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## Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis

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# SACRIFICING LEGISLATIVE INTEGRITY AT THE ALTAR OF APPROPRIATIONS RIDERS: A CONSTITUTIONAL CRISIS

*Sandra Beth Zellmer\**

## I. INTRODUCTION

The technique of appending substantive provisions to appropriations bills has become a favorite tool of the legislative trade in recent years. Congress has employed appropriations riders to dictate the outcome of public policy issues ranging from abortion to oil development in pristine wilderness areas. Riders have been used with particularly destructive effect to circumvent long-standing environmental policies, especially those involving the use of natural resources and public lands. In many cases, the policies affected were the result of decades of activity in Congress and in the courts, and retain broad public and legislative support. Appropriations riders have also allowed these significant changes in policy to be made without public input or legislative accountability. The policy changes implemented through the appropriations process would likely not survive the scrutiny of natural resources committees and full floor debate. Appropriations riders have mandated dramatic changes in these carefully brokered policies, with highly disruptive effects on the long-term management and the sustainability of the public lands<sup>1</sup> and natural resources.

This Article explores several recent environmental riders and proposed riders, and their likely long-term effects. In particular, it focuses on the effects of the 1995 Rescissions Act<sup>2</sup>—specifically

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\* U.S. Department of Justice, Environment and Natural Resources Division; L.L.M., George Washington University, 1996; J.D., University of South Dakota, 1990; B.A., Morningside College, 1985. Paper submitted in partial satisfaction of the degree of Master of Laws. This Article represents only the views of the author.

1. The term "public lands" includes lands managed by federal agencies with jurisdiction over natural resources: the Department of Agriculture National Forest Service and the Department of Interior Bureau of Land Management ("BLM"), Fish and Wildlife Service, and National Park Service.

2. 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 of 1995, Pub. L. No. 104-19, 109 Stat. 194 (1995) [hereinafter Rescissions Act].

the Emergency Timber Salvage Rider<sup>3</sup>—on the management of natural resources within federal forest lands in the Pacific Northwest. In an attempt to provide relief to communities dependent on logging of public lands, this rider undermined decades of land management planning and overturned policies developed through extended litigation and negotiations between industry, environmentalists, state and local governments, and the executive branch of the federal government. The cumulative environmental effects of the rider are likely to persist long after the “emergency” indicated by the rider has passed. Yet, because of the abbreviated nature of the appropriations process, neither the public nor the legislators who voted on the timber rider were aware of its potentially far-reaching consequences.

This Article argues that the appropriations process is an ill-suited vehicle for formulating major changes in policy and establishing national priorities. Indeed, the repeated abuse of the process to force executive action and curtail judicial oversight has created a serious crisis. This Article examines several possible remedies, including the possibility of stricter judicial scrutiny of legislation passed by rider, as well as the enactment of line-item veto legislation and legislation that would give congressional germaneness rules (limiting the subject matter of provisions that can be appended to a bill) the force of law. Such legislation may be a step in the right direction; however, it may raise constitutional challenges, and, in any event, none of these options would go far enough to prevent future legislative subterfuge. Moreover, as a practical matter, the fact that an interest is deemed a “right” does not necessarily preclude erosion of that right through appropriations riders.

This Article also considers proposals to recognize or create a constitutional right to sustainable public lands and natural resources, or a healthful environment, but determines that they are not the best solution. While such proposals merit further consideration, value-laden amendments find little support in our constitutional structure.

Instead, this Article proposes the passage of a constitutional amendment that prohibits the use of appropriations measures to enact substantive exemptions or changes in the law. A process-ori-

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3. *Id.* at 240–47.

ented amendment would inhibit further legislative incursion on the constitutional checks and balances between political branches. As a result, important public policy decisions, such as environmental priorities, would be based on full and informed consideration of competing interests and long-term effects. Such an amendment would be the most effective means of protecting the right to adequate representation and deliberative lawmaking, which are at the core of a democratic, republican government. It would also protect the environment from the kinds of rider-based attacks that have become an all-too-frequent hallmark of the current legislative process.

## II. PRESENT PUBLIC LANDS POLICY AND LAWS ARE THE CULMINATION OF A CENTURY OF DELIBERATION AND RETAIN BROAD SUPPORT

Today's natural resources laws build upon a century of experience in managing federal lands and natural resources. The conflict between extractive, commodity-based uses and the need to preserve limited natural resources has presented a constant challenge to both legislative and executive decision makers throughout the twentieth century. Existing natural resources laws, "the pillars of federal environmental law"<sup>4</sup>—the National Environmental Policy Act ("NEPA"),<sup>5</sup> the National Forest Management Act ("NFMA"),<sup>6</sup> the Federal Land Policy and Management Act ("FLPMA"),<sup>7</sup> and the Endangered Species Act ("ESA")<sup>8</sup>—represent Congress's considered efforts to resolve these conflicts and balance competing interests. NFMA and FLPMA embody sustained yield and multiple use principles,<sup>9</sup> while NEPA requires public participation and informed decisionmaking.<sup>10</sup> The ESA establishes substantive protections for endangered and threatened species of wildlife.<sup>11</sup> Together, these laws ensure con-

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4. Victor Sher, *Ancient Forests, Spotted Owls, and the Demise of Federal Environmental Law*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,469, 10,469 (1990).

5. 42 U.S.C. §§ 4321-4361 (1994).

6. 16 U.S.C. §§ 1600-1614 (1994).

7. 43 U.S.C. §§ 1701-1784 (1994).

8. 16 U.S.C. §§ 1531-1544 (1994).

9. See *id.* §§ 528-31, 1600(3), 1604(e), (g)(3), 1611; 43 U.S.C. §§ 1701(a)(7)-(8), 1712(c)(1).

10. See 42 U.S.C. § 4332(2); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (9th Cir. 1989).

11. See 16 U.S.C. §§ 1536(a)(2), 1538(a)(1).

sideration of the interrelatedness of natural resources and their ecosystems, and strive to maintain them for future generations.<sup>12</sup>

*A. Long-Standing Natural Resources Laws Strive to Strike a Balance between Preservationist and Utilitarian Views*

Contemporary land use policies have their roots in forestry requirements enacted near the end of the nineteenth century. In 1891, Congress authorized the President to create forest reserves,<sup>13</sup> and millions of acres of forest lands were subsequently reserved from western public lands over the next two decades.<sup>14</sup> The Organic Administration Act of 1897<sup>15</sup> was the first management directive for the national forests, and Congress's first statement of the goal of maintaining a sustained yield from natural resources. It provided that forest reserves were to be established to secure favorable water flow conditions and to furnish a continuous timber supply.<sup>16</sup> Timber harvest was limited to "dead, matured, or large growth trees" marked and designated by a forester.<sup>17</sup>

Planning became a centerpiece of federal forest management under Gifford Pinchot's guidance as Chief of the Division of Forestry, beginning as early as 1898,<sup>18</sup> although formal forest planning was not legislatively required until the mid-

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12. See *id.* § 1604(b),(d)-(e); 43 U.S.C. § 1712(c).

13. See The Forest Reserve Act, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified in scattered sections of 16 U.S.C., 25 U.S.C., 30 U.S.C., and 43 U.S.C.), repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2792.

14. Presidents Harrison, Cleveland, and Theodore Roosevelt added over 50 forest reserves during their administrations. See CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 18 n.57 (1987); J. William Futrell, *The History of Environmental Law*, in ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY 15 (Celia Campbell-Mohn et al. eds., 1993). Not surprisingly, these extensive withdrawals drew serious criticism from the western citizenry. See *id.* A special session of Congress was convened in 1897, resulting in the enactment of the Organic Administration Act of 1897 ("Organic Act"), ch. 2, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473-482, 551 (1994)). Toward the end of the Roosevelt administration, Congress enacted a rider that barred further executive additions to forest reserves. See Futrell, *supra*, at 22.

15. 16 U.S.C. §§ 473-482, 551.

16. See *id.* § 475.

17. *Id.* § 476, repealed by NFMA, *id.* § 1611.

18. See WILKINSON & ANDERSON, *supra* note 14, at 19-23; George Coggins, *The Developing Law of Land Use Planning on Federal Lands*, 61 U. COLO. L. REV. 307, 308, 334 (1990) (detailing origins and current requirements of planning on both forest lands and other public lands).

1970s.<sup>19</sup> Pinchot's long range plans required data collection, creation of natural resource inventories, and assessment of management strategies,<sup>20</sup> much as forest plans do today.<sup>21</sup> In addition, these plans provided a strategy to guide individual land use decisions, and ensured that the sustained yield objectives would be met.<sup>22</sup>

In the early twentieth century, two countervailing schools of thought began to develop with respect to management of public lands: utilitarianism, championed by Gifford Pinchot, and preservationism, associated with John Muir, founder of the Sierra Club.<sup>23</sup> Both sought to preserve forests for future generations, but the utilitarians promoted sustainable commodity production, while the preservationists focused on aesthetics and other non-commodity uses, typically associated with wilderness.<sup>24</sup> This conflict, and the opposing resource management strategies it spawned, continues today.<sup>25</sup>

Contemporary management mandates were established during the 1960s and 1970s, an era during which the preservationist view took hold.<sup>26</sup> The first of these laws was the Multiple-Use, Sus-

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19. See Coggins, *supra* note 18, at 308. The passage of NEPA in 1969 "fore-shadow[ed] formal land planning mechanisms." *Id.*

20. See WILKINSON & ANDERSON, *supra* note 14, at 22-23.

21. See FLPMA, 43 U.S.C. §§ 1712, 1732 (1994); NFMA, 16 U.S.C. § 1604.

22. See Coggins, *supra* note 18, at 308, 319-25, 333-37 (discussing past and present Bureau of Land Management ("BLM") and Forest Service management mandates). "Sustained yield" is defined as "the achievement and maintenance of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of production of the land." 16 U.S.C. 531(b). See generally WILKINSON & ANDERSON, *supra* note 14, at Chapter IV.

23. See Kenneth L. Rosenbaum, *Timber*, in ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY 387 (Celia Campbell-Mohn et al. eds., 1993); Futrell, *supra* note 14, at 20-21.

24. See Rosenbaum, *supra* note 23, at 387, 390. The Wilderness Society and the National Wildlife Federation were both formed in 1935 to advance wilderness values and protect wildlife, respectively. See *id.*

25. For example, the recent reservation of public lands in Utah raised vastly divergent viewpoints. Preservationists praised the creation of the Grand Staircase-Escalante National Monument as "visionary" and "a brave and true act," while county officials and industry representatives labelled it the "most arrogant gesture" ever seen. David Maraniss, *Clinton Acts To Protect Utah Land*, WASH. POST, Sept. 19, 1996, at A1, A10.

