife prior to timber sales, and renewed grazing permits in the absence of accompanying environmental restrictions. See Legislation by Stealth, supra note 109, at A14. One Senate rider that Congress passed repeatedly since 1995 barred the Department of the Interior from making final regulations that would have required oil companies to pay higher royalties for oil recovered from drilling on federal land. See Pub. L. No. 106-31, § 3003, 113 Stat. 57, 90 (1999); Tim Weiner, supra note 109, at A20. Another rider barred the Secretary of the Interior from issuing and finalizing rules to revise environmental restrictions on hard rock mining on public lands until at least 120 days after accepting public comment on a National Academy of Sciences report on the proposed rule, which itself had been authorized and required by an omnibus and emergency appropriations act earlier in 1999. See Pub. L. No. 106-31, § 3002, 113 Stat. 57, 89–90 (1999). Yet another rider sought to overturn the legal effect of a recent opinion issued by the Solicitor of the Interior, which had imposed limits on the millsites for hard rock mining on public lands. See id. § 3006, 113 Stat. at 90–91. A host of other enacted riders applied to the work of EPA. They imposed limits on the Agency’s addressing of the problem of global climate change, its investigating of Title VI civil rights claims, and its promulgating Clean Water Act stormwater regulations. See ANTI-ENVIRONMENTAL RIDERS ON FY 2000, supra note 117, at 15–16.

120. See generally ANTI-ENVIRONMENTAL RIDERS ON FY 2001, supra note 117.
122. See id. § 127, 114 Stat. at 945.
123. See id. § 126, 114 Stat. at 944.
124. See id. § 340, 114 Stat. at 998.
125. Id. § 129, 114 Stat. at 946.
pollution. Because certain powerful members of Congress opposed more demanding environmental controls on timber harvesting in the national forests, Congress denied altogether any funding for the salaries and expenses of the Office of the Under Secretary for Natural Resources and the Environment "for the supervision, management, or direction of the Forest Service or the Natural Resources Conservation Service until January 20, 2001." The rider's aim was no less than to shutdown the operations of one specific federal official.

At EPA, Congress barred the use of any funds for the implementation (or preparation for the implementation) of the Kyoto Protocol on Global Climate Change; the implementation or administration of the Agency's interim guidance for investigating complaints filed pursuant to Title VI of the Civil Rights Act of 1964, the promulgation of a final regulation pertaining to pesticide tolerance processing fees; the designation of areas as nonattainment for ozone under the Clean Air Act; for publicity designed to "support or defeat legislation pending before Congress, except in presentation to the Congress itself;" or for the determination of a final discharge point for an interceptor drain for the purposes of Clean Water Act regulation. Appropriations legislation further modified existing Clean Air Act law by easing a restriction applicable to areas not in compliance with national ambient air quality standards, and it modified Superfund by removing existing deadlines on EPA's preparation of a health assessment and allowing for health studies other than those called for by the Act itself.

Because so many of the riders in the late 1990s resulted from policy conflicts between the Republican leadership in Congress and the Clinton Administration, one could fairly have anticipated a decrease in the number and substantive

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128. See id.
129. See id. § 423, 114 Stat. at 1441A-55.
130. See id. § 427, 114 Stat. at 1441A-56.
131. Id. § 425, 114 Stat. at 1441A-54.
132. See id. § 603, 114 Stat. at 1441A-84 to 85.
134. See Pub. L. No. 106-377, Tit. III, 114 Stat. 1441A-40 (2000). In what proved to be an extraordinary pas de deux of political one-upmanship, Congress also sought to deny EPA the funds necessary to promulgate final water pollution control regulations opposed by the agricultural industry. See Pub. L. No. 106-246, 114 Stat. 511, 567 (2000). At the time of the rider’s passage, EPA was just weeks away from completing an ambitious rulemaking under the Clean Water Act on which the Agency had been working for several years. The Administration managed to avoid the effect of the rider’s ban on rule promulgation—even though Congress passed the rider before the EPA Administrator had made final the regulations of concern to industry—by having President Clinton delay formally signing into law the appropriations bill for several days (the maximum allowed). The delay allowed EPA Administrator Carol Browner to sign the final regulations a few hours before the President signed the appropriations bill into law. See 65 Fed. Reg. 43,586–670 (July 13, 2000); The EPA Strikes Back, Wash. Post, Jul. 13, 2000, at A26. The regulations, accordingly, became effective, although the rider did ultimately delay their implementation (and the current Administration has since abandoned the Clinton EPA revisions). See 66 Fed. Reg. 41,817 (Aug. 9, 2001); 68 Fed. Reg. 13,608 (Mar. 19, 2003).
significance of appropriation riders since President Bush took office in January 2001. Unlike in the late 1990s during the Clinton presidency or in the late 1980s during the senior Bush presidency, there was not a divided government at the very outset of the George W. Bush Administration and therefore potentially less need for Congress to try to micromanage the executive branch.\textsuperscript{135}

There is, moreover, some support for the proposition that such an overall decrease has in fact taken place, at least in the context of environmental law and policy. Whatever its absolute accuracy, the compilation of “Anti-Environmental Riders” prepared by the Defenders of Wildlife suggests the existence of a significant decrease in riders during the first full year of the Administration of George W. Bush. According to that compilation, while Congress enacted forty-two, fifty-three, and forty-eight “anti-environmental riders” in 1998, 1999, and 2000, respectively, that number dropped by approximately one-half to twenty-three during 2001.\textsuperscript{136} Because, however, appropriations bills remain the only viable legislative lawmaking option available for those interested in reforming environmental law, significant substantive lawmaking is still occurring and may well be beginning to increase steadily in number again. The Consolidated Appropriations Resolution, enacted by Congress in 2003, included more than thirty-five separate appropriations riders applicable to various activities of the Department of the Interior, Forest Service, and Army Corps of Engineers.\textsuperscript{137}

3. Appropriations Legislation as Authorization Legislation

Beyond the multiplicity of discretely focused riders, one now also routinely finds in appropriations legislation what is, in effect, comprehensive authorization legislation pertaining to a specific topic. To be sure, these riders are not the equivalent of a massive comprehensive piece of legislation such as the Clean Air or Water Acts of 1977, or the Superfund legislation of 1980. But, they still amount to significant authorizing legislation. They consist of multiple provisions over many pages and they are no different from the kind of legislation that would have, decades ago, been presumed appropriate for congressional enactment only after the relevant authorization committee had debated its terms, held hearings, subjected the language to possible amendment, and formally reported it out of committee for plenary consideration by the full Congress.

One recent, prominent example was Congress’s inclusion of the “Information Quality Act” in a massive 2001 appropriations bill for “Treasury and General


\textsuperscript{136} \textit{Anti-Environmental Riders on FY 2002}, supra note 117, at 1.

Government Operations.”138 This Act completely blurs any possible remaining distinction between the substantive scope of appropriations and authorization legislation. The traditional distinction, of course, was that the former was limited to the appropriation of funds for the implementation of laws enacted by the latter. Appropriations measures could not create new legal authorities and authorization measures could not appropriate funds for federal agency expenditure, even for statutorily mandated federal programs. In the Information Quality Act, however, Congress—through an appropriations bill—authorized and required the Office of Management and Budget (OMB) to undertake a significant rulemaking to establish procedures to ensure the “quality, objectivity, utility, and integrity of information . . . disseminated” by the federal government.139 Although it may sound innocuous, the potential reach and impact of such a rulemaking are both wide and deep. The Act could affect a vast array of governmental actions, including, for example, substantive rulemakings dependent on scientific information (such as environmental protection rules) and agency reports on environmental impacts released to the public.

A rationalization of the use of scientific information could, depending on the nature of the OMB regulations ultimately promulgated, be entirely positive by promoting a more rational, coherent use of science, or instead paralyze agency regulation efforts by encumbering the use of science. Environmental protection rules in particular are, by their nature, dependent on uncertain scientific information. It is unavoidable. Any OMB requirement, therefore, that requires agencies to rely only on scientific information with particularly high confidence levels of certitude could dramatically delay or altogether prevent many environmental regulations and reports.140

Notwithstanding its potential significance for environmental law and policy, Congress enacted the Information Quality Act with very little public discussion. As an appropriations rider, there were not any committee hearings on the substance of the rider at which proponents and opponents could have testified, allowing for a meaningful consideration of the proposed law’s substantive import and potential practical impact. There was no formal authorization committee report on the statutory terms. Nor was there any debate on the floor. There is consequently a virtual vacuum of any congressional guidance in contemporaneous legislative reports or otherwise on the meaning of the essential terms of this significant Act now open for OMB interpretation.141

139. Id. at 2673A-154.
141. See Shapiro, supra note 140, at 345, 374. Review of other recently enacted appropriations bills likewise reveals other examples of detailed authorization provisions contained in appropriations legislation. The Consolidated Appropriations Resolution of February 20, 2003, included the Moccasin
4. Committee Report Directives

Finally, all of these different kinds of formal riders, expressed in the language of the statute itself, are not the only significant way that members of Congress (as opposed to Congress itself) instruct an agency regarding the expenditure of funds. Members of Congress also now regularly include specific directives in the legislative appropriations committee report that accompanies and explains the legislation. According to former federal agency officials at EPA and the Department of the Interior, including those who served in both Democratic and Republican administrations, these officials generally treat that report language as the almost legal equivalent of statutory language absent compelling circumstances.\textsuperscript{142} If a congressional appropriations committee report provides that money should be spent on a particular activity or, conversely, not spent on that activity, the agency generally obeys that instruction. The fact that the relevant language is mere legislative history, lacking any formal status of law, is apparently not controlling.