26. Environmental issues were brought to the forefront by a number of widely read publications; perhaps the most critical example was RACHEL CARSON, *SILENT SPRING* (1962). For an important work in the natural resources area, see ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 236-39 (1966) ("A land . . . ethic reflects the existence of an ecological conscience, and this in turn reflects a conviction of individual responsibility for the health of the land."). In addition, increased access to national and world events through the media, and the broadcast of photographs of earth from the moon, fostered a new ecological

tained-Yield Act of 1960 (MUSY),<sup>27</sup> which was *unanimously* passed by Congress and added the concept of multiple use to the sustained yield objective of the Organic Act.<sup>28</sup>

Critical natural resources laws, which prioritized preservation and protection over extraction and exploitation, were enacted as well: the Wilderness Act of 1964,<sup>29</sup> the National Historic Preservation Act in 1966,<sup>30</sup> the Wild and Scenic Rivers Act in 1968,<sup>31</sup> the National Environmental Policy Act of 1969,<sup>32</sup> and the Endangered Species Act of 1973.<sup>33</sup> Numerous laws specific to Forest Service and BLM lands were also passed: the Forest and Rangeland Renewable Resources Planning Act of 1974,<sup>34</sup> the Federal Land Policy and Management Act of 1976,<sup>35</sup> and the National Forest Management Act of 1976.<sup>36</sup> Together, these statutes built upon lessons learned over nearly a century of public lands management, striving to strike a balance between divergent viewpoints and ushering in a new era of comprehensive, ecologically based planning open to citizen involvement.<sup>37</sup>

### *B. Despite Recent Polarization, Preservation of the Nation's Resources Retains Broad Support*

The past two decades have witnessed two contrary trends: an intensified hostility to government control over natural resources,

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awareness: "[e]xtraterrestrial exploration . . . [has given] modern man a unique perspective on the earth and his natural environment . . . . [W]e have finally realized that no matter . . . how far afield our explorations take us, and no matter how great our vision, we must always return to earth." Edmund S. Muskie, *Environmental Jurisdiction in the Congress and the Executive*, 22 ME. L. REV. 171, 171 (1970).

27. 16 U.S.C. §§ 528-531 (1994).

28. *Id.* §§ 473-479.

29. *Id.* §§ 1131-1136.

30. *Id.* §§ 470-470w-6.

31. *Id.* §§ 1271-1287.

32. 42 U.S.C. §§ 4321-4370a (1994).

33. 16 U.S.C. §§ 1531-1544.

34. 16 U.S.C. §§ 1600-1687.

35. 43 U.S.C. §§ 1701-1782 (1994). BLM lands in Oregon and northern California are governed by a separate charter that stresses sustained yield management. *See* 43 U.S.C. § 1181a.

36. 16 U.S.C. §§ 1600-1614.

37. These statutes, coupled with the Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559, 701-706 (1994), provide a basis for citizen intervention and judicial review of agency action and strive to balance the perennial conflict between preservationists and utilitarians. *See* MUSY, 16 U.S.C. § 475; NFMA, 16 U.S.C. § 1604.

and a growing sense of urgency to protect the global environment. Private property rights proponents have gained momentum through the Wise Use and Sagebrush Rebellion movements, which advocate privatization of public lands and a dramatically diminished role for federal oversight.<sup>38</sup> Meanwhile, events such as the 1992 Conference on the Environment and Development (the "Earth Summit") signified an international awareness of the relationship between humankind's future well-being and the protection of the global environment.<sup>39</sup> The Summit "marked the emergence" of the "central organizing principle" of the post-Cold War world—namely the task of protecting the earth's environment while fostering economic progress,<sup>40</sup> and ushered in "a new generation of global treaties aimed at promoting sustainable economic progress and healing the relationship between civilization and the fragile ecological system of the earth."<sup>41</sup>

Despite increased polarization between extremists at either end of the spectrum, public support for progress on environmental goals has in general remained steadfast.<sup>42</sup> This support has encouraged continued efforts to resolve differences through compromise and negotiated solutions. The premier example of a successful negotiated compromise is the Northwest Forest Plan, which made major strides toward resolving the decades-long controversy over the northern spotted owl.<sup>43</sup>

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38. See Thomas R. Huffman, *Legislatures and the Environment*, in 3 *ENCYCLOPEDIA OF THE AMERICAN LEGAL SYSTEM* 1313, 1326–27 (Joel H. Silbey ed., 1994). The Wise Use movement gained strength during the Reagan administration, with the appointment of James Watt as Secretary of the Interior. See Denis Hayes, *Environmental Law and Millennial Politics*, 25 *ENVTL. L. REV.* 953, 958 (1995) (Wise Use movement continues to present a "disciplined opposition [to the environmental movement] that displays a robust pride in being 'anti-environmental.'"). For in-depth discussions of this movement, see Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 *ENVTL. L.* 847 (1982); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 *U.C. DAVIS L. REV.* 317 (1980).

39. See AL GORE, JR., *EARTH IN THE BALANCE* at xiii–xiv, 180, 183–84 (Plume ed. 1992).

40. *Id.* at xv.

41. *Id.* at xii.

42. See, e.g., Jessica Mathews, *Prognosis for the Environment*, *WASH. POST*, Jan. 13, 1997, at A17 (noting that even environmentalists have been surprised by breadth and strength of public opposition to the Contract With America's anti-environmental provisions); James Gerstenzang, *Environmentalists See Attacks by Foes Easing in Congress*, *LOS ANGELES TIMES*, Jan. 2, 1997, at A14 (noting that public pressure during the re-election campaign has made it unlikely that the anti-environmental initiatives of the 104th Congress will be repeated).

43. The results of these negotiations are contained in U.S. DEPT. OF AGRICULTURE



This spirit of compromise came to an end with the "Republican Revolution" of 1994, as party leaders sought to implement a "Contract with America" founded in large part on private property rights.<sup>44</sup> Republican leaders in the 104th Congress made strenuous efforts to dismantle decades of environmental law.<sup>45</sup> When their proposals to change the law were unsuccessful in regular legislative channels,<sup>46</sup> riders were attached to appropriations bills.<sup>47</sup> Among those enacted were the salvage timber rider<sup>48</sup> and a moratorium on listing endangered species.<sup>49</sup> Numerous others were proposed, but were ultimately unsuccessful.<sup>50</sup>

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ET AL., RECORD OF DECISION (ROD) FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (1994) [hereinafter FOREST PLAN ROD], discussed in detail *infra* Part III.A. See 59 Fed. Reg. 18,788 (Apr. 20, 1994) (providing notice that the ROD was signed by the Sec'y of the Interior and Dep. Sec'y of Agriculture); see also Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291 (W.D. Wash. 1994) (discussing innovative nature of the Forest Plan, which strove to resolve years of conflict in the Pacific Northwest, and finding that it satisfied environmental laws), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

44. See Christopher Georges, *Wider Property Owner Compensation May Prove a Costly Clause in the "Contract with America,"* WALL ST. J., Dec. 30, 1994, at A8; Marianne Lavelle, *GOP Marches into New Deregulation Battle*, NAT'L L.J., Dec. 19, 1994, at A16; Mary Beth Regan, *The GOP's Guerilla War on Green Laws*, BUS. WK., Dec. 12, 1994, at 102.

45. Secretary of Interior Bruce Babbitt equated the GOP's Contract with America with an "invisible contract" with lobbyists, who have been allowed to "literally rewrit[e] our environmental and resource protection laws." Bruce Babbitt, *Springtime for Polluters*, WASH. POST, Oct. 22, 1995, at C2; see also Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 734, 761 (1996) ("Many would conclude that the Marketplace won the election and that environmental law was the preordained enemy of the Limbaughian majorities that took power. Significantly, industrial lobbyists straightforwardly took over the legislative process in the 104th Congress.").

46. See, e.g., Babbitt, *supra* note 45 (discussing failed efforts to pass legislation opening the Arctic National Wildlife Refuge to oil and gas drilling and mining reform); Gerstenzang, *supra* note 42 (noting that efforts to enact revisions of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994), and the Superfund law, 42 U.S.C. §§ 9601-9675 (1994), were unsuccessful in the 104th Congress); discussion *infra* Parts III-V (describing attempts to enact these and other changes piecemeal through appropriations riders).

47. See discussion *infra* Parts IV.B-C.

48. See Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194, 240-48.

49. See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86. The 104th Congress did not limit its riders to environmental issues; it forayed into numerous other public policy areas as well, such as abortion, immigration, and medical "gag rules." See discussion *infra* Parts IV.B-C.

50. For example, the proposed Appropriations for the Department of Interior and Related Agencies for the Fiscal Year Ending Sept. 30, 1996, House Bill 1977, 104th Cong. (1995), contained numerous riders that would increase logging in the Tongass National Forest, restrict protections for the Mojave National Desert, and curtail or prohibit the Forest Service and BLM initiative to create a Columbia River Basin Ecosystem Manage-

### III. THE 1995 TIMBER RIDER DEMONSTRATES THE ADVERSE CONSEQUENCES OF APPROPRIATIONS RIDERS, AND THEIR DISTORTION OF THE PROCESS OF PUBLIC DEBATE AND INFORMED DECISIONMAKING

The Rescissions Act of 1995 "making emergency supplemental appropriations for additional disaster assistance, for . . . the tragedy that occurred at Oklahoma City" was signed into law by President Clinton on July 22, 1995.<sup>51</sup> An early product of the first Republican Congress in 40 years, the Rescissions Act was considered a "down payment" on deficit reduction<sup>52</sup> and an indication of the new Congress's fiscal resolve.<sup>53</sup>

Included in the Rescissions Act was a provision that had nothing to do with fiscal restraint, but nonetheless demonstrated another priority of the Republican majority. The so-called Emergency Salvage Timber Rider, inserted by Rep. Taylor and picked up by Senator Gorton in the appropriations committees, sought to overturn dec-

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ment Strategy. The bill was vetoed. *See* 141 CONG. REC. H15,057 (daily ed., Dec. 18, 1995). Similarly, the Balanced Budget Act of 1995, House Bill 2491, 104th Cong. (1995), which was also vetoed, *see* 141 CONG. REC. H14,136-37 (daily ed., Dec. 6, 1995), included a rider that would open the Arctic National Wildlife Refuge to oil and gas exploration and development. *See also* discussion *infra* Part IV.B.3.

51. *See* Pub. L. 104-19, § 2001, 109 Stat. 194 (1995). In its original form, House Bill 1158, the Rescissions Act drew the first veto of the Clinton administration, in part because of the inclusion of this rider, as well as objectionable cuts to education. *See* 141 CONG. REC. H5315, H5339-52 (daily ed., May 18, 1995). With respect to the timber rider, the Administration stated that the definition of "salvage" was too broad and opposed the provision that would overturn the existing land management framework under the Northwest Forest Plan:

The carefully crafted balance in the Forest Plan allows for a sustainable timber harvest as well as environmental protection. This Plan was key to the release of a court injunction on logging in the territory of the Northern Spotted Owl and represents a finely crafted compromise that took two years to achieve. The Administration believes that it can expedite Option 9 sales without setting aside the existing land management framework.

*Id.* at 5341. The Act, including the timber rider, was ultimately passed in slightly revised form. *See* Pub. L. No. 104-19, § 2001, 109 Stat. at 240-47 (1995).

52. *See, e.g.*, 141 CONG. REC. H6594 (daily ed. June 29, 1995) (Statement of Rep. Dreier).

53. The Act removed \$16.4 billion already appropriated for governmental operations during the current fiscal year. *See* Dan Morgan & Tom Kenworthy, *Pair of Liberals Block Bill on Spending Cuts*, NEW ORLEANS TIMES-PICAYUNE, July 1, 1995 at A8. Traditionally Democratic priorities, such as low-income housing, summer jobs funding, and federal education programs were particularly targeted by the rescissions process. *See, e.g.*, David Rogers, *Conferees Agree on Spending Cut Bill, Setting Up Confrontation With Clinton*, WALL ST. J., May 17, 1995, at A2.

ades of environmental policy and compromise relating to logging in sensitive old growth forests of the Pacific Northwest. In particular, it attempted to bypass the comprehensive forest management principles of the Northwest Forest Plan—the recently completed and much-publicized outcome of negotiations between environmentalists and industry, which was strongly supported by President Clinton. Under the guise of expediting “salvage” sales of timber, the rider mandated timber sales without regard to the Plan, prevented or reduced the potential for environmental analysis and mitigation, and narrowly circumscribed the possibility of judicial review.<sup>54</sup>

The effects of the bill have been dramatic, causing the cutting of millions of board feet of additional timber in areas that had been declared off-limits, and using methods that but for the rider would have been prohibited by a variety of environmental statutes. Although many of the provisions of the rider have expired,<sup>55</sup> this will not undo the damage done by the rider either to the sensitive forest ecosystems or to the integrity of the political process. Long term damage has likely been done to sensitive habitat and resident wildlife by the harvesting allowed and in some cases mandated by the Act. At the same time, by enacting the timber rider through the appropriations process, Congressional leaders have denied their own members the opportunity to make an informed decision about whether these sales were wise policy or even an efficient use of the public's natural resources.<sup>56</sup>

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54. Section 2000 has been characterized as “order[ing] the Forest Service and BLM to sell off some of the nation's healthiest and most ecologically valuable ancient forests at bargain basement prices.” Michael Axline, *Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613, 614 (1996).

55. Sections 2001(b) and (d) expired December 31, 1996, but contracts offered prior to that date continue to be governed by the rider. See § 2001(j). Section 2001(k) expired on September 30, 1996, see § 2001(a)(2), but harvest of many awarded contracts continues.

56. “[T]he issue of whether ecologically important federal timber, which supports a variety of environmental values, should be used to support a jobs program for mills has never received the congressional attention that such an important and complex issue deserves.” Axline, *supra* note 54, 54, at 625 (1996). See Muskie, *supra* note 26, at 172 (“[W]e should exercise extreme caution concerning every decision which may affect the environment; we should insure that our public institutions have the capacity to evaluate environmental hazards and to reduce those hazards to an absolute minimum.”).

*A. The Northwest Forest Plan, Developed through Extensive Negotiation between Affected Parties, Represents a Comprehensive Approach to Old Growth Forest Management*

Old growth forests,<sup>57</sup> part of a complex ecosystem in the Pacific Northwest, provide habitat to hundreds of wildlife and aquatic species, including at least eight threatened or endangered species.<sup>58</sup> They also fulfill important watershed functions by inhibiting erosion and flooding.<sup>59</sup> Pacific Northwest old growth is rapidly disappearing—roughly ten percent of the original ancient forest domain is left in the region.<sup>60</sup> This is virtually the only old growth left in the nation, and almost all of it is located on public lands.<sup>61</sup>

Management of public forest lands in the Pacific Northwest has been marked by controversy since the 1970s,<sup>62</sup> symbolized by the highly visible and heated debate over the northern spotted

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57. Old growth stands are forest stands, typically mature conifers such as Douglas fir, between 175 and 250 years old, with moderate to high canopy closure, dominated by large overstory trees and numerous large snags and accumulations of downed wood. See FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM: AN ECOLOGICAL, ECONOMIC AND SOCIAL ASSESSMENT IX-24 (1993) [hereinafter FEMAT REPORT]; FOREST PLAN ROD, *supra* note 43, at F-4. For a detailed discussion of Pacific Northwest old growth ecosystems, see ELLIOTT A. NORSE, ANCIENT FORESTS OF THE PACIFIC NORTHWEST (1990).

58. See U.S. FISH AND WILDLIFE SERVICE, CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL 66-70 (1992); FEMAT REPORT, *supra* note 57, at II-3-4, 30-40.

59. They have been held to contribute "some of the highest quality waters flowing into the major rivers in the American West." Linda M. Bolduan, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 ENVTL. L. 329, 342 (1990). See generally CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE WEST 156-67 (1992) (discussing ancient forests of the Pacific Northwest).

60. There are about 2.5 million acres of old growth forests where 19 million acres once stood. See WILKINSON, *supra* note 59, at 157. Late successional reserves, which are forests in mature stages, see FEMAT REPORT, *supra* note 57, at IX-18, including old growth, comprise an additional 7.5 million acres of forest lands. See FOREST PLAN ROD, *supra* note 43, at 6.

61. See WILKINSON, *supra* note 59, at 157. Science knows no way to create "man-made" old growth forests; nor can it markedly hasten the natural processes that form them. See *id.* at 165 (quoting SOCIETY OF AMERICAN FORESTERS, SCHEDULING THE HARVEST OF OLD GROWTH 17 (1984)); see also FEMAT REPORT, *supra* note 57, at II-3 (noting that ecologists now believe ecosystems in old forests in the Pacific Northwest may have developed under climatic conditions that cannot be duplicated).

62. There are numerous articles that detail the history of the controversy and the litigation that it spawned. See, e.g., Bolduan, *supra* note 59; Steven L. Yaffee, *Lessons About Leadership from the History of the Spotted Owl Controversy*, 35 NAT. RESOURCES J. 381 (1995); Andrea L. Hungerford, *Changing the Management of Public Lands Forests: The Role of the Spotted Owl Injunctions*, 24 ENVTL. L. 1395 (1994); Victor M. Sher, *Travels with Strix: The Spotted Owl's Journey through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993). The history of the litigation over the spotted owl controversy is also set forth in *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1300 (W.D. Wash. 1994).

owl.<sup>63</sup> Spotted owl populations had been in decline, and forest health in question, since 1973, when an interagency committee recommended that the owl be listed under the ESA.<sup>64</sup> Listing finally occurred in 1990.<sup>65</sup> The dispute over the management of spotted owl habitat spawned more than a dozen lawsuits, resulting in at least three separate injunctions against the Bureau of Land Management ("BLM") and the Forest Service under NFMA, FLPMA, ESA, and NEPA,<sup>66</sup> which severely restricted federal timber sales.<sup>67</sup>

In the midst of the spotted owl controversy, section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, also referred to as the Hatfield/Adams Rider, became law.<sup>68</sup> Section 318 was intended to balance the desire for a predictable flow of public timber with the goal of preserving significant old growth forest stands for the northern spotted owl.<sup>69</sup> Subsection 318(a) set an overall target level of timber from national forests and BLM lands in Oregon and Washington for fiscal years 1989 and 1990.<sup>70</sup> The statute set forth procedures for expedited review and prohibitions on injunctions and restraining or-

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63. The spotted owl, an indicator species, is viewed as "a surrogate for the other species that inhabit the forest," and a monitor for the overall vitality of forest vegetation and watersheds. See Bolduan, *supra* note 59, at 342; 36 C.F.R. § 219.19 (providing guidelines for selection of indicator species and maintenance of their habitat).

64. See Hungerford, *supra* note 62, at 1404; Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

65. See 55 Fed. Reg. 26,114 (1990) (codified at 50 C.F.R. § 17 (1993)).

66. For BLM litigation, see Lane County Audubon Soc'y v. Jamison, 958 F.2d 290 (9th Cir. 1992); Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489 (D. Or. 1992), *aff'd sub nom.* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993); Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456 (D. Or. 1989), *aff'd in relevant part*, 884 F.2d 1233 (9th Cir. 1989); Portland Audubon Soc'y v. Hodel, 18 ENVTL. L. REP. 21,210, 21,213 (D. Or. 1988), *rev'd and rem'd*, 866 F.2d 302 (9th Cir. 1989). For Forest Service cases, see Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992), *aff'd sub nom.* Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993); Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd in part*, 952 F.2d 297 (9th Cir. 1991); Seattle Audubon Soc'y v. Robertson, No. C89-160-WD (W.D. Wash. Nov. 6, 1989), *rev'd*, 914 F.2d 1311 (9th Cir. 1990), *rev'd and rem'd*, 503 U.S. 429 (1992). The litigation is concisely summarized in Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1299-1302 (W.D. Wash. 1994), *aff'd sub nom.* Seattle Audubon Soc'y v. Moseley 80 F.3d 1401 (9th Cir. 1996).

67. See FOREST PLAN ROD, *supra* note 43, at 1.

68. See Dept. of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989); 135 CONG. REC. S8762, 8795-97 (daily ed., July 26, 1989). For a discussion of a series of riders that governed timber harvest in the Northwest, see Bolduan, *supra* note 59, at 329.