In light of the modern debate concerning the relevance of legislative history in the construction of statutory language, federal agency acquiescence in this practice is simultaneously astounding and revealing. Current members of the Supreme Court sharply disagree about the relative weight, if any, the judiciary should provide different forms of legislative history in statutory construction.\textsuperscript{143} So too, do many prominent academics, and their scholarly disputes have produced a rich body of legal commentary.\textsuperscript{144} Yet, it should be relatively safe to


\textsuperscript{143} See E-mail from Ruth Bell, former Associate General Counsel, U.S. Environmental Protection Agency (October 17, 2005) (on file with author); E-mail from Jonathan Cannon, former General Counsel, U.S. Environmental Protection Agency and Professor of Law, University Virginia School of Law (October 17, 2005) (on file with author); E-mail from E. Donald Elliott, former General Counsel, U.S. Environmental Protection Agency (October 17, 2005) (on file with author); E-mail from Gary Guzy, former General Counsel, U.S. Environmental Protection Agency (October 14, 2005) (on file with author); E-mail from John Leshy, former Solicitor, U.S. Department of the Interior (October 15, 2005) (on file with author). Former Chief of Staff to Secretary of the Interior Bruce Babbitt, Anne Shields, added the further insight that “agencies often follow report language but it is often because the agency got it in the report in the first place.” E-mail from Anne Shields, former Chief of Staff, Secretary of the Interior Bruce Babbitt (July 24, 2004) (on file with author).


\textsuperscript{144} See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (exploring liberal, legal process and normative theories of statutory interpretation, including the use of legislative history); John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 675 (1997)
presume that protagonists on neither side of that legitimate judicial and scholarly debate would embrace the notion that a federal agency should treat such specific committee report language as the equivalent of a statutory command possessing the force of law.

Most tellingly, the legislative committee report does not serve as an interpretative aid in the construction of statutory language that Congress in fact has enacted. These are not circumstances where the statutory language says, for instance, that the agency may not fund certain types of pollution remediation and the accompanying legislative report provides guidance about what kinds of “pollution remediation” were of congressional concern. These are instead circumstances where the relevant statutory language says nothing at all on topic. Nonetheless, the legislative report, entirely on its own initiative, includes its own laundry list of demands concerning what the agency can and cannot do. Whatever weight one may or may not believe legislative committee report language should serve as an aid in interpreting language enacted into law, one threshold proposition cannot be gainsaid: a committee report cannot add language to a statute. But that is just what legislative appropriations committee report language routinely does, and apparently with the acquiescence of the relevant federal agency.

For instance, a legislative report of the House Appropriations subcommittee responsible for EPA’s fiscal year 2001 budget included language directing EPA not to clean up contaminated sediments in rivers until after completion of a National Academy of Sciences study.\textsuperscript{145} Under existing law, EPA could do so upon concluding that the contamination presented an “imminent and substantial endangerment” to human health or the environment.\textsuperscript{146} Although broadly applicable to EPA cleanup authorities, the impediment to EPA action directed by the appropriations committee report language was designed to benefit the General Electric Company, which was then disputing EPA’s plans to clean up sediment from the Hudson and Housatonic rivers that EPA claimed General Electric had contaminated with PCBs.\textsuperscript{147}

Similar directives can be found in the reports accompanying appropriations legislation applicable to other federal agencies, including both the Forest Service of the Department of Agriculture and the Fish and Wildlife Service of the Department of the Interior. The House Interior Appropriations subcommittee

\textsuperscript{146} 42 U.S.C. §§ 6973, 9604, 9606 (2000).
\textsuperscript{147} See ANTI-ENVIRONMENTAL RIDERS ON FY 2000, supra note 116, at 15.
issued a report, accompanying the Forest Service appropriations legislation for fiscal year 2001, that "direct[ed] that the road funding allocation [be] sufficient to provide needed road support to maintain the timber sales and salvage program at the fiscal year 2000 target level." According to the Defenders of Wildlife, that directive amounts to "a massive increase in logging subsidies at great expense to the environment due to foregone road maintenance and decommissioning." Another provision, in the same appropriations committee report, instructed the Fish and Wildlife Service to allow the U.S. Air Force to use specific areas of a National Wildlife Refuge, notwithstanding the incompatibility of such use with the conservation purposes for which the Refuge had been created. Similar examples can be found in legislative reports in prior years.

The obvious question raised is why federal agencies comply with these directives when it is clear that they formally lack the force of law. The answer lies in the agency's working assumption that an agency cannot afford to risk angering the legislative committee that is primarily responsible for its current and future appropriations. As described by one commentator:

What gives the appropriations reports special force is not their legal status but the fact that the next appropriations cycle is always less than one year away. An agency that willfully violates report language risks retribution the next time it asks for money. It may find this year's report language relocated to the next appropriations act, thereby giving it even less leeway than it had before. Or it may find the next time that the appropriations committees' guidance is more detailed and onerous or that its appropriation has been cut.

Former federal agency officials confirm that explanation. They did not dare risk incurring the wrath of members of Congress on congressional appropriations committees, or their staff, who possessed jurisdiction over their budgets in future years. The committees are too powerful to ignore, even if that requires agencies to treat committee report language as binding law. Hence, if a member of Congress fails in his effort to include rider language in the bill itself,

151. In March 2005, the public learned how one Senator had succeeded in inserting language in an appropriations committee report that had effectively compelled a federal agency to give a grant of three million dollars to one of the nation's richest Indian tribes, when the governing statute provided that those funds should be received by impoverished Indian tribal schools. See Susan Schmidt, Tribal Grant Is Being Questioned, Senator Who Had Dealings with Lobbyist Abramoff Pushed for Award, Wash. Post, Mar. 1, 2005, at A1.
152. Schick, supra note 67, at 238.
153. See supra note 142 and accompanying text. One former federal official who generally agreed with this assessment of the significance of appropriations legislation added, however, that sometimes she thought that the agency's own staff took advantage of the significance of appropriations legislation and, to that end, sometimes worked with congressional staff to have certain language included in the legislation or accompanying committee report.
he may seek to achieve the same result by placing the identical language in the committee report. The dominance of environmental law and policy by the appropriations legislative process becomes, therefore, even more complete.

III. DEMISE OF DELIBERATIVE DEMOCRACY IN ENVIRONMENTAL LAW

As described above, congressional lawmaking in environmental law has undergone a gradual, yet radical transformation since the dawn of the modern era of environmental law in the early 1970s. During the first two decades, the congressional authorization committees dominated the field as they engaged in an ongoing collaboration with the executive and legislative branches in a maturation of environmental law. Although the collaborative effort was marked by both cooperation and conflict, the result was a series of increasingly comprehensive and detailed natural resources and pollution control laws that, notwithstanding significant gaps and no doubt some overreaching, have proved very successful.

Since the early 1990s, however, the role of Congress in environmental law has markedly shifted. The authorization committees have proved incapable of sustained constructive lawmaking efforts and have been replaced by the appropriations committees and appropriations legislation, which now dominate federal environmental law and policy. The shift from environmental authorization to environmental appropriations legislation has serious procedural and substantive repercussions for environmental law. These repercussions derive from the very significant differences in the legislative process applicable to appropriations rather than authorization legislation, with serious implications for the transparency of the lawmaking process as well as for the degree to which interested members of the public may both participate in and influence the legislative outcome.

The environmental appropriations legislative process is not, therefore, just an alternative track to the same substantive legislative end. No doubt because it was not originally conceived as a suitable track for the drafting and consideration of comprehensive regulatory programs, the same kinds of procedural safeguards that apply to authorizations legislation do not apply to appropriations legislation. These procedural safeguards do make a difference in the result, as is


155. Apparently, however, it does not even require anything as formal as language in a legislative report to prompt a federal agency to change its implementation of a statute in potentially significant ways not dictated by any statutory language. A recent empirical examination of the relationship of congressional committee membership, including appropriations committee, to federal agency implementation of the Endangered Species Act concluded that the agency responded to the individual concerns of those members. See J.R. DeShazo & Jody Freeman, The Congressional Competition to Control Delegated Power, 81 Tex. L. Rev. 1443, 1468 (2003). The authors concluded that the effect was potentially so pervasive that "members of oversight and appropriations committees can essentially replace a national approach adopted in federal law with a policy patchwork of policy decisions that affect districts unevenly because they cater to member interests." Id. at 1507.
well established by contrasting the environmental authorization legislation that Congress regularly passed until the early 1990s with the environmental appropriations legislation that Congress has since enacted.

A. PROCEDURAL DIFFERENCES

While both authorization legislation and appropriations legislation are plainly "laws" of the United States, requiring passage by both legislative chambers and, absent a congressional override of a veto, a presidential signature, the appropriations process is procedurally distinct from the authorization process in several significant respects. These differences, moreover, have significant ramifications for the kind and substance of the laws that are produced.

First, neither the House nor the Senate requires that the authorization committees that have jurisdiction and programmatic expertise over the subject matter of a rider separately consider or otherwise pass judgment on the merits of the rider. The only committee that reviews the legislation, if any does at all, is the relevant subcommittee on appropriations. As a result, the congressional committee that is supposed to possess the broader policy expertise plays no necessary role. This includes members of Congress who chose to serve on the authorization committee because of their heightened interest and/or expertise in the subject matter, as well as committee staff, many of whom may possess years of relevant background in the subject matter.

Under normal procedures, the members of that authorization committee and its staff are not able to hold hearings on the rider, formally vote as a committee on the merits of the rider, or otherwise modify the rider's language. Therefore, the authorization committee's ability to ensure the wisdom of a proposed appropriations rider in light of any comprehensive legislation previously reported out by that committee and favorably acted on by Congress is sharply circumscribed.