69. See Gifford Pinchot Alliance v. Buttrille, 742 F. Supp. 1077, 1079 (D. Or. 1990).

70. § 318(a)(1), 103 Stat. at 745.

ders,<sup>71</sup> and required certain minimal environmental safeguards in lieu of existing laws.<sup>72</sup> These procedures applied exclusively to timber sales from the "thirteen national forests in Oregon and Washington and [BLM] Management districts in western Oregon known to contain northern spotted owls."<sup>73</sup>

Despite Congress's attempt to reduce governmental interference and encourage timber production, some section 318 sales were delayed or suspended by litigation. Section 318 itself was challenged on constitutional grounds, with the Supreme Court ultimately affirming the law in *Robertson v. Seattle Audubon Society*.<sup>74</sup> A number of section 318 sales were enjoined while this issue moved through the courts.<sup>75</sup> Other sales were challenged over their compliance with the specific terms of section 318, such as the requirement to minimize fragmentation of ecologically significant old growth.<sup>76</sup> Many such sales did not go forward because of concerns about impacts to listed species, particularly the marbled murrelet<sup>77</sup> and spotted owl.<sup>78</sup>

In April 1993, in response to judicial decisions that halted logging in essentially all federal old growth forests within the range of the spotted owl, the Clinton Administration convened the Forest Conference in Portland, Oregon. As a result of the conference, the interdisciplinary Forest Ecosystem Management Assessment Team ("FEMAT") was assembled to produce a scientific options report.<sup>79</sup> The FEMAT report was then analyzed, along with

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71. See § 318(d),(f)(1),(g), 103 Stat. at 748-50.

72. Although section 318 directed the agencies to sell ecologically significant old growth only as necessary and in a manner designed to minimize the effects of fragmentation within each sale, see § 318(b)(1),(2), and provided that nothing was to affect interagency cooperation under the ESA and its regulations, see § 318(e), it was a "piecemeal approach to forest resource use when a broad, long-term vision is needed." Bolduan, *supra* note 59, at 375.

73. See § 318(i), 103 Stat. at 750.

74. 503 U.S. 429 (1992).

75. See, e.g., *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992).

76. See *Seattle Audubon Soc'y v. Robertson*, No. C89-160-WD, (W.D. Wash. Nov. 6, 1989), *rev'd*, 914 F.2d 1311 (9th Cir. 1990), *rev'd and rem'd*, 503 U.S. 429 (1992).

77. On September 28, 1992, the FWS listed the marbled murrelet, a seabird that is also dependent on old growth forest stands, as a threatened species. See 57 Fed. Reg. 45,328 (1992).

78. See *Lone Rock Timber Co. v. United States Dept. of Interior*, 842 F. Supp. 433 (D. Or. 1994). See generally *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

79. See FEMAT REPORT, *supra* note 57.

its suggested alternatives for forest management, in the Supplemental Environmental Impact Statement ("SEIS") for the Northwest Forest Plan.<sup>80</sup>

The Record of Decision ("ROD") for Amendments to Forest Service and BLM Planning Documents Within the Range of the Northern Spotted Owl (the Northwest Forest Plan) was issued in April 1994,<sup>81</sup> in "an attempt to anticipate and forestall future environmental problems, avoiding the severe economic dislocation and legal gridlock that occur when environmental problems are ignored."<sup>82</sup> The agencies characterized the Northwest Forest Plan as an "unprecedented effort in public land management."<sup>83</sup> The Plan represents a comprehensive ecosystem approach, analyzing the interrelatedness of all resources—timber, fish and wildlife, water quality—as well as economic well-being over a vast planning area. It is the first time that the BLM and the Forest Service, two of the largest federal land management agencies, have worked together to develop a common management approach for public lands throughout an entire ecosystem.<sup>84</sup> It was also strongly supported by the U.S. Fish and Wildlife Service.<sup>85</sup>

The ROD consists of extensive standards, guidelines, and land allocations that comprise a comprehensive ecosystem management strategy, designed to end the decades-long spotted owl controversy by accommodating both the need for sustained timber yield and protection of forest resources.<sup>86</sup> It establishes two primary categories of land allocation: reserves, including late-successional reserves<sup>87</sup>

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80. See FOREST PLAN ROD, *supra* note 43, at 1. The draft SEIS was made available on July 28, 1993, see 58 Fed. Reg. 40,444-45 (1993), and generated over 100,000 public comments. See U.S. DEPT. OF AGRICULTURE ET AL., FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT app. 4 (1994) [hereinafter FINAL SEIS]; see also FOREST PLAN ROD, *supra* note 43, at 25-28, 65-73. The final SEIS was released in February 1994. See 59 Fed. Reg. 18,788 (1994). It considered 10 alternatives in detail, selected from 48 strategies analyzed in the FEMAT report. See Moseley, 80 F.3d at 1404.

81. See 59 Fed. Reg. 18,788.

82. FOREST PLAN ROD, *supra* note 43, at 1-2. It is intended to "provide for a steady supply of timber sales and nontimber resources that can be sustained over the long-term without degrading the health of the forest or other environmental resources." *Id.* at 3-4.

83. *Id.* at 1; see also Lyons, 871 F. Supp. at 1303.

84. See FOREST PLAN ROD, *supra* note 43, at 1.

85. See FINAL SEIS, *supra* note 80, at app. G.

86. See *id.* at 3-4; Moseley, 80 F.3d at 1404 (the alternative selected, Option 9, protects wildlife viability while allowing other multiple use activities).

87. Late successional reserves are forests in mature stages, including old growth. See FEMAT REPORT, *supra* note 57, at IX-18. A mature stand is defined as one "for which the annual net rate of growth has peaked," and includes those generally between 100 and

and riparian reserves,<sup>88</sup> where programmed harvest is severely restricted;<sup>89</sup> and “matrix” and “adaptive management” areas, where harvest may proceed in accordance with the Plan’s requirements.<sup>90</sup>

Immediately after the ROD was issued, environmental groups and industry groups brought a series of actions challenging the legality of the Northwest Forest Plan. Environmentalists challenged, *inter alia*, the Plan’s compliance with NEPA and with NFMA wildlife “viability” regulations, alleging that the ROD did not ensure that a viable population of old growth forest dependent species, including the northern spotted owl, would be maintained.<sup>91</sup> Industry groups alleged that the Plan was too restrictive, in violation of NFMA, FLPMA, NEPA, and other laws.<sup>92</sup>

In December 1994, Judge Dwyer, of the U.S. District Court for the District of Washington, rejected all challenges, and declared the Plan to be lawful under NEPA, NFMA and their implementing regulations.<sup>93</sup> The Ninth Circuit affirmed, noting that the litigation had presented a “substantial controversy . . . surrounding a plan designed to bring some much needed coherence to the management of federal forests in the Pacific Northwest.”<sup>94</sup>

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180 years old. *See id.* at IX-20. Old growth, by comparison, is usually 175–250 years old, with larger diameter and greater structural complexity. *See id.* at IX-20, IX-24.

88. A riparian area includes “the aquatic ecosystem and adjacent upland areas that directly affect it,” including floodplain, woodlands, and areas within approximately 100 feet of the high-water mark of a stream or the shoreline of a standing water body. *See* FEMAT REPORT, *supra* note 57, at IX-30.

89. Certain salvage and thinning activities are allowed. *See* FOREST PLAN ROD, *supra* note 43, at 2.

90. *See id.* at 2, 6–11. Programmed harvest may occur on approximately 22% of the 24 million acres of federal land in the planning area. *See id.* Harvest levels under the Plan are expected to be about one-fourth of pre-litigation 1980s levels. *See* Hungerford, *supra* note 62, at 1430 (citing Draft SEIS at S-16).

91. *See* Supplemental Complaint at ¶¶ 1–3, *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994) (Civil No. 92-479D), *aff’d sub nom.* *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

92. *See* Northwest Forest Resources Council (NFRC) v. Dombeck, No. 94-1031-TPJ (D.D.C.) (complaint filed May 11, 1994); Northwest Forest Resources Council v. Thomas, No. 94-1032-TPJ (D.D.C.) (complaint filed May 11, 1994); *Lyons*, 871 F. Supp. at 1300.

93. 871 F. Supp. at 1300. The three-year logging ban had been lifted earlier that year. *See* Hungerford, *supra* note 62, at 1431.

94. *Moseley*, 80 F.3d at 1406.



*B. The 1995 Timber Rider's Provisions Required or Encouraged Sales that May Proceed Regardless of Violations of the Forest Plan or Environmental Law*

*1. Subsection (k) of the Timber Rider Required the Release of Previously Cancelled or Enjoined Sales*

Subsection 2001(k) of the Rescissions Act directs the Secretaries of the Interior and Agriculture to, *inter alia*:

act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745).<sup>95</sup>

At the time the bill was signed into law, it was widely believed that subsection 2001(k) applied to a discrete set of remaining section 318 sales.<sup>96</sup> However, immediately after the rider was enacted, timber industry representatives sought to compel the release of all timber sales offered prior to the rider's enactment on *all* public lands within the geographic scope of section 318.<sup>97</sup>

The United States District Court for the District of Oregon agreed with the timber industry's expansive interpretation, and ordered the BLM to release all pending timber sales in western Oregon and the Forest Service to release all pending timber sales on any national forest within the states of Washington and Oregon.<sup>98</sup> The court's order was affirmed by the United States Court of Appeals for the Ninth Circuit on April 24, 1996.<sup>99</sup> These rulings required the release of sixty-two additional sales, totalling 230 mil-

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95. Pub. L. 104-19, § 2001(k)(1), 109 Stat. 194 (1995).

96. See U.S. FOREST SERVICE, EFFECTS STATEMENT, Ex. D to United States' Memorandum in Opposition to Temporary Restraining Order, NFRC v. Glickman (NFRC I), 82 F.3d 825 (9th Cir. 1996) (No. 95-6244-MRH). As discussed *supra* Part III.A.2, section 318 applied exclusively to sales offered in fiscal years 1989 and 1990 in the 13 national forests in Oregon and Washington and BLM districts in western Oregon known to contain northern spotted owls. See Pub. L. No. 101-121, § 318(i), 103 Stat. 701, 750 (1989).

97. See NFRC v. Glickman, No. CV-95-06244-MRH (complaint filed Aug. 8, 1995).

98. See NFRC v. Glickman, No. 95-6244 (D. Or. Sept. 13, 1995).

99. See NFRC I, 82 F.3d 825 (9th Cir. 1996).

lion board feet (MMBF) over and above the remaining section 318 sales volume.<sup>100</sup>

The district court entered a second order in the case, which held, *inter alia*, that section 2001(k) required the release of all sales in Oregon and Washington<sup>101</sup> if the bids were opened during the relevant time period.<sup>102</sup> The Ninth Circuit also affirmed that decision.<sup>103</sup> Thus, subsection (k) required the release of all sales that had been offered any time in the last five years anywhere on public lands in the states of Washington and Oregon—even if the sales had been withheld or enjoined for failure to comply with the Northwest Forest Plan or any environmental law or regulation.<sup>104</sup>

## 2. The Rider Provided Agencies with Virtually Non-Reviewable Discretion to Execute Timber Sales

By combining a broad grant of authority with explicit restrictions on judicial review, the timber rider made it virtually impossible to successfully challenge salvage sale awards. Section 2001(b) provided that salvage sales shall be offered “to the maximum extent feasible . . . above the programmed level” of harvest, notwithstanding any other law or previously entered judicial order.<sup>105</sup> “Salvage timber sale” was defined very broadly: a sale “for which an important reason for entry includes the removal of . . . dead, damaged, or down trees.”<sup>106</sup> The statute provided expedited procedures for these salvage sales: the Secretary could rely on pre-existing

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100. See United States' Memorandum in Support of Emergency Motion for Stay Pending Appeal, at 5–6, 19–20 (filed Oct. 19, 1995) (No. 95-36038). Replacement timber was offered for some sales under a narrow exception provided in section 2001(k)(2), allowing harvesting to be done in less environmentally sensitive areas, see NFRC v. Glickman (NFRC II), 97 F.3d 1161, 1165 (9th Cir. 1996); Tom Kenworthy, *U.S., Timber Firms Agree to Save Old-Growth Tracts*, WASH. POST, Sept. 19, 1996, at A3.

101. See NFRC v. Glickman, No. 95-6255-MJH, slip op. at 16 (D. Or. Jan. 10, 1996).

102. The court held that Pacific Northwest timber sales offered between October 23, 1989, the date of section 318's enactment, and July 27, 1995, the date of enactment of the 1995 timber rider, must be released. See *id.* at 13.

103. See NFRC II, 97 F.3d at 1165–66. The Ninth Circuit subsequently denied the environmental groups' motion for clarification of this issue, rejecting their argument that sales that had been found to violate applicable laws (other than section 318 itself) at the time they were offered were *void ab initio*. See NFRC v. Glickman, No. 96-35132 (9th Cir. July 23, 1996).

104. See *id.*

105. See Pub. L. No. 104-19, § 2001(b)(1), 109 Stat. 194, 241 (1995).

106. § 2001(a)(3).

documents, no matter how dated they were, or prepare a document that combined "an environmental assessment . . . [under NEPA] and a biological evaluation" under the ESA.<sup>107</sup>

In addition, section 2001(f) severely restricted the scope and timing of judicial review of salvage sale decisions.<sup>108</sup> The scope of review was limited to a determination of whether the decision was "arbitrary and capricious or otherwise not in accordance with applicable law (*other than laws specified in subsection (i)*)."<sup>109</sup> This limitation essentially exempted salvage sales from the requirements of all major federal environmental and natural resources laws.<sup>110</sup> Section 2001(f) further discouraged challenges by permitting suits to be brought only within 15 days of a sale's initial advertisement.<sup>111</sup>

Subsection (d) of the Act directed the Secretary to "expeditiously prepare, offer, and award timber sale contracts" on forests covered by the Northwest Forest Plan notwithstanding any other law or pre-enactment judicial order.<sup>112</sup> Like section 2001(b), subsection (d) specifically prohibited judicial review based on environmental laws, including NFMA, NEPA and the ESA.<sup>113</sup> The Ninth Circuit found that the requirement that sales proceed "notwithstanding any other law," and the limitation on judicial review, left it with essentially no law to apply to challenges based on environmental concerns.<sup>114</sup>

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107. § 2001(c)(1)(A) (citing NEPA, 42 U.S.C. § 4332 (1995); ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (1985)).

108. *See* § 2001(f)(4)-(5).

109. § 2001(f)(4) (emphasis added).

110. It provides that, with respect to any activity related to a salvage timber sale: "The documents and procedures . . . shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws): . . . [NEPA, the ESA, NFMA], [and] . . . [a]ll other applicable Federal environmental and natural resource laws." § 2001(i). President Clinton has directed the agencies to comply with environmental laws "to the maximum extent allowed" and to conduct sales in an "environmentally sound manner," and the agencies have issued agreements and directives to minimize impacts to natural resources, in which they have evidenced their intention to continue to comply with environmental laws "to the extent practicable." However, these guidance documents have not been construed as legally enforceable. *See, e.g., Inland Empire v. Glickman*, 911 F. Supp. 431, 437 (D. Mont. 1995), *aff'd*, 88 F.3d 697 (9th Cir. 1996).

111. *See* § 2001(f)(5).

112. *See* § 2001(d).

113. *See id.*

114. *See Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996) (rejecting allegations that sales would degrade aquatic resources, reduce viable

In fact, all courts that have reviewed challenges to section 2001(b) and (d) sales have upheld the decision to proceed with the sale.<sup>115</sup> The clear implication is that agency conclusions regarding endangered species, watershed, sustained yield, and cost-benefit analyses clearly are off-limits to citizen challenges.<sup>116</sup> Even compelling evidence that salvage sales will have adverse effects on endangered or threatened species will not be a basis for invalidating a salvage sale.<sup>117</sup>

In sum, although subsection (d), like subsection (b), is not as draconian as section 2001(k), in that it provides the Administration with discretion to proceed with Northwest Forest Plan sales, no analytical documents or protective procedures are required under section 2001(d), and virtually no judicial review is allowed if a challenge is presented on environmental grounds. While the agencies can take steps to prevent adverse environmental effects with respect to subsection (b) and (d) sales, the rider allows them to

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populations of resident and anadromous fish species, and violate Northwest Forest Plan standards and guidelines as unreviewable).

115. A number of these opinions have upheld section 2001(b) sales. *See, e.g.*, Idaho Sporting Congress v. Thomas, 92 F.3d 922 (9th Cir. 1996); Southwest Center for Biological Diversity v. Glickman, 932 F.Supp. 1189 (D. Ariz., 1996); Ozark Chapter/Sierra Club v. Thomas, 924 F. Supp. 103 (E.D. Mo. 1996); Idaho Conservation League v. Thomas, 917 F. Supp. 1458 (D. Idaho, 1995), *aff'd*, 91 F.3d 1345 (9th Cir. 1996); Inland Empire Public Lands Council v. Glickman, 911 F. Supp. 431 (D. Mont. 1995), *aff'd*, 88 F.3d 697 (9th Cir. 1996); Kentucky Heartwood v. U.S. Forest Service, 906 F. Supp. 410 (E.D. Ky. 1995); *see also* Armuchee Alliance v. King, 922 F. Supp. 1541 (N.D. Ga. 1996) (rejecting constitutional challenges based on separation of powers, vagueness, equal protection and due process). Other recent cases have upheld decisions to proceed with section 2001(d) sales regardless of alleged failure to comply with NEPA, NFMA, and the Northwest Forest Plan. *See, e.g.*, Oregon Natural Resources Council v. Thomas, 92 F.3d 792 (9th Cir. 1996); Sierra Club v. U.S. Forest Service, No. 94-6245-TC (D. Or. 1995), *aff'd*, 93 F.3d 610 (9th Cir. 1996).

116. *See* Idaho Sporting Congress, 92 F.3d 922 (9th Cir. 1996); Idaho Conservation League, 91 F.3d 1345; Inland Empire, 88 F.3d 697.

117. *See* Idaho Conservation League, 91 F.3d 1345 (allowing salvage harvesting in highly eroded drainage, even though FWS and NMFS determined that sales were likely to adversely affect salmon and trout); *cf.* Inland Empire, 88 F.3d 697 (upholding district court's determination that sale could go forward under section 2001(b) even if adverse effects to endangered grizzly bear had been shown); Kentucky Heartwood, 906 F. Supp. 410 (rejecting challenge to sale that would allegedly affect the Indiana bat; court found that record supported Forest Service's position that sale would not harm the bat, but stated that there was little it could do even if adverse effects were proven). For a list of the most controversial salvage sales, *see* Elizabeth Manning, *Forests Worth Fighting For*, HIGH COUNTRY NEWS, Sept. 2, 1996, at 12. For a discussion of public protests over salvage logging under the rider, *see* Tony Davis, *Last Line of Defense: Civil Disobedience and Protest Slow Down "Lawless Logging"*, HIGH COUNTRY NEWS, Sept. 2, 1996, at 6, 10-11.

proceed with damaging sales in the Northwest Forest Plan area and other forests, without any public input or opportunity for review.

*C. The Abbreviated Appropriations Process Allowed the Rider to be Enacted without Sufficient Legislative Consideration of its Scope and Consequences*

Despite the dramatic effects of the timber rider on forest management policy, its passage was accompanied by severely limited debate. The rider was not submitted to the congressional committees having jurisdiction over federal lands for hearings or for the preparation of reports.<sup>118</sup> Not only were no reports made available on the language of the bill at the time of its consideration; members of the House had to vote on the bill without seeing the final language themselves.<sup>119</sup>

As a result, many members were surprised to discover the actual impact of the rider. In addition, benefits of the rider touted by sponsors have proved to be overstated, and its potential for harm substantially greater than was acknowledged when the bill was voted on. The rider's passage clearly demonstrates the dangers of legislating on policy through the appropriations process.

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118. See Axline, *supra* note 54, at 631-32 (citing 141 CONG. REC. H6637 (daily ed., June 29, 1995)).

119. See 141 CONG. REC. H6637 (daily ed. June 29, 1995). Many members criticized the techniques of the bill's sponsors during floor debate. See *id.* (statement of Rep. Obey) ("The timber issue is important to a lot of people in this House, including me, and just for the heck of it, I would like to know what the agreement is and see it in black and white before we debate it. It might be kind of quaint, but it might also be kind of useful."); *id.* at H6638 (statement of Rep. Defazio) ("[W]e are being asked to accept a pig in a poke. We are being told that the Democrat Administration has entered into a secret agreement not available in writing with the Republican majority which we are going to be asked to vote on within 15 minutes here in the House of Representatives . . . This is an outrage, this is an extraordinary outrage."); *id.* at H6639 (statement of Rep. Furse) ("It is impossible for us to know whether this is going to be good for our watershed plans or bad for them, because we do not know the language.") (other citations and footnotes omitted). For a contradictory viewpoint, see Slade Gorton & Julie Hayes, *Legislative History of the Timber and Salvage Amendments Enacted in the 104th Congress: A Small Victory for Timber Communities in the Pacific Northwest*, 26 ENVTL. L. REP. 641 (Envtl. Law Inst.) (1996) (noting that the language and some analysis of House Bill 1158, the rider's defeated predecessor, were available at the time of passage).