Members of Congress and committee staff on an appropriations committee or subcommittee do not possess the degree of focused substantive expertise and experience on substantive environmental issues as possessed by an authorization committee and its professional staff. For instance, the subcommittee of the House Appropriations Committee that has historically had jurisdiction over EPA's annual appropriations is not concerned just with EPA.\(^{156}\) The subcommit-

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tee is responsible for holding hearings on the budgets of the Department of Veteran Affairs, the Department of Housing and Urban Development, and eighteen miscellaneous independent agencies, including EPA.157 That House subcommittee has a total of only six committee staff for that entire jurisdiction. The corresponding Senate subcommittee similarly has only six employees in total. By contrast, the House Standing authorization committee (Energy and Commerce) with primary jurisdiction over environmental matters, including EPA, has sixty-one staff, and it is one of only several standing committees in the House that shares jurisdiction over EPA. Its Senate counterpart, the Senate Committee on the Environment and Public Works employs approximately fifty staff members.158

The same contrasting numbers in professional staff and apparent depth of substantive expertise exist when one compares the House and Senate standing appropriations and authorization committees with jurisdiction over the Department of the Interior and natural resource policy. The House and Senate appropriations subcommittees with jurisdiction over the appropriations of the Department of the Interior employ approximately six and seven subcommittee staff respectively. The House Committee on Resources, which is the House’s primary standing authorization committee with jurisdiction over Interior (but not the only such committee), employs approximately sixty-one committee staff, while the Senate Energy and Natural Resources Committee employs approximately forty-five committee staff.159

In short, there is no reason to suppose that the two different kinds of committees possess remotely similar degrees of relevant policy expertise in the substantive details of environmental pollution control and natural resource management policies. The converse is true. There is every reason to suppose that they do not. It is fair to presume that the substantive environmental policy expertise possessed by an appropriations committee staff is minimal when

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157. The other agencies include the Agency for Toxic Substances and Disease Registry; American Battle Monuments Commission; Cemeterial Expenses; Army; Chemical Safety and Hazard Investigation Board; Community Development Financial Institutions; Federal Consumer Information Center; Consumer Product Safety Commission; Corporation for National and Community Service; Council on Environmental Quality and Office of Environmental Quality; Court of Appeals for Veterans Claims; Federal Deposit Insurance Corporation—Office of Inspector General; National Aeronautics and Space Administration; National Credit Union Administration; National Institute of Environmental Health Sciences; National Science Foundation; Neighborhood Reinvestment Corporation; Office of Science and Technology Policy; and Selective Service System. See Press Release, House Committee on Appropriations, supra note 156.


159. See supra note 158.
compared to that possessed by the several authorization committees’ staff; appropriations committee staff expertise lies elsewhere (such as budgets and spending rates).

This is not an incidental loss in substance. One of the primary reasons congressional standing committees were created in general and the authorization committees in particular was the potential for such committees to provide informational expertise that could then be used by the entire legislative body. Indeed, specialization is arguably “the raison d’être of legislative committee systems.”

“Committees, as agents of their parent chambers, exist to investigate, deliberate, apply specialized knowledge, and recommend action.” The process by which committee members and their staff gain expertise on related topics over time promotes constructive dialogue between majority and minority members and their staffs. Shared expertise allows for informed decisionmaking and naturally creates opportunities for political compromise and consensus. For that same reason, shifting substantive policymaking away from committees with such expertise has precisely the opposite effect.

The Committee on Appropriations, moreover, is not necessarily subject to the kinds of congressional rules that seek to promote both transparency and the deliberative process in congressional lawmaking. In the Senate, for example, the Senate Committee on Appropriations, unlike the authorization committees such as the Committee on Environment and Public Works, need not comply with the generally applicable requirement that there be a public announcement of the time, place, and subject matter of legislative hearings. There is similarly no requirement that a complete record be made of all actions, including committee votes. And, perhaps most significantly, the ranking minority Member does not have the right to request witnesses.

Consequently, appropriations hearings rarely, if ever, provide an opportunity for any in-depth consideration of the substantive merits of a proposal. At a typical appropriations hearing, the only witness will be the agency head ready to answer very general questions about appropriations requests, accompanied by heads of various agency offices ready to respond to more specific inquiries. There is no testimony by government officials from other agencies with relevant expertise. There is rarely any significant testimony by nongovernmental experts, stakeholder organizations, or individuals potentially affected by the legislation. While such narrowly circumscribed hearings may make sense when an appropriations committee is considering only an agency’s overall appropriations requests, it makes little sense when the nature of the legislation denominated “appropriations”

162. See Vanderzanden, supra note 96, at 437–38.
163. See STANDING RULES OF SENATE, supra note 75, at 29–31 (Rule XXVI(1)–(4)).
164. Id. at 33 (Rule XXVI(7)(b)).
165. See id. at 31 (Rule XXVI(4)(d)).
tions” is in fact wholly substantive in its policy impact with potentially widespread national implications.

Compare, for example, the witness lists and depth of inquiry for several recent appropriations committee hearings to the witness lists and depth of inquiry when Congress has instead considered the wisdom of enacting comprehensive environmental legislation through the authorization committee track. On Tuesday, March 12, 2002, and April 2, 2003, the Subcommittee on the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies of the House Committee on Appropriations held its hearings on appropriations for EPA for fiscal years 2003 and 2004, respectively. Each hearing lasted one day. EPA Administrator Christine Todd Whitman testified at each hearing, accompanied by twenty agency officials who elaborated as necessary in response to questions posed by members of the committee. EPA also answered in writing a series of follow-up questions. As finally published, each of the hearings covered approximately 200 pages.166

Although the tone of the hearings was naturally friendlier when Administrator Whitman was appearing before a Republican-controlled Congress than it was a few years earlier when Clinton-appointed Administrator Carol Browner was appearing before such a Congress,167 the questions and answers in all of these appropriations hearings were relatively brief. The exchanges in the hearing itself lasted only a few pages at most. And, while the supplementary written answers EPA submitted after the hearing were often longer, the depth of the inquiry remained largely superficial. Not surprisingly, many of the topics raised in the hearings were later the subject of appropriations rider provisions tacked


167. Not surprisingly, the tone of the appropriations committee hearings was decidedly different in 2000 than it was in either 2002 or 2003 because the same political parties were not in control of both Congress and the White House during the earlier time period. In 2000, the Republican Party held the majority in Congress during the final year of office for President Clinton and his EPA Administrator Carol Browner. See Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 2001: Hearing Before a Subcomm. of the H. Comm. on Appropriations, 106th Cong. (2000). There were two days of EPA appropriations hearings rather than just one, and the committee majority leadership was more hostile in its questioning than it was in later years for Administrator Whitman. During the first day, Administrator Browner was the principal witness and during the second day, various Assistant Administrators responsible for different agency offices and programs testified. Individual members of Congress sharply questioned Administrator Browner on the substance of EPA policy. They questioned her, for example, regarding the proper numerical standard for acceptable concentrations of radon in drinking water, see id. at 11–16, the extent to which EPA has “done anything” to prepare for implementation of the Kyoto Protocol on Global Climate Change, see id. at 18, 22–24, the substance of EPA's regulatory initiative to implement the “total maximum daily load” approach to meeting state water quality standards under the Clean Water Act, see id. at 20–22, 38–39, 66–69, the status of EPA's pending enforcement actions against coal-fired power plants for Clean Air Act violations, see id. at 35–36, 63, and the implementation of Title VI of the Civil Rights Act against the States, see id. at 54.
on to EPA’s budgetary legislation.\textsuperscript{168}

Even more fundamentally, any perceivable difference in either the tone or the degree of substantive probing that may have occurred in the Browner and Whitman EPA appropriations hearings is many orders of magnitude less than that which exists between authorization and appropriations committee hearings. A hearing on an agency budget generally lasts one or two days and involves just a few witnesses, all from the government. By contrast, authorization committee hearings will extend not just over days, but weeks, and sometimes months and years, as legislators and their staff take the opportunity to probe at great length into the statutory details of proposed laws. There will be multiple panels of witnesses representing an array of divergent views. Some will support the proffered legislation. Some will oppose it, but for potentially very different reasons. The opposition of some will be based on the belief that the legislation accomplishes too little, while other opponents may well contend that the legislation goes too far. Both the political party in the majority and the political party in the minority will have an opportunity to play a significant role in the legislative hearings, including calling witnesses and asking questions.

The legislative hearings leading up to the Clean Air Act Amendments of 1990 are illustrative. Congress held years of hearings during which it considered and debated proposed federal air pollution control legislation. These hearings began soon after Congress passed comprehensive amendments to the same law in 1977. Considering just the legislative hearings commencing with the 98th Congress in late 1983 and narrowing the focus even more to just those hearings most directly concerned with amending the Clean Air Act, the hearings completely overwhelm comparable appropriations hearings in terms of their breadth and depth. During the 98th Congress (1983–84), the Senate held four days of committee hearings resulting in 987 published pages of hearings, while the House held nine days of hearings, resulting in 4321 pages of hearings.\textsuperscript{169} During the 99th Congress (1985–86), the Senate held six days of hearings and published 1606 pages of hearings, while the House held eight days of hearings.

\textsuperscript{168} See supra text accompanying notes 127–34.

and published 4600 pages of hearings. During the 100th Congress (1987–88), the Senate increased its number of days of committee hearings on Clean Air Act legislation to twenty total days and published 4860 pages of hearings, while the House held fifteen days of hearings, resulting in more than 6500 pages of hearings. Finally, during the 101st Congress (1989–90), during which Con-


gress passed the 1990 Clean Air Act Amendments, the Senate held sixteen days of committee hearings and published 6582 pages of hearings, and the House held twenty days of committee hearings and published 7452 pages of committee hearings. In sum, the 98th, 99th, 100th, and 101st Congresses held a total of

ninety-eight days of legislative committee hearings and published 36,912 pages of committee hearings in its deliberations on possible amendments to the Clean Air Act. When compared to recent appropriations committee hearings, lasting at most two days and amounting to a couple hundred published pages, the policy implications are obvious and mirror precisely what one would forecast given the difference in authorization and appropriations committee staff resources. Appropriations committee deliberations about substantive policy cannot and do not remotely approximate those that result from authorization committee deliberations. There is, accordingly, a huge loss in meaningful deliberations about national policy when the appropriations legislative process is substituted for the authorization legislative process. But of course, that is precisely what appears to have occurred in environmental law during the past fifteen years.

Nor is there any reason to suppose that other parts of the appropriations legislative process, beyond appropriations committee hearings, fill that chasm by providing alternative opportunities for meaningful debate and discussion over substantive policy. Indeed, just the opposite is true. Because riders are often buried deep within massive budgetary and appropriations legislation, even potentially interested lawmakers are unlikely to have any idea that the riders are even at issue when voting up or down on the entire legislative package. Omnibus appropriations legislation can be hundreds, and sometimes thousands of pages long, and riders are often buried within those pages without any index or table of contents to allow for their discovery.\footnote{See \textit{Schick}, supra note 67, at 238.} For instance, the Consolidated Appropriations Act for the Fiscal Year Ending September 30, 2001, which included a barrage of riders, was more than 710 pages long\footnote{Pub. L. No. 106-554, 114 Stat. 2763 to 2763A-710 (2001)} and the October 1998 omnibus budget bill was 3,825 pages long and reportedly weighed approximately forty pounds.\footnote{See Brannon P. Denning \\& Brooks R. Smith, \textit{Uneasy Riders: The Case for a Truth-in-Legislation Amendment}, 1999 \textit{Utah L. Rev.} 957, 958.} The riders may also be deliberately written in a manner that masks their intended effect on particular agency actions.

Whether or not barred by formal procedural rules, as a practical matter legislators frequently have very little time or practical ability to review appropriations or budget legislation to any meaningful extent prior to voting. Members of Congress, their staffs, and interested stakeholders may have just a few hours to review hundreds of pages of proposed omnibus appropriations legislation and they, accordingly, are compelled to pour over the pages in the hope of discover-
ing what is at issue. As with the 1995 Timber Salvage Rider, previously discussed, it can be extremely difficult to discover the existence of a potentially significant rider before a vote must be taken, let alone to evaluate fairly the merits of the rider. Indeed, because of the sheer size of the omnibus budget legislation to which riders are appended, a legislator is hard pressed to vote against the legislation even if she manages to discover a rider to which she is vehemently opposed. There are likely to be too many other important programs that depend on the bill’s passage, which is precisely what happened to members of Congress who felt compelled to vote in favor of emergency appropriations needed to immediately address the Oklahoma City bombing even though it required them to vote in favor of the Timber Salvage Rider, which they opposed, but which was strategically placed within the same legislation.

A narrow amendment that eliminates the offensive rider is also unlikely to be a politically feasible option. Whether or not there is a restrictive rule imposing numerical or temporal limits on floor amendments, the political costs of seeking to obtain such a vote can quickly become too high. Hence, the posture of the bill is such that the only meaningful choice the legislator faces is to vote the entire legislation up or down, and the costs of a negative vote make that option the worst of the two evils. The legislator simply cannot afford the defeat of the entire package of legislation. In this manner, a rider can easily become law even if, given an up or down focused vote, that same rider would plainly have been defeated.

B. SUBSTANTIVE REPERCUSSIONS

Because the significant procedural differences between the appropriations and authorization legislative processes have such a profound impact on the potential for deliberative democracy, it is not surprising that very different kinds of laws result from the two distinct legislative tracks. Those differences, moreover, can be especially problematic for environmental legislation.

Appropriations legislation, as highlighted by recent years, is typically a grab bag of special interest legislation attached to a specific agency’s annual, supplemental, or emergency appropriations bill. As described by one academic commentator, “Congress is in its least deliberative cast of mind in the appropriations process. . . .” The various riders and other appropriations provisions tend to


177. See supra text accompanying notes 110–14.

178. See supra note 114.

179. The resulting political juggernaut is what drove Presidents Reagan, Bush, and Clinton to seek the power to exercise a “line item veto” of isolated aspects of an appropriations bill, which would allow a president to veto a part of a bill but not the entire bill. Although Congress ultimately enacted a statute conferring such authority on the President, the Supreme Court declared it unconstitutional shortly thereafter. See Clinton v. City of New York, 524 U.S. 417, 448–49 (1998).

reflect the discrete policy or parochial interests of many individual legislators whose votes are necessary to secure passage.

There is no particular resulting policy coherence in the final product, which represents an expedient amalgam of individual legislative preferences sharing in common only the simple fact that each is tied to the same bill. It is literally akin to a Christmas tree on which enough members of Congress have hung their favorite ornaments with little regard (or perhaps even knowledge) of what else is on that same tree. Omnibus appropriations legislation is "complex, lengthy and somewhat problematic in part because it was cobbled together in a hurry and without significant public deliberation on all its aspects. But it is also complex, lengthy and somewhat confusing because only in that form could it be enacted."\(^{181}\)

It is not possible, based on such a process, for Congress to achieve the kind of comprehensive and increasingly coherent legislation that had been the hallmark of our nation’s environmental laws. The Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act resulted from years of discussion, debate, and deliberation within Congress, between chambers, and between competing authorization committees with differing perspectives. They each required enormous substantive policy exchanges between branches of government and between those branches and affected constituencies, including industry, environmentalists, affected individuals, and state, tribal, and local governments.

Congress could not have achieved the intricate nonattainment, prevention of significant deterioration,\(^{182}\) or acid deposition provisions\(^{183}\) now present in the Clean Air Act if Congress were confined to the kind of narrowly focused, nondeliberative incrementalism that resists meaningful give-and-take and compromise but which dominates appropriations legislation. Nor could Congress have achieved the revolutionarily innovative land disposal restrictions of the Resource Conservation and Recovery Act\(^ {184}\) or the Clean Water Act’s complex and path-breaking program for regulating point sources of water pollution through a series of technology-, health-, and water-quality-based effluent limitations and standards.\(^ {185}\)

Congress sought in those earlier laws to fashion an approach to environmental protection law that reflected the exceedingly complex nature of ecological problems. Such problems are not readily susceptible to one-size-fits-all regulatory approaches. Different kinds of regulatory techniques are more or less desirable for different kinds of environmental issues. That is why Congress


\(^{183}\) See id. §§ 7651–7651o.


drew distinctions, for example, in statutes like the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act, between point source and nonpoint source pollution; existing, new, and modified pollution sources; major and nonmajor sources; mobile and stationary sources; health-based, technology-based, and cost-based pollution control standards; information disclosure requirements and monetary liability for solid versus hazardous waste management; and distinguished between those federal requirements that should act as ceilings (maximums) and those that should instead constitute floors (minimums).

Laws such as the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act are not made up out of whole cloth in the first instance. The requisite forging occurs only after years of initial statutory experimentation with various regulatory approaches, resulting in both surprising successes and just as surprising failures. Congress must study, frequently over several decades, what an agency has done, including what has worked and what has not worked in the field. Hearings and other less formal techniques for congressional investigations are required to gather the necessary facts. Also necessary is careful assessment of competing submissions by interested stakeholders with very different policy perspectives.

The resulting statutory programs may lack strict coherence in their provisions but they are a far cry from the kind of crazy legislative quilt pieced together in appropriations legislation. To be sure, a comprehensive law like the Clean Water Act is riddled with compromises and aspirational promises made in one part of the law that may be left largely unfulfilled by other parts of the law. But there is at least some modicum of effort over time to craft a unified whole within which the various portions of a comprehensive federal law work together to further a common legislative end rather than the disparate, narrow, and parochial interests of individual legislators.

Nor is it a matter of only theoretical speculation to posit that the congressional track for enacting authorization legislation is more capable of producing comprehensive environmental pollution control laws. The proof of this thesis is in the statutory pudding or, more accurately described, the lack thereof in more recent years. As detailed earlier in this Article, since congressional passage of the Clean Air Act Amendments of 1990 more than fifteen years ago, Congress has passed virtually no major comprehensive pollution control or natural resource conservation laws. The extraordinary, methodical maturation of federal statutory programs witnessed during the 1970s and early 1990s has instead come to an abrupt halt. And in their place is the laundry list of special-interest requests buried in hundreds of pages of unindexed legislative bills with the aim of achieving formal votes without any necessary knowledge of their express terms, let alone their true legal import.