*1. The Scope and Impact of the Bill, Unexamined during Passage, Have Proved Far Greater than Sponsors Claimed*

In the absence of committee hearings or extended analysis, the rider's sponsors were largely able to shape the debate that took place in the House. The sponsors focused attention on the provisions that appeared most compelling, such as the one expediting salvage sales, section 2001(b).<sup>120</sup> Senator Gorton created a sense of urgency by arguing that "the window of opportunity that the agencies have to conduct these forest health and salvaging operations gets smaller with each passing day . . . set[ting] the stage for another devastating wildfire season this summer."<sup>121</sup> Representative Taylor further stated that "[w]e are not talking about green timber that needs also to be harvested. We are talking about dead and dying trees. We are talking about timber that has been burned."<sup>122</sup>

In addition, the bill's sponsors minimized the breadth of the rider by explaining section 2001(k) as a provision that simply allowed the administration to proceed with sales that had been previously authorized, but had been subject to lengthy delays.<sup>123</sup> Yet, far from *allowing* the Clinton Administration to proceed with sales that it believed to be desirable, section 2001(k) *forced* the agencies to proceed with a number of sales that they had determined to be in violation of the Northwest Forest Plan standards

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120. The legislative history deals extensively with the subject of forest health—fire, disease, and insect infestation—but barely mentions section 318 or green tree sales. *See* 141 CONG. REC. H5557 (daily ed. May 24, 1995) (Rep. Taylor's defense of the bill's predecessor); *see also* H.R. REP. NO. 104-71, at 20-23 (1995); S. REP. NO. 104-17, at 122-24 (1995); H.R. CONF. REP. NO. 104-124 (1995).

121. Letter from Senator Slade Gorton to Members of the Interior Subcommittee of the Senate Appropriations Committee (Mar. 20, 1995) (cited in Axline, *supra* note 54, at 626 n.79).

122. 141 CONG. REC. H3153 (daily ed. Mar. 14, 1995); *see also id.* at H5558-59 (daily ed. May 24, 1995) (Rep. Metcalf predicted that, without the rider, valuable natural resources will "rot" away: "Sadly, if these giants are not harvested within 2 years of being blown down, or fire or disease-damaged, they are of no value as timber . . . . This is part of the emergency situation we face in our forests.").

123. *See* H.R. REP. NO. 104-124, at 137; 141 CONG. REC. S4875 (daily ed. Mar. 30, 1995) (statement of Sen. Gorton); *id.* at S10,463-65 (daily ed. July 21, 1995) (statement of Sen. Gorton). Senator Gorton retracted this representation as soon as the rider was enacted and wrote a letter to the Clinton Administration stating that he expected the agencies to release all old sales in all forests and districts in Washington and Oregon. *See NFRC v. Glickman* (NFRC I), 82 F.3d 825, 835-36 (9th Cir. 1996) (citing July 27, 1995 letter of Sens. Gorton, Murkowski, and four others). *See generally* Gorton & Hayes, *supra* note 119.

and guidelines, and that they believed would likely cause serious, irreparable harm.<sup>124</sup>

The difference in scope between that suggested when the bill was debated and that actually required by the law was substantial. The bill's sponsors told their colleagues that section 2001(k) would release roughly 300 MMBF of section 318 sales.<sup>125</sup> It later became clear that members, including those familiar with logging practices in the Pacific Northwest, were confused about the amount of timber the rider would actually release.<sup>126</sup> In fact, it required the Forest Service to release approximately 116 MMBF more timber than anticipated, and the BLM to release nearly 115 MMBF more than expected, from areas that were never governed by section 318.<sup>127</sup>

## 2. *The Timber Rider May Substantially Diminish Agencies' Ability to Accomplish Multiple Use and Sustained Yield Objectives*

Although the rider purported to be short-term legislation to remedy an "emergency" situation, its provisions, especially section 2001(k), undermine years of planning and multiple use resource management in the northwest forests, with potentially long-term

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124. See U.S. Memorandum in Support of Emergency Motion for Stay Pending Appeal at 19-27 (filed Oct. 19, 1995) *NFRC v. Glickman* (NFRC I), 82 F.3d 825 (No. 95-36038) (9th Cir. 1996) [hereinafter U.S. Memorandum]. The sponsors told Congress that the rider would effectuate implementation of the Northwest Forest Plan, when in fact section 2001(k) "undermined that plan by requiring the cutting of old growth reserves which the Forest Plan was crafted to protect." *Furse Takes Lead in Repealing Timber Salvage Rider*, Press Release (Dec. 7, 1995) (cited in Axline, *supra* note 54, at n.121) [hereinafter *Furse Press Release*].

125. See 141 CONG. REC. S10,464 (daily ed. July 21, 1995) (statement of Sen. Gorton).

126. See 142 CONG. REC. H6635, H6661 (daily ed. June 20, 1996) (Oregon Rep. Wes Cooley remarked that "750 million board feet" would be released under section 2001(k)).

127. See U.S. Memorandum, *supra* note 124, at 5-6, 19-20. The total amount required to be released, including section 318 and non-318 sales, was well over 400 MMBF. See *id.* at 5-6, 19-20. Senator Gorton, however, in a post-enactment article, estimated that 650 MMBF would be released—more than twice as much as he told his colleagues would be required. See Gorton & Hayes, *supra* note 119, at 644. Senator Gorton believes that this is a sustainable amount of harvest. See *id.* at 646. Gorton neglects the fact that timber stands are not fungible, and that much of the section 2001(k) harvest is taking place in the most sensitive areas in Pacific Northwest forests—areas that had been reserved from timber cutting under the Northwest Forest Plan, see U.S. Memorandum, *supra* note 124, at 19-20, although a small number of replacement sales have been accomplished under the rider. See Kenworthy, *supra* note 100.

effects.<sup>128</sup> In the wake of the harvests and habitat disruptions permitted by the rider, resource management choices in the affected forests are likely to remain severely limited even after the conclusion of the emergency period.<sup>129</sup> In addition, by upsetting the Plan's careful balancing of interests, the rider discredited the political process and "reopened old wounds in communities which were beginning to heal [after] decades of 'timber wars.'"<sup>130</sup>

Declarations submitted by the United States in a motion to stay implementation of the rider, after it was expansively interpreted by Judge Hogan, indicated that a number of the sales required to be released under section 2001(k) had been withdrawn long before the rider's enactment, because they did not comply with Northwest Forest Plan standards and guidelines.<sup>131</sup> In addition, section 2001(k) resurrected sales that had been enjoined for violations of NEPA and other environmental laws.<sup>132</sup> Many old sales had been withdrawn or enjoined because they would harm forest resources, such as watersheds,<sup>133</sup> or endangered, threatened and at-risk species, such as the chinook salmon,<sup>134</sup> northern spotted owl,

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128. See *Furse Press Release*, *supra* note 124; 142 CONG. REC. H6635, H6656 (daily ed., June 20, 1996) (statement of Rep. Porter) (the rider "is superseding the carefully crafted environmental and natural resource laws that previously regulated logging in the Pacific Northwest").

129. See discussion, *infra*, at notes 139–143 and accompanying text.

130. See 141 CONG. REC. S4870 (daily ed. Mar. 30, 1995) (Sen. Murray predicted political turmoil in the Northwest); 142 CONG. REC. H6635, H6655 (daily ed. June 20, 1996) (Rep. Furse stated that "[b]y circumventing the normal avenues of public input," section 2001 "has reignited a war in the woods"); Tom Kenworthy, *Protected Timber Opened to Logging*, WASH. POST, Sept. 14, 1995, at A13 (the rider, and the interpretation given it by the courts, strikes a blow to the "comprehensive plan for managing forests in the Northwest . . . [which] put[ ] to rest years of public battle over old-growth timber in the region"); Tom Kenworthy, *A Clear-Cut Solution for Loggers*, WASH. POST, Feb. 19, 1996 at A1 (the rider "ignited a new logging war between timber companies and environmentalists throughout the West" by requiring the agencies to proceed with sales that were halted years ago to protect wildlife and fish, and "short-circuit[ing] the normally complex regulatory and legal structure that applies to timber sales on federal land").

131. See Declaration of William Bradley at ¶¶ 4–5, attached to U.S. Memorandum, *supra* note 124 [hereinafter Bradley Declaration].

132. See ONRC's Memorandum in Support of Motion for Stay Pending Appeal at 8–9 (filed Oct. 19, 1995), *NRFC v. Glickman* (NFRC I), 82 F.3d 825 (9th Cir. 1996) (No. 95-36038) (discussing the Tiptop and Tip sales in the Wenatchee forest, enjoined on NEPA and NFMA grounds in *Leavenworth Audubon v. Ferraro*, 881 F. Supp. 1482 (W.D. Wash. 1995), and the Gatorson sale in the Colville National Forest, enjoined on NEPA grounds in *Smith v. U.S. Forest Service*, No. 93-178-JLG (E.D. Wash. Mar. 30, 1995)). See generally Declaration of Robert Williams, Associate Regional Forester for the Pacific Northwest Region, attached to U.S. Memorandum, *supra* note 124 [hereinafter Williams Declaration].

133. See Kenworthy, *supra* note 130, at A5.

134. See Williams Declaration, *supra* note 132, at ¶¶ 6–11; see also Declaration of



and shortnose sucker.<sup>135</sup> Agency officials predicted that the release of many 2001(k) sales would result in severe long-term effects:

[T]he harvest of most of these 62 sales would adversely impact northern spotted owls, marbled murrelets, shortnose suckers, and bull trout. In some cases, these impacts would be serious and may lead to direct mortality . . . *In most of these cases, adverse impacts to habitat would be long-term and would lead to depressed reproduction rates and reduced probabilities of recovery for these species.*<sup>136</sup>

The resulting damage is not likely to be undone quickly now that the rider has expired. Because section 2001(k) sales were awarded on originally offered terms, they did not comply with the Northwest Forest Plan's strategies for protecting fragile soils, old growth, watersheds, and wildlife.<sup>137</sup> The extensive logging required by section 2001(k), some of which took place in late successional reserves, could well cause such declines in populations of at-risk species that the return of Northwest Forest Plan standards and guidelines will do little good.<sup>138</sup> Similarly, harvest in riparian areas could degrade aquatic habitat to the point that applying the Forest Plan's Aquatic Conservation Strategy to future activities will not necessarily reverse those effects.<sup>139</sup>

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Dr. Jacqueline Wyland, Chief, Environmental and Technical Services Division, National Marine Fisheries Service, at ¶ 13, 38–39, 45–46, 49–50, 53–54, 58, and Attachment A, attached to U.S. Memorandum, *supra* note 124 [hereinafter Wyland Declaration] (listing BLM and Forest Service 2001(k) sales that will affect threatened or at-risk anadromous fish species, including Snake River chinook salmon, cutthroat trout, coho salmon, and steelhead trout).

135. See Bradley Declaration, *supra* note 131, at ¶ 4; Declaration of Thomas J. Dwyer, ¶¶ 9–12, 15–16, 19–21, 26, and App. I, attached to U.S. Memorandum, *supra* note 124 [hereinafter Dwyer Declaration].

136. See Dwyer Declaration, *supra* note 135, at ¶ 26 (emphasis added); see also Second Declaration of Spear, at ¶ 22, attached to U.S. Memorandum in Opposition to TRO, *supra* note 96 (predicting that the Forest Service's 2001(k) sales will cause long-term impacts to habitat and reduce the probability of recovery of northern spotted owls, murrelets, shortnose suckers, and bull trout).

137. See Kenworthy, *supra* note 130, at A1 ("Everything we've learned about how not to log in the West has been thrown out the window. This is the old style, ugly clear-cuts the Forest Service said they'd never do again.") (quoting former congressman Jim Jontz (D-Ind.), who now heads Western Ancient Forest Campaign).

138. "It is now painfully clear that in short-circuiting the process and exempting timber sales from the environmental laws . . . irreparable harm to the fragile ecosystems was caused to our national forests." 142 CONG. REC. H6635, H6657 (daily ed., June 20, 1996) (statement of Rep. Yates).

139. The FEMAT report identified 314 at-risk anadromous salmonid stocks identified within the range of the northern spotted owl and concluded that habitat protections

As a result of such lasting impacts, forest management decisions in the future are likely to be more restrictive than might otherwise have been the case. For example, because numerous section 2001 timber sales have been exempted from the requirements of the Endangered Species Act, consultations on post-rider activities may well result in "jeopardy findings"<sup>140</sup> under that act, in light of the cumulative effects of timber sales on the forest landscape.<sup>141</sup> Such a finding could preclude future grazing, mining, or agriculture that otherwise would have been permissible.<sup>142</sup> These long-term effects on the Pacific Northwest communities and forest resources could have been avoided, or at least mitigated, had the rider been considered in the "full sunshine of public review,"<sup>143</sup> instead of being sheltered by appropriations subterfuge.

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on federal lands are "increasingly important for ensuring the existence of high quality aquatic resources." FEMAT REPORT, *supra* note 57, at V-2. Accordingly, the Northwest Forest Plan incorporated an Aquatic Conservation Strategy to avoid further damage to riparian habitat. See FOREST PLAN ROD, *supra* note 43, at 9-10. Protective measures imposed on new sales in riparian areas—but not 2001(k) sales—include buffer zones around streams, helicopter retrieval of logs in areas with fragile soils and less disruptive road construction techniques. For other management measures that protect riparian areas in forests with anadromous fish-bearing streams, see Interim Strategy for Managing Anadromous Fish-Producing Watersheds ("PACFISH"), 60 Fed. Reg. 11,655 (1995) (amending forest plans and BLM resource management plans for public lands in eastern Oregon and Washington, Idaho, and northern California). For interim management measures protective of National Forest System riparian areas with resident fish species, see Inland Native Fish Strategy, 60 Fed. Reg. 43,758 (1995). These two interim strategies are to be replaced with long-term ecosystem plans with the adoption of the Columbia River Basin Ecosystem Management Strategy, see 59 Fed. Reg. 4680 (1994), which is to be completed in the summer of 1998. See 62 Fed. Reg. 2176 (1997).

140. See 16 U.S.C. § 1536(a)(2) (1994).

141. See Wyland Declaration, *supra* note 134, at ¶¶ 23, 35-36 (impacts of additional sales would degrade watersheds more than anticipated in consultations that had taken place on over one hundred grazing, mining, and harvest activities in the Wallowa-Whitman and Umatilla National Forests); Dwyer Declaration, *supra* note 135, at ¶ 20 (noting degradation due to historic watershed impacts from activities including timber harvest, grazing, and agriculture in the sale area, and potential exacerbation due to further timber harvest).

142. Activities taken pursuant to the rider's salvage logging provision, § 2001(b), may also hinder the achievement of forest plan goals and objectives—complicating programmatic planning efforts and perhaps even foreclosing some future management activities. See WILDERNESS SOC'Y, SALVAGE LOGGING IN THE NATIONAL FORESTS: AN ECOLOGICAL, ECONOMIC, AND LEGAL ASSESSMENT 9-10 (1996).

143. Gorton & Hayes, *supra* note 119, at 647 (arguing that the rider was not enacted behind closed doors).

### 3. *The Rider's Benefits, as Claimed by Sponsors, Were Not Evaluated and Have Not Materialized*

Congress enumerated several reasons for enacting the timber rider, most notably improvement of forest health and recovery of the economic value of damaged timber before extensive deterioration occurs.<sup>144</sup> However, whether salvage harvesting actually does promote forest health by controlling future fire and insect infestation is debatable.<sup>145</sup> Whether measures as drastic as a blanket exemption from all environmental laws was necessary to address this concern is even more questionable, given the agencies' extensive discretion and authority under the National Forest Management Act and Federal Land Policy and Management Act to manage forest lands.<sup>146</sup>

Further, at the time of the rider's enactment, the legislative bodies and the President were led to believe that it would generate funds to provide disaster relief for bombing victims and anti-terrorism measures.<sup>147</sup> However, the two provisions with the greatest potential to contribute to losses to the federal treasury were barely mentioned during committee and floor debate. First, the rider allowed salvage sales to proceed, even if they resulted in "below cost sales" for which the government's costs of preparation exceeded revenues.<sup>148</sup> In addition, section 2001(k) required the award and release of old sales, which were offered more than five years ago

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144. See H.R. CONF. REP. 104-124, at 134 (1995).

145. See Axline, *supra* note 54, at 626-28; see also Tom Kenworthy, *Wildfires Rekindle Debate on What's Best for Forests*, WASH. POST, Sept. 2, 1996, at A1, A11 (many forestry experts attribute the explosion of wildfires during the summer of 1996 to "well-intended but misguided fire suppression efforts and poor timber harvest practices"; according to NRDC spokesperson Sami Yassa, the increase in wildfires shows "how disingenuous [Congress's] concerns about fire really are": harvest practices have increased fire severity by removing the largest, most fire-resistant trees).

146. See 16 U.S.C. §§ 1600-14 (1994); 43 U.S.C. § 1732 (1994). See generally WILKINSON & ANDERSON, *supra* note 14, Ch. IV (discussing Forest Service's broad discretion under the National Forest Management Act and Multiple-Use, Sustained Yield Act to establish natural resources priorities and protect forest health and sustainability).

147. See 141 CONG. REC. H5557, H5561-62 (daily ed. May 24, 1995) (statement of Rep. Riggs); Gorton & Hayes, *supra* note 119, at 647 (based on the sponsors' pre-enactment representations of the timber harvest required by the rider, the Congressional Budget Office reported that the rider would generate \$84 million in revenue).

148. See Pub. L. No. 104-19, § 2001(c)(6), 109 Stat. 194, 241 (1995). "Below cost sales" are not forbidden by the National Forest Management Act, although economic suitability is a factor to be considered. See 16 U.S.C. § 6(k) (1994). Increased salvage logging frequently results in additional losses from below cost sale. See WILDERNESS SOC'Y, *supra* note 142, at 30.

when prices were generally lower, on "originally advertised terms, volumes, and bid prices."<sup>149</sup> It is now estimated that, even with the sale of valuable old growth timber, the rider could cost taxpayers in excess of \$330 million.<sup>150</sup>

Moreover, although the rider purported to create jobs and provide assistance to communities dependent on federal timber, any economic benefit attributable to the rider has accrued to only a few mills, and the brief increase in available federal timber will not halt the overall decline of the timber industry's economic importance in the Pacific Northwest.<sup>151</sup> In fact, the opposite may be true—the rider may accelerate the industry's demise by depleting available resources more quickly and obstructing the renewal of areas available for selective harvest in a manner ensuring sustainable yields.<sup>152</sup>

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149. Pub. L. No. 104-19, § 2001(k)(1).

150. See Axline, *supra* note 54, at 617 & n.27 (citing WILDERNESS SOC'Y, ESTIMATED FISCAL COSTS OF CURRENT PROPOSALS FOR EMERGENCY SALVAGE TIMBER SALE PROGRAM 1 (1995)). The Congressional Research Service estimated that the salvage program alone could cost the Treasury as much as \$233.5 million. See WILDERNESS SOC'Y, *supra* note 142, at 32–33. Representative Lowey reported to her colleagues that the Congressional Research Service had estimated that the rider would cost \$50 million in 1996 alone. See 142 CONG. REC. H6635, H6661–62 (daily ed. June 20, 1996) (it is unclear whether this amount reflects the costs of all three provisions of the rider, including green tree sales awarded under section 2001(k), or whether it is limited to salvage sales under section 2001(b), which are typically less lucrative); see also *id.* at H6660–61 (Rep. Morella predicted that section 2001 sales in fragile and remote roadless areas are likely to be big money-losers, "[w]hile a potential boondoggle for large timber companies, PL 104-19 poses a significant threat to local businesses.").

151. See WILKINSON, *supra* note 59, at 166 ("The timber industry in the Northwest has been in transition for more than a decade, for reasons largely unrelated to the spotted owl or any other environmental factor"; job losses are attributable to liquidation of the old growth stands and slow rates of regeneration, worker productivity and exports of unprocessed logs); Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1095 (W.D. Wash. 1991) ("Job losses in the wood products industry will continue regardless of whether the northern spotted owl is protected . . ."); Axline, *supra* note 54, at 614 (the timber industry will continue to decline in spite of the brief economic boost provided by the rider).

152. See WILDERNESS SOC'Y, *supra* note 142, at 35–36. In addition, other enterprises are likely to suffer as a result of the timber rider. "By threatening the health of the forests and the fisheries, the rider is in turn threatening the sports, commercial fishing, and the tourism industries, all of which are economically important to the Pacific Northwest." 142 CONG. REC. H6635, H6663 (daily ed. June 20, 1996) (statement of Rep. McDermott).