Finally, although both political parties, industry, and environmentalists have each taken advantage of the appropriations process to secure the passage of riders that, if subject to an isolated up or down vote, would likely have failed, there is reason to anticipate that the rise of appropriations riders is substantively
skewed over the long term in favor of an overall relaxation of pollution control requirements. The substantive upshot of environmental appropriations riders is unlikely to be a draw. Instead, the political demand for riders is likely to be disproportionately generated by those concerned about the more immediate, short-term economic costs imposed by environmental protection requirements. These costs provide those seeking to relax environmental laws with a powerful, focused incentive to lobby for the passage of riders, extending to a willingness to offer financial campaign support to those in Congress who prove responsive to their concerns. The beneficiaries of environmental protection requirements are not similarly situated. By their nature, the beneficiaries are more far-flung over space and time (for example, future generations), less organized as a result, and less likely to be willing or able to offer the kind of political support of interest to members of Congress needing to raise funds for a reelection campaign. 186

In sum, in environmental law the Constitution’s first branch has all but abandoned any effort to enlist the tools that justify the primacy of Congress in determining the substance of such important legal rules as those that govern the quality of the air citizens breathe, the water they drink, and ultimately the quality of the natural environment they leave for future generations. As described by one commentator decrying the increasing dominance of appropriations legislation in environmental law, such legislation “erode[s] the very foundation of the democratic model of bicameral, tripartite government by limiting responsive representation that can only result from fully informed debate and decisionmaking.” 187

IV. CONGRESSIONAL REORGANIZATION, THE DEMISE OF BIPARTISANSHIP, AND THE POLITICIZATION OF APPROPRIATIONS IN ENVIRONMENTAL LAW

Academics, principally political scientists, who have studied congressional use of omnibus appropriations legislation, have generally offered several reasons for its rise in recent decades. Foremost are formal congressional reorganizations that have occurred since the early 1970s to address the problem of budgetary deficits, political polarization that has risen in Congress during the same time period, and changes in the practices of party leadership deliberately designed both to increase the partisan nature of appropriations legislation and to use such legislation to enact substantive policy changes otherwise not capable of legislative enactment. These three factors, combined with the general persistence of divided government and the frequency of thin working majorities in the

186. LAZARUS, supra note 6, at 24–28, 47.

House and the Senate, have undermined the potential for legislative agreements based on open negotiation and fair compromise and, therefore, tended to promote ever more extreme and dominant appropriations legislation.¹⁸⁸

A. CONGRESSIONAL REORGANIZATION FOR BUDGETARY PURPOSES

Although there is widespread disagreement about how Congress should organize itself, there is little serious dispute that the legislature’s internal organization has significant effect on the substantive content of the laws that Congress is able to pass. Institutional structure and procedure matter a great deal.

Beyond a few outlines provided by Article I of the Constitution, there are no fixed rules about how Congress organizes itself internally or what procedures it follows in the consideration of legislative bills.¹⁸⁹ It is entirely up to Congress to decide how bills are to be considered and passed, including the use and relative authority of competing committees, the membership of those committees, and the procedures to be followed on the floor for bill consideration and for resolving differences in competing bills passed by the two Chambers. Congress has historically changed its internal structure and rules in order to make it easier or harder to enact certain kinds of laws.¹⁹⁰

For instance, differences between internal organizational rules in effect between the time that Congress passed the Clean Air Act Amendments of 1970 and the Clean Air Act Amendments of 1990 are one reason why the legislative experiences leading up to the passage of those two laws were so different.¹⁹¹ In 1970, under prevailing rules, the legislation was referred to only one House Committee, but when the 1990 legislation was under consideration, the rules

¹⁸⁸. Garrett, supra note 181, at 5 & nn.20–21 (citing Morris Fiorina, Divided Government (2d ed. 1996), and Sarah A. Binder, Can the Parties Govern?, in American Political Parties: Decline or Resurgence? 211 (Jeffrey E. Cohen et al. eds., 2001)).


¹⁹¹. See Sinclair, supra note 190, at 1–3. Professor Sinclair, however, places too much weight on the rule change for the far more protracted and complex consideration the air pollution legislation received in 1990 than in 1970. The two bills were also very different in nature. The 1990 bill was, as previously noted, see supra text accompanying notes 42–43, far more detailed in its substance and as a result the distributional repercussions were far more apparent. In addition, members of Congress, by 1990, were much better aware than they had been in 1970 of what those repercussions could be and their impetus for their own constituencies.
had been changed to provide for joint referral and, accordingly, several different
House Committees and multiple subcommittees considered the bill. 192 Floor
consideration in 1990 was consequently far more complex. After multiple
committees reported very different language, the House leadership had to forge
its own compromise legislation and to impose rules sharply restricting its
possible amendment on the House floor. 193 As part of the compromise, the
House subsequently appointed to the Conference Committee 130 members of
the House from seven different House Committees that claimed jurisdiction
over the bill’s substance. 194 By comparison, only five members of the House
were on the Conference Committee that considered the 1970 bill. 195

Of particular relevance to environmental law, rule changes over the past
several decades have prompted the rise of omnibus legislation, especially
related to appropriations. 196 Congress passed the Budget Impoundment and
Control Act in 1974 197 for the express purpose of changing internal congres-
sional lawmaking procedures in order to make it possible for Congress to rein in
deficit spending. 198 Congress sought to impose more fiscal discipline on itself.
The perceived source of the problem was two-fold: the increased tendency of
authorization committees to secure the passage of entitlement programs (such as
federal welfare and Medicaid laws) that required massive federal expenditures
on a permanent basis outside the annual legislative budgeting and appropri-
tions process; 199 and the failure of distinct appropriations subcommittees to
consider the competing budgetary needs of programs under the jurisdiction of
the other appropriations subcommittees. 200 The Budget Act was deliberately
designed to reduce the authority of the authorization committees and to rein in
more of the appropriations subcommittees by creating a new “Committee on the
Budget” in each chamber. Under the new legislatively mandated procedures,
appropriations committee legislation could not be passed until the chambers had
first passed a “Budget Resolution” that considered the budget as a whole and
that set overall budgetary caps for each appropriations subcommittee. 201 The
Budget Resolution, which is first prepared by the Budget Committee for each

192. See Sinclair, supra note 190, at 1–2.
193. See id. at 2–3.
194. See id. at 3.
195. See id. at 1.
196. See id. at 63–74.
198. See John B. Gilmour, Reconcilable Differences? Congress, the Budget Process and the
199. See id. at 144–45.
200. See id. at 98–101.
201. See id. at 64–76; Sinclair, supra note 190, at 66. After it repeatedly missed its April 15th
deadline for passing the necessary Budget Resolution, Congress changed the rules so that appropriations
committees may now commence working on appropriations prior to passage of the Resolution.
Budget Process Timetable (Feb. 25, 1999), http://www.senate.gov/~budget/democratic/
crsbackground/budgettimetable.html.
chamber, may include provisions regarding changes in substantive law that will be needed to meet the established budgetary caps.\textsuperscript{202} A Budget Resolution is not itself a law, signed by the President, but rather a procedural prerequisite to passage of appropriations legislation and binding within Congress itself. It is no happenstance that supporters of oil drilling in the Arctic National Wildlife Refuge, after years of losses in Congress, ultimately turned to a budget resolution as their legislative vehicle of choice to secure a favorable outcome.\textsuperscript{203}

Under the Budget Act, the two measures that become law are the appropriations legislation and a "Budget Reconciliation Act." The Appropriations Committees prepare the former, now governed by the Budget Resolution. The Budget Committees in each chamber prepare the Budget Reconciliation Act, which consists of the amendments to laws proposed by each of the authorization committees in response to the demands for substantive changes in laws set forth in the Budget Resolution.\textsuperscript{204}

The Budget Act's reorganization of congressional internal procedures relating to the overall budget and annual appropriations has had increasing effect over time and is now substantial. The budget process tends to drive the legislative agenda, crowding out most everything else except under the most compelling circumstances. The authorization committees, in particular, have been significantly weakened. They are less often now the driving force behind legislation and more likely responsive to the demands generated by the budgetary process in the first instance. Authorization committee substantive expertise has become far less important over time because it plays a decreasingly significant role in lawmaking.\textsuperscript{205} For that same reason, members of authorization committees have less incentive to gain such expertise and less reason to hold meaningful legislative hearings than they once did.\textsuperscript{206} The substantive expertise that authorization committees once were able to lend to the drafting of proposed legislation and the oversight of federal agencies in complex areas of law and policy, such as environmental law, is being lost.

More omnibus legislation is also the natural result of the reorganization of the legislative process.\textsuperscript{207} The underlying theory of the Budget Act is that overall fiscal responsibility can best be achieved by tying as many things together as possible. The tough choices demanded by fiscal discipline requires, as a practi-

\textsuperscript{202} See Gilmour, supra note 198, at 64–76.
\textsuperscript{204} See Gilmour, supra note 198, at 107–12; Sinclair, supra note 190, at 66–68. Importantly, the authorization committees are not strictly compelled to adopt the substantive changes called for by the Budget Resolution. They are required instead to approve changes in laws necessary to meet the total spending caps included in the Budget Resolution. If the authorization committee members can agree on a different program to change that will achieve the same budgetary result, they are free to make that proposal instead. The practical difficulties of approving such an alternative, however, are considerable, which is why the Budget Resolution's leverage on the authorization committee is so great.
\textsuperscript{205} See Sinclair, supra note 190, at 227.
\textsuperscript{206} See id.
\textsuperscript{207} See id. at 92.
cal matter, the cobbling together of legislation that addresses the interests of just enough individual members of Congress necessary for a bill’s passage, first in each chamber, and then subsequently of the conference compromise legislation forged between the two chambers. As decades of legislative experience have shown, the inevitable price of such a massive legislative effort is ever-larger omnibus appropriations bills riddled with riders and the demise of the substantive input of expert authorization committees. According to those who applaud the reorganization, however, the value added is nonetheless considerable: the demise of the anti-majoritarian tendencies of authorization committees and the concomitant increase in legislation that reflects the will of the majority on policy priorities yet also compels that majority to exercise necessary fiscal discipline.208

B. DEMISE OF BIPARTISANSHIP

A second major reason for the rise of environmental appropriations legislation is increasing political polarization in Congress. The more politically polarized the debate, the harder it is for members of different political parties, both between branches and within the legislative branch, to engage in the kind of constructive dialogue necessary in the drafting and passage of compromise legislation. Absent one political party possessing a supermajority in both chambers, the only legislation that tends to become enacted into law in a politically polarized atmosphere is legislation that lawmakers are, in effect, compelled to pass, such as appropriations legislation needed to avoid a politically calamitous government shutdown.

The tendency toward gridlock outside of appropriations legislation is significantly increased when political polarization is combined with “divided government.” Political scientists have long debated the impact of divided government because, notwithstanding the obvious obstacle to lawmaking created when opposing political parties must work together to secure the enactment of legislative proposals into law, there have certainly been prominent occasions of significant legislative productivity during divided government.209 Indeed, the environmental laws of the early 1970s are a prime example of when the divided nature of the government may have helped to promote passage of even more ambitious legislation, as Senator Ed Muskie and President Richard Nixon competed for the potential political support of environmentalists.210 That precedent, however, has little bearing on the impact of divided government when, unlike in the early 1970s for environmental law, there is significant political

208. See Gilmour, supra note 198, at 93–94, 234–35.
polarization on a policy matter. When a policy issue is politically polarized, the additional ingredient of divided government will invariably make it harder to overcome the obstacles to lawmaking that such polarization creates.\textsuperscript{211}

The relative thinness of the margin between the majority and minority voting blocs in congressional chambers also affects the extent to which political polarization impedes passage of authorization legislation and therefore indirectly promotes appropriations riders. If one party is plainly and firmly in control of one or both chambers, it is generally that much easier to secure agreement within that chamber on legislation. If the minority party does not have sufficient votes to impede majority passage, then political polarization does not impede the passage of bills. Just the opposite. When the parties are polarized and the majority party enjoys a substantial voting margin in the relevant congressional chamber, the factor of political polarization will make it easier for the majority leadership to rely on party loyalty for the necessary votes.

But, for that reason, the same is not true if the voting margins are very close. When very small numbers of individual legislators can easily threaten to deny a majority to a party leader, those same legislators possess significant political leverage. They can make repeated demands for political payoffs that address their narrow concerns (or those of their constituents). A party leader, however, has only a finite amount of resources that can be deployed to meet those demands. When the demands of a legislator whose vote a party leader needs on one bill pertain to legislative action on a different piece of legislation, a legislative impasse can quickly ensue. Each legislator wants the other to commit first to her part of the political bargain before performing her end of the deal. Hence, the necessary political compromise proves elusive.

Omnibus appropriations legislation becomes a politically attractive way to overcome these hurdles when political polarization is coupled with narrow voting margins. Every individual legislator shares a general political interest in securing the passage of some legislation, lest the government undergo a costly and politically embarrassing shutdown. The omnibus character of the legislation provides a party leader with an opportunity to cobble together a set of disparate provisions that, while not purporting to present a coherent program, does succeed in addressing a sufficient number of individual legislators' narrow concerns to construct a workable voting majority.

During the past several decades of environmental lawmaking, these factors promoting omnibus appropriations legislation have been present. Most important, environmental politics has become increasingly polarized. Leon Billings, who served as Staff Director for the Senate Committee on the Environment and Public Works during much of the 1970s, when the first comprehensive air and water pollution control laws were drafted and debated, describes a very different political climate than that which prevails today. According to Billings, "[t]he

\textsuperscript{211} See Binder, supra note 209, at 74, 81.
debate was vigorous, sharp, sometimes humorous, sometimes acrimonious, but always constructive and never partisan.” Russell Train, the first Chair of the President’s Council on Environmental Quality, and the second Administrator of EPA, summed up the political tone during the 1970s in strikingly similar words. Testifying before the Senate Committee on the Environment and Public Works in 1993, Train declared that “during my tenure at EPA, it would have been impossible to have had a more supportive relationship than I had with this committee on a bipartisan basis.”

Members of Congress routinely insist that the level of partisan rancor in Congress has increased dramatically since the early 1990s. It is the rare event when leaders from opposing sides of the aisles are able to work together. Instead, it seems that no issue is sufficiently benign to let slip past an opportunity for one political party leader to harshly denounce members of the opposition. Gone are the legislative statesmen who seemed capable of rising above such harsh political rhetoric. Indeed, in announcing the decision to retire from office, some senior members of Congress have stressed the hostile political climate in Congress as a major reason for not seeking reelection. The increasingly partisan nature of recorded votes in both the House and the Senate illustrate the changing atmosphere. In the early 1970s, Democrat and Republican majorities voted against each other on less than 30% of the recorded votes in the House and on 36% of the votes in the Senate. By contrast, by the time of the 104th Congress in the mid-1990s, the party majorities voted against each other two-thirds of the time, while “the average Republican voted with his party colleagues over 90 percent of the time while the average Democrat did so about 85 percent of the time.”

214. See R.W. Apple, Jr., A Blow to Democrats, N.Y. TIMES, Aug. 17, 1995, at A1 (“That Mr. Bradley and Mr. Nunn, two of the most respected men on Capitol Hill, substantive men with an instinct for compromise, should feel inclined to call it quits is a measure of the political mood here. It is also a sign of the weakening of the bipartisan center in Control, the legislative pool from which majorities on big issues have often been fashioned in the past.”); David E. Rosenbaum, In With the Ideologues, On With the Deadlock, N.Y. TIMES, Jan. 21, 1996, § 4, at 5 (“If the ideological positions of the Democrats and Republicans in Congress in [the early 1970s] were plotted on a graph, the result would be two largely overlapping bell curves. . . If the ideological positions of lawmakers were plotted today, the Democratic coordinates would be bunched on the left and Republican ones on the right. There would hardly be any overlap at all. The polarization is almost certain to be strengthened after this fall’s elections.”).
Environmental law is no exception to that overall trend. The policy positions held by Democrats and Republicans on environmental issues are starker in their opposition, and the contentiousness of public discourse has correspondingly increased. Whatever the underlying cause, the two major parties embrace sharply different starting positions on a wide variety of procedural and substantive matters. They disagree about the extent to which natural resources should be conserved and preserved rather than economically exploited; the role of cost in the setting of pollution control standards; the use of voluntary, incentive-based programs rather than mandatory, enforceable standards; the use of tradable emission policies and other market incentives; the degree to which state governments should be provided flexibility in attaining federal environmental statutory goals and mandates; and the extent to which federal environmental standards should be enforceable through citizen suits.

The votes of Democrats and Republicans on Capitol Hill are, accordingly, more and more divergent. One available numeric touchstone for evaluating trends in partisan politics in environmental law is data compiled by the League of Conservation Voters (LCV). The LCV has tracked the votes of individual members of Congress since 1971 based on the extent to which those members have voted on legislative proposals in a manner favored by the environmental groups that make up the LCV. Each member of Congress is assigned a score for any one session of Congress based on how many times that legislator voted in favor of LCV-favored positions. A score of “100” means that the legislator voted in the manner preferred by the LCV on all those votes, while a score of “0” denotes the converse.

217. Environmentalists may have missed past opportunities to break down the current partisan divide. For example, the absence of positive political return was a reason why both President Richard Nixon in the early 1970s and President George H.W. Bush in the early 1990s, both of whom promoted significant pro-environmental protection measures in the first two years of their respective Administrations, adopted positions more responsive to industry’s concerns during the second half of their terms in office. See Lazarus, supra note 6, at 77, 126–27. Had environmentalists been more able or perhaps even willing to find ways to credit those early Republican Party efforts, today the two parties might not be so politically polarized on environmental issues.
218. See id. at 238–45.
219. See League of Conservation Voters, Scorecard (2005), http://www.lcv.org/scorecard. There are, of course, several potential problems with heavy reliance on the LCV data. The LCV is not a nonpartisan academic entity. It has a political agenda that reflects those of the national environmental organizations that make up the “League.” The scorecard is intended to further that political agenda by placing political pressure on members of Congress to vote in ways that the LCV favors. Those who do are rewarded with high scores and those who do not are punished with low scores, both of which are intended to provide a ready numerical signal to voters who care about the same environmental issues that the LCV cares about. Like any organization with a defined political agenda, it would not be surprising if the LCV were willing and able to design the scorecard in a way that furthers its political mission. For instance, the scorecard is more useful to the extent that it suggests differences between individual legislators rather than similarities. The LCV should, accordingly, be more likely to select environmental votes in Congress that are more rather than less divisive on the theory that they are also more revealing at the margin. Furthermore, there is always the risk that the LCV could deliberately select certain issues and not select others because of a pre-determined desire to curry favor with some members of Congress or alternatively to punish others. For example, if there were a member of
What the LCV scores strongly suggest is that congressional voting patterns on environmental issues have become more partisan and politically divisive over time. Graphs of those voting patterns are reproduced below. The first graph depicts votes by political party in the Senate and the second does the same for the House.

The same general voting trend is reflected in both graphs. In both the House and the Senate, what commenced as a relatively bipartisan political issue in Congress has been steadily transformed into a highly charged partisan topic about which the two major political parties sharply differ. While the difference between the Democratic and Republican parties in voting increased somewhat in the House during the 1970s, a more significant change occurred in the 1980s in the House during the Reagan Administration, because that is when the votes of the two parties systematically began to go in opposite directions. When one party goes up, the other goes down. During the 1990s, the divergence accelerated so much that by 2004, what commenced as a relatively small difference in LCV scores between the two political parties became a huge discrepancy. The contrast is equally dramatic in both chambers.220

What the LCV scores suggest is an increasingly wide and deep partisan divide in environmental law. Democrats and Republicans in both chambers vote principally by party and the two parties are fundamentally at odds on most basic issues of environmental protection law. Notwithstanding the extraordinary past successes achieved by the nation’s environmental laws that the two major political parties joined together to pass and implement, there is very little common ground between those same two parties today concerning environmental law’s future. The unfortunate upshot of the partisan divide has been to promote increasing use of appropriations legislation to address environmental issues, which is a legislative track that not only thrives because of the absence of meaningful deliberation but which is also substantively skewed against long-term environmental protection concerns and in favor of short-term economic demands.

Nor is there any reason, based on the LCV data, to suggest that this legislative pattern will soon be broken. Neither the absence of divided government for the first time in more than a decade nor the fact that the political leadership of both the executive and legislative branches supports major reform of environmental laws is likely to change the existing political dynamic. The

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220. The Senate graph is noticeably more volatile than the House graph. There are many possible explanations for that difference. The most likely, however, would seem to be the simple one that there are far fewer Senators than members of the House of Representatives. Consequently, overall averages are more susceptible to changes in membership in the Senate than they are in the House.
Republican majorities in the Senate and House are not as thin as they were prior to the recent presidential election, but they are still unlikely to be substantial enough to secure passage of major reform legislation through authorization committees. Northeastern Republicans in both chambers are, just as they did in the 104th Congress in 1995, likely to block any major legislative efforts at
comprehensive regulatory reduction. They are the one geographic area that has bucked the overall trend towards policy convergence within both political parties.\textsuperscript{221} The inability of the Senate Committee on the Environment and Public Works to craft a consensus position on amendments to the Clean Air Act is merely the most recent instance of a pattern that has dominated Congress since the early 1990s.\textsuperscript{222} So long as such gridlock disables the authorization committees, the appropriations process is likely to continue to dominate environmental lawmaker.

C. THE (FURTHER) POLITICIZATION OF APPROPRIATIONS

A final cause of the demise of the authorization committees in Congress and the increasing dominance of environmental lawmakership by the appropriations and related budgetary process is that the political leadership in Congress, especially in the House, changed its practices in the 1990s for the deliberate purpose of ensuring just that result. The leadership embraced a concerted strategy to exercise more centralized party control over the appropriations process. The express purpose of the strategy was, moreover, to use the leverage provided by the appropriations process (especially as modified by the budgetary reorganization reforms discussed above) to secure substantive changes in law that could not otherwise be obtained from the standing authorization committees, be passed on the floor, and be able to survive a presidential veto.\textsuperscript{223}

A central part of the House Republican leadership’s strategy in the 104th Congress was its assumption of much greater control over the most powerful “prestige” committees, including the Committees on Appropriations, Budget, and Rules.\textsuperscript{224} To that end, the Speaker declined to follow traditional practices of appointing chairs based on seniority and instead appointed those who were

\textsuperscript{221} See Richard J. Lazarus, A Different Kind of “Republican Moment” in Environmental Law, 87 MINN. L. REV. 999, 1017–18 (2003).

\textsuperscript{222} See Janofsky, supra note 56, at A24.

\textsuperscript{223} See John H. Aldrich & David W. Rohde, The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA 31, 31–72 (Jon Bond & Richard Fleischer eds., 2000) [hereinafter Aldrich & Rohde, The Consequences of Party Organization in the House]; John H. Aldrich & David W. Rohde, The Republican Revolution and the House of Appropriations Committee, 62 J. POL. 1 (2000) [hereinafter Aldrich & Rohde, The Republican Revolution]. These efforts to centralize authority in party leadership are strikingly consistent with what political scientists would predict would occur when, as was the case with the 104th Congress on environmental issues, the two political parties were highly polarized on environmental policy and there was general homogeneity within the majority party. The formal term in political science scholarship is “conditional party government,” which posits that the more homogeneity within a party and the more preference conflict between parties, the more likely it is that party members will grant “stronger powers to their leaders and to collective party organizations, and to support their exercise of those powers in specific instances.” Aldrich & Rohde, The Republican Revolution, supra, at 2.

more loyal to party leadership. For instance, the Speaker appointed as chair of the Committee on Appropriations, Bob Livingston (R-La.), even though he was fifth in seniority on that Committee. The Speaker further abandoned the practice of selecting members of the committee based on seniority and preference in favor of selecting as members those who were more likely to be loyal to the leadership and to leadership policy preferences. The Speaker, accordingly, took the unusual step of appointing a large number of freshman members of Congress to the Appropriations Committee based on perceptions of loyalty.

The impact was profound. No one could, of course, fairly claim that any congressional committee is devoid of politics. Indeed, the notion of an apolitical legislative committee should be an oxymoron. With that caveat, the Appropriations Committees were historically known for being more autonomous from party leadership and the least partisan in their operations. Members of the minority were treated with respect and deference.

The changes made in the 104th Congress appeared to have wholly transformed the House Appropriations Committee's operations. For instance, the number of partisan votes based on roll call committee votes increased dramatically. (A “partisan vote” in this context refers to a vote wherein the majority of each party voted in opposition to each other.) The “frequency of partisan amendments was nearly sixteen times as great in the 104th Congress as the average of the seven Congresses between 1979 and 1992 and over nine times as great in the 104th as in the 103d.” There were only an average of 8.4 partisan votes from the 96th to the 102nd Congress, 14 during the 103rd Congress, and 133 during the 104th Congress.

The leadership’s de-emphasis on seniority in selecting both the chair and committee members, including the appointment of several freshmen, also diminished committee authority by decreasing the collective expertise. With less expertise, committee members were more susceptible to the preferences of party leadership and less able to challenge them. In addition, as it becomes known that seniority is less important, individual members of Congress lose some of

225. See Aldrich & Rohde, The Consequences of Party Organization in the House, supra note 223, at 42 n.9, 48; Aldrich & Rohde, The Republican Revolution, supra note 223, at 11.
227. See Aldrich & Rohde, The Republican Revolution, supra note 223, at 12.
229. See Aldrich & Rohde, The Republican Revolution, supra note 223, at 6 (citing FENNO, CONGRESSMEN IN COMMITTEES, supra note 228, at 177, 200–02, and FENNO, THE POWER OF THE PURSE, supra note 228, at 164).
231. Id. at tbl.2.
their incentive to gain valuable substantive policy expertise.\textsuperscript{232} A related change in the practices of the House Rules Committee magnified the impact of the shift in Appropriations Committee operations. Historically, the vast majority of Rules Committee rules were entirely "consensual," meaning that there was no dispute within the majority and minority of the Committee on the propriety of a particular rule.\textsuperscript{233} For instance, during the 96th Congress, only eight percent of the House Committee rules were nonconsensual.\textsuperscript{234} During the 104th Congress, by contrast, however, the percentage of nonconsensual rules had jumped more than nine-fold to seventy-seven percent.\textsuperscript{235} These changes were, moreover, directly relevant to the use of appropriations riders to secure substantive policy changes in the law. Because such substantive riders are a violation of House rules, they can be ruled procedurally out of bounds when an objection is raised.\textsuperscript{236} The Republican leadership, however, took several specific steps to make it easier for riders they preferred to survive such objections and riders they did not support to be procedurally dismissed. They used the authority of the House Rules Committee to obtain the necessary waivers for those rules they supported.\textsuperscript{237} And, they made it more difficult for riders they did not support to receive a favorable vote, both by blocking efforts in the House Rules Committee to obtain a waiver for such a rider and by making such riders more difficult to introduce by amendment from the floor.\textsuperscript{238}

Nor did the House leadership deny the purpose of these changes. The Majority Leader, Dick Armey, expressly told the chairs of the authorization committees that substantive changes in law were now to be made through the appropriations committees. He informed them that: "You’ll get a lot of stuff

\textsuperscript{232} See Krehbiel, supra note 161, at 142–44.
\textsuperscript{233} See Aldrich & Rohde, The Republican Revolution, supra note 223, at 5.
\textsuperscript{234} Id. at 19.
\textsuperscript{235} Id. The Republican leadership of the 104th Congress, however, did not invent the practice of using House Committee rules more aggressively to serve partisan ends. By the 103rd Congress, under Democratic leadership, the number of nonconsensual rules had increased to one-third. The Republican leadership appears to have taken the approach pursued by the Democratic leadership, under which they purportedly had long chafed, and expanded it several-fold. See id. at 5, 19–20; see also Owens, supra note 224, at 248–49 (describing efforts by Democratic Speakers in the 1980s to decrease committee autonomy in favor of leadership control).
\textsuperscript{236} See supra text accompanying note 75.
\textsuperscript{238} See Aldrich & Rohde, The Republican Revolution, supra note 223, at 14–15. In a related action, the leadership changed the rules to allow only the leadership to make a motion to "rise and report" a bill. This change was important because under House rules, no legislative rider amendments can be offered on the floor until all other business is complete, but a motion to rise and report cuts off the time for consideration of such amendments. By providing itself with exclusive authority to make such a motion, the leadership enhanced its ability to ensure that only substantive appropriations riders supported by the leadership could become part of a bill. See id. at 13 (citing Stanley Bach & Richard C. Sachs, Legislation, Appropriations, and Limitations: The Effect of Procedural Change on Policy Choice (1989) (unpublished manuscript presented at annual meeting of the American Political Science Association) (on file with author)).
done, but using the appropriations process." \(^{239}\) He also made clear that the views of the leadership on substance would be those that prevailed. "Any authorizing language in an appropriations bill would be subject to a point of order if it does not reflect a leadership position." \(^{240}\)

**CONCLUSION: RESTORING DELIBERATIVE DEMOCRACY**

Environmental law is, by its nature, difficult to enact because it is so redistributational in its thrust. Because of the nature of ecological cause and effect, which is spread out over time and space, environmental protection laws naturally tend to impose costs currently on some persons for the benefit of other persons in other locations, sometimes far removed in time and space. \(^{241}\) Enacting such redistributational laws is not easy for any lawmakers system. In the United States, it has resulted only when deliberative democracy is working at its best. Only then are lawmakers able to rise above the near term and more immediate concerns of the moment to establish the kind of broader social vision needed to secure and maintain environmental protection law.

The nation enjoyed just such a lawmaking process, led by Congress with much bipartisan support, for the first two decades of modern environmental law. In the 1970s, Congress catapulted the nation forward with the enactment of a series of statutes. In the 1980s, Congress took the logical next step—immersing itself in the statutory details by learning from and responding to the implementation efforts of federal agencies as well as state and local governments. Congress, accordingly, fine-tuned the laws, backtracking in some respects and filling in details in others. Since the early 1990s, however, Congress has been unable to enact meaningful environmental legislation, and the nation has suffered as a result. The rise of appropriations legislation to fill the gap has only made the problem worse. Environmental appropriations legislation is invariably ad hoc, special interest legislation that lacks any coherent, far-reaching legislative vision and systematically sacrifices long-term interests in favor of short-term needs.

The congressional descent that has occurred during the past fifteen years is undoubtedly not unique to environmental law, \(^{242}\) but the nation’s current inability to address pressing natural resource management and pollution control issues provides reasons for congressional reforms. It will not be easy to break the current legislative logjam. Neither bipartisanship nor great leaders capable of bridging partisan divides can be legislated into existence. What Congress can do now, however, is reform its internal procedures in a manner that promotes

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242. See generally Denning & Smith, supra note 175, at 957–59.
the opportunities for deliberative democracy and reduces the opportunities for its ready circumvention.\footnote{243} If the political conditions in Congress are more amenable to such deliberation and more dependent on those able to create bipartisan coalitions, it may be possible to promote such leadership and even a resurgence of a more bipartisan political dialogue.

Institutions matter. Precisely how Congress organizes its committees, including referral rules, conference committee procedures, voting rules, and amendment rules, has a major impact on the substantive content of the laws that emerge from the legislative process.\footnote{244} Indeed, some of the current problems with legislative riders and decreasing authorization committee authority can be traced to prior institutional reforms. In particular, earlier reforms designed to curb congressional appetites for deficit spending helped to weaken congressional authorization committees, including those possessing environmental expertise, and to promote omnibus appropriations legislation. Further procedural reforms adopted by the Republican leadership in the 104th Congress (some of which were escalated responses to tactics adopted by the Democrats in prior years)\footnote{245} exacerbated the problems. What the currently moribund state of environmental lawmaking in Congress makes plain is that mitigating procedural reforms are now needed to restore some equilibrium. There are several threshold possibilities.

First, Congress could pass internal lawmaking reform legislation designed to limit the use of environmental riders in appropriations legislation. The rules that nominally exist in both chambers to limit riders are mostly ineffective because they are too easily waived. The direct way to address that problem is to make

\footnote{243}{Other commentators have proposed more radical possibilities, including a formal amendment to the Constitution, limiting legislation to a single subject coupled with a requirement that the subject be expressed in the legislation’s title akin to that found in many state constitutions. \cite{Denning-Smith:2004} supra note 175, at 962, 965–67. Others have contended that existing constitutional due process requirements already support courts’ playing a more active role in ensuring that Congress has engaged in the “minimal deliberation” necessary for valid lawmaking by issuing a “suspensive veto,” invalidating a law on a provisional basis, while allowing Congress to reenact the identical legislation but based on a more deliberative legislative record. \cite{Victoria-Goldfeld:2004} Note, Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Practices, 79 N.Y.U. L. Rev. 367, 370 (2004). I have deliberately eschewed such an approach in favor of Congress’s adopting its own internal procedural reforms. While there may well be some legislative due process limitations on lawmaking in extreme circumstances not unlike those suggested by recent Congresses, see \cite{Oliver-Houck:2006} Oliver A. Houck, Things Fall Apart: A Constitutional Analysis of Legislative Exclusion, 55 Emory L.J. (forthcoming 2006), the potential pitfalls and likely unintended policy ramifications of invoking such judicial oversight are, to say the least, considerable. \cite{United-States-v-Lopez:1995} Cf. United States v. Lopez, 514 U.S. 549, 613–14 (1995) (Souter, J., dissenting) (“[R]evision for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court.”); \cite{William-W-Buzbee:-2001} William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 Stan. L. Rev. 87, 119–20 (2001) (criticizing the kind of legislative record review embraced by the Supreme Court in Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), as violating separation of powers norms); \cite{Hans-Linde:-1976} Hans Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 242 (1976) (“The problem with due process of lawmaking lies in the consequences of its violation.”).}

\footnote{244}{Epstein & O’Halloran, supra note 190, at 952–53.}

\footnote{245}{See Owens, supra note 224, at 246–49.}
those waivers far more difficult to accomplish. There is, moreover, congres-
sional precedent for just this kind of procedural reform as well as contemporary
evidence of its effectiveness. In the mid-1980s, the Senate successfully curbed
the ability of legislators to place riders on Budget Reconciliation Bills by
adopting the so-called “Byrd Rule” (named after Senator Robert Byrd).246 The
Byrd Rule bars “extraneous matter” in budgetary legislation, so that any mem-
ber can object to the presence of a rider on that ground.247 There is a detailed set
of rules for determining germaneness. Once a part of a bill is deemed nonger-
mane, it must be removed from the bill absent a three-fifths vote in favor of the
Rule’s waiver.248 The Byrd Rule has repeatedly had major policy effects on the
substance of bills by stripping them of potentially significant legislation, includ-
ing legislation supported by the House.249

A similar rule applicable in the House and the Senate could apply to
appropriations bills in general. Any amendment that is not strictly germane to an
appropriations bill could be subject to procedural objection and removal absent
a three-fifths vote. No doubt some riders would still persist, but the heightened
voting requirements would limit the number and require more congressional
deliberation regarding a rider’s policy merits.

Another procedural reform that could be adopted would be to eliminate the
discrepancy between authorization and appropriations committees in their hold-
ing of hearings on proposed legislation. Those differences may have once been
warranted, based on the assumption that appropriations legislation was limited
in substantive nature, but they no longer are. To the extent that the actual
content of appropriations legislation is all but authorization legislation in name,
similar procedures should apply to both committees. This includes, for instance,
the duration of committee hearings, the nature of the witnesses to be heard at
the hearings, and the right of the ranking Minority Member to request wit-
nesses. By eliminating, moreover, the currently stark procedural advantages of
utilizing the appropriations legislative route, the authorization track will no
longer seem so unattractive. Indeed, given that the authorization committees
have the resources, including expert committee staff, and greater ability to
conduct such hearings, such a rule change may even make some of the
authorization committees, such as the Senate Committee on Environment and
Public Works or the Senate Committee on Energy and Natural Resources, more
attractive fora for congressional deliberations.

Finally, Congress should pass reforms that limit its own ability to pass
omnibus legislation absent an opportunity for its members to discover and
understand a bill’s complete contents. This could be accomplished in a variety
of straightforward and direct ways. There could be requirements, like that found

246. See 2 U.S.C. § 644(b) (2000); see also Sinclair, supra note 190, at 69.
249. See Sinclair, supra note 190, at 69.
in many state constitutions, that bills be limited to one single subject. 250 There could also be related requirements to make it easier to know what was contained within a bill, such as requirements that the bill’s subject be expressly stated in the title of the bill, or that a bill over a certain size include a topical index and/or topical headings. While all of these procedural rules would necessarily be subject to waiver, here too waiver should not turn on mere majority votes. They should require at least a three-fifths majority. It makes a mockery of any notion of representative democracy to require legislators to vote on massive omnibus legislation absent these kinds of procedural safeguards.

It will naturally be difficult for Congress to enact these kinds of self-regulations. But it should not be presumed that it is impossible for Congress to do so. Throughout its history Congress has frequently reformed its lawmaking procedures when a sufficient number of lawmakers are persuaded that existing procedures are hindering their ability to do their work in a responsible and effective fashion. In the 1960s, Congress substantially modified its internal rules, including cloture rules, to allow for the possibility of civil rights legislation. 251 Congressional reform of the lawmaking process for budgetary reform is a more recent example. Congress recognized then that significant procedural reforms were needed to guard against the perverse political incentives that otherwise threatened to sabotage any effort at fiscal discipline. 252 It is also not unprecedented for a political party in leadership to undertake procedural reforms to curb its own appetite for using appropriations riders to achieve changes in substantive law. In the 1970s, the majority party, reacting to a rise in the use of legislative riders, adopted procedural reforms to make it harder to add such riders from the floor, and a reduction then was accomplished. 253

The past two decades of experience with environmental lawmaking support a new set of lawmaking reforms partly as a correction to those earlier reforms that, designed for budgetary reform, have shifted too much of the federal legislative lawmaking authority to the appropriations process. Environmental protection law, not unlike fiscal responsibility, does not come easily to lawmakers. Just as it is all too easy to succumb to the short-term pressures generated by constituents to spend more money in the short-term, leaving future generations to deal with the problem of massive federal deficits, the same can be said for environmental protection. The economic and political pressures on legislators to address the shorter term needs of the present at the expense of the environmental quality of the future is exceedingly difficult to overcome. The temptation is great to acquiesce in demands to fill in a few more wetlands, extract a few more minerals, combust a little more coal, or cut down a few more trees. It is natural for legislators to seek to improve the material wealth of current generations

250. See supra note 243.
251. See Gilmour, supra note 198, at 234.
252. See id. at 223–44.
rather than to make the tougher decisions necessary to address the long-term public health and environmental protection concerns of those not yet born, let alone represented in the electoral process or the marketplace. But that is also precisely why Congress needs to reform its own procedures: to make it harder to succumb to those natural political tendencies.

The challenges presented by demands for environmental legislation are no less pressing today than they were in the 1970s even if the ever-expanding spatial and temporal dimensions of the problems we face tend to mask their immediate presence and urgency. Congress needs to level its own playing field to make it easier to enact and maintain environmental protection laws that address the long-term needs of the nation. Only then will Congress truly be able to fulfill once again the Framers’ vision of Congress as the nation’s “first branch.”