#### 4. Repeal Efforts Demonstrate the Frustration of Members of Congress with the Process Accorded the Rider

Once the true effects of the bill became apparent, the rider was the subject of a remarkably sustained effort at repeal. Senator Murray proposed repeal based in part on the belief that members had been misled by the bill's sponsors.<sup>153</sup> Representative Furse sponsored a bill to repeal the rider, which was co-sponsored by over 100 representatives, and circulated a memorandum to members of the House identifying misrepresentations that had resulted in the passage of the rider.<sup>154</sup> In addition, Representative Furse offered language that would have modified the timber rider as an amendment to H.R. 3662, FY 1997 Appropriations for the Department of Interior and Related Agencies.<sup>155</sup>

A number of members made statements on the House floor in support of repeal, expressing outrage at having been misled.<sup>156</sup> Others believed that repeal was appropriate because there had been

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153. See 142 CONG. REC. S2006 (daily ed. Mar. 14, 1996). Senator Bradley introduced a similar measure, Senate Bill 1595, 104th Cong. (1996). See 142 CONG. REC. at S1603-S1605 (daily ed. Mar. 6, 1996).

154. See 141 CONG. REC. H14238 (daily ed. Dec. 7, 1995) (introducing the Restoration of Natural Resources Laws on the Public Lands Act of 1995, H.R. 2745, 104th Cong. (1995)); *Furse Press Release*, *supra* note 124.

155. See 142 CONG. REC. H6635, H6654-64 (daily ed. June 20, 1996) (statements of Rep. Furse and others in support of the amendment). The Furse amendment was almost defeated on procedural grounds before it even came before the floor for consideration. The Rules Committee recommended that Rule XXI, prohibiting attachment of substantive legislation to appropriations bills, be enforced against the Furse amendment, H.R. RES. 455, 104th Cong. (1996), although it recommended that the rule be waived with respect to other policy-based amendments. See 142 CONG. REC. H6518 (daily ed. June 19, 1996); H.R. REP. NO. 104-627 (1996). Of course, the salvage timber program was enacted only because Rule XXI had been waived with respect to that provision: "it seems only fair and reasonable to allow the House to consider terminating the program through the same means by which it was originally enacted." 142 CONG. REC. at H6521 (statement of Rep. Beilenson). The House agreed to consider the Furse amendment. See *id.* at H6625.

156. "Although touted as an emergency measure to cut dead and dying timber, the rider has been used to clearcut healthy forests, including some hundreds of years old." 142 CONG. REC. at H6635, H6655 (statement of Rep. Furse); *id.* at H6656 (statement of Rep. Boehlert) (this rider "was sold to this body under what can most generously be considered false pretenses"); *id.* at H6660 (statement of Rep. Morella) ("The so-called forest health justification for suspending laws is a sham"); *id.* at H6661 (statement of Rep. Lowey) (the timber rider, one of many in a "shameful list" of the majority's attacks on environmental protections, "was misleadingly touted as being necessary to reduce forest fires . . . [but] is now being used to clearcut healthy forests in the Pacific Northwest"); *id.* at H6662 (statement of Rep. Obey) (the rider "wound up allowing . . . a lot more than it was explained as doing . . . [if the rider] in fact had been limited simply to straight salvage, as the House was told it was, we would not have had much of the controversy that has surrounded this ever since").

no hearings on the timber rider at meaningful times in the decisionmaking process,<sup>157</sup> and because of the lack of notice that the rider was going to be offered anew in the Oklahoma disaster relief package.<sup>158</sup>

The Furse amendment was defeated, but by the narrowest of margins.<sup>159</sup> Another measure of the unpopularity of the policy contained in the rider is the fact that efforts to extend the rider have so far been unavailing,<sup>160</sup> as have attempts to enact a permanent form of the law.<sup>161</sup>

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157. *See id.* at H6635, H6656 (daily ed. June 20, 1996) (statement of Rep. Porter); *id.* at H6657 (statement of Rep. Yates); *id.* at H6659 (statement of Rep. McDermott); *id.* at H6660 (statement of Rep. Morella); *id.* at H6661 (statement of Rep. Blumenauer); *see also* 141 CONG. REC. H3231 (daily ed. Mar. 15, 1995) (statement of Rep. DeFazio) ("The issue should never have been brought to the floor in this fashion."); *id.* at S4881 (daily ed. Mar. 30, 1995) (statement of Sen. Bradley) (attaching this rider to an appropriations bill "sets an incredibly dangerous precedent"). *But see* 142 CONG. REC. H6635, H6658 (in response to such criticism, Rep. Riggs noted and discussed the hearings that had taken place months earlier in connection with a previous version of the bill).

158. *See id.* at H6635, H6656 (statement of Rep. Porter).

159. *See id.* at D648-49 (daily ed., June 20, 1996). The recorded vote was 211 to 209, *see id.*, and at least one representative who was absent at the time of the vote later stated that he would have voted in favor of the Furse amendment because of concerns about the environmental and economic effects of the rider. *See id.* at E1160-61 (daily ed. June 25, 1996) (statement of Rep. Ramstad). Others seemed to think the issue was moot, because section 2001(k), forcing sales of green timber in Washington and Oregon, would expire in September 1996. *See id.* at H6635, H6655 (statement of Rep. Dicks); *id.* at H6662 (statement of Rep. Taylor); *id.* at H6663 (statement of Rep. Kolbe).

160. For example, the Hatfield timber rider, set forth in the proposed 1996 Interior appropriations bill, H.R. 1977, 104th Cong. (1996), was omitted from the Consolidated Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). *See* 142 CONG. REC. S4161, S4169 (daily ed. Apr. 25, 1996) (statement of Sen. Murray); *see also* *Final Deal Sealed; Key Riders Dropped*, GREENWIRE, Apr. 25, 1996, p. 4 (discussing the Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134).

161. Senate Bill 391, 104th Cong. (1996), creating a permanent salvage policy, was sponsored by Senator Larry Craig and approved by the Senate Energy Committee on June 19, 1996, but was not allowed to go to the floor until compromises were made with the then-ranking minority member, Senator Bill Bradley. *See New USDA Policy Bars Most Salvage Sales in Roadless Areas*, PUB. LANDS NEWS, July 11, 1996, at 1-2. The Committee released its report on July 16, 1996, but negotiations were never completed. *See Glickman to Face Senate Fire Over Timber Salvage Policy*, PUB. LANDS NEWS, July 25, 1996, at 8. The 105th Congress is considering a bill proposed by Senator Craig that would overhaul NFMA and FLPMA. *Senator Craig Issues Draft of Public Lands Management Bill for Next Congress*, 237 ENV'T REP. (BNA) at A8 (Dec. 10, 1996). The bill addresses forest health issues, but "is not a repeat" of Craig's efforts to expand the salvage rider, according to Senate staff. *See id.* The bill, now entitled the Public Land Management Responsibility and Accountability Restoration Act, has not been formally introduced, but public hearings and workshops are currently being held. *See* 143 CONG. REC. S1409 (daily ed. Feb. 13, 1997).

#### IV. OTHER RECENT RIDERS DEMONSTRATE THE DANGERS POSED BY THE APPROPRIATIONS PROCESS

The use of riders to provide special interest projects with exemptions from substantive legislation is nothing new, having been recognized as problematic by the early nineteenth century.<sup>162</sup> However, the abuse of the appropriations process has been taken to new and more extreme heights in recent decades,<sup>163</sup> and has been especially prevalent in the environmental area.<sup>164</sup>

##### *A. Exemptions Passed as Appropriations Riders Have Jeopardized Public Lands and Natural Resources*

Legislative short-cuts have been employed in numerous contexts in past legislative sessions.<sup>165</sup> In 1973, for example, the Trans-Alaska oil pipeline was exempted from NEPA requirements by use

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162. The practice of adding riders to appropriations bills has been "a perennial complaint." Walter Oleszek, *The Congressional Budget Process*, in 2 *ENCYCLOPEDIA OF THE AMERICAN LEGAL SYSTEM* 731, 735 (Joel H. Silbey, ed., 1994). "By 1835 the delays caused by injecting legislation [extraneous policy riders] into [appropriations] bills had become serious and John Quincy Adams . . . suggested that they be stripped of everything save appropriations." *Id.* (citing ROBERT LUCE, *LEGISLATIVE PROBLEMS* 425-26 (1935)).

163. See Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Policy Changes*, 19 *HASTINGS CONST. L.Q.* 457, 460 (1992). Oleszek notes that, during the partisan disputes between the Reagan White House and the Democratic Congress of the 1980s, Congress resorted to massive "omnibus" bills that combined Congress's priorities with some of the President's priorities to discourage vetoes. See Oleszek, *supra* note 162, at 742.

164. "The vehicle of choice for insulating federal agencies from environmental laws has been to insert obscure . . . [riders into] annual spending bills." Sher, *supra* note 4, at 10,469. Indeed, the FY 1989 appropriation for the Department of Interior, Pub. L. No. 100-446, 102 Stat. 1774 (1988), contained nearly 100 provisions that directly contravened pre-existing environmental law, or restricted the expenditure of funds on otherwise authorized programs. See Charles Stewart III, *The Appropriations Committees*, in 2 *ENCYCLOPEDIA OF THE AMERICAN LEGAL SYSTEM* 1015, 1021 (Joel H. Silbey ed., 1994).

165. Among these were many earlier "timber riders" presaging the particularly damaging rider appended to the Rescissions Act. Faced with court injunctions limiting logging operations, Oregon Senator Mark Hatfield sponsored riders each year from 1986 to 1990 to allow timber sales to go forward in spite of noncompliance with environmental laws. Those passed include the Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, 99 Stat. 293; Department of the Interior and Related Agencies Appropriations Act for 1989, Pub. L. No. 100-446, § 321, 102 Stat. 1774, 1827 (1988); Department of the Interior and Related Agencies Appropriations Act for 1990, Pub. L. No. 101-121, § 3318, 103 Stat. 701, 745-50 (1989). The Department of the Interior and Related Agencies Appropriations Act for 1991, Pub. L. No. 101-512, 104 Stat. 1915 (1990), was the first in five years to include no such rider, in large part because 20 senators and 79 representatives sent letters to the chairs of the appropriations committees protesting the enactment of 1989's section 318 and its predecessor, section 314. See Victor Sher & Carol Hunting,

of an appropriations rider.<sup>166</sup> In 1980, Congress voted to exempt the Tennessee Valley Authority's Tellico Dam project from the Endangered Species Act<sup>167</sup> by the same vehicle.<sup>168</sup> In 1988, construction of a multi-million-dollar observatory on Mount Graham in the Coronado National Forest was given the blessing of an appropriations rider that exempted the project from the requirements of both the Endangered Species Act and NEPA.<sup>169</sup> Congress also employed an appropriations measure to exempt a proposed highway in Hawaii from the Federal Highway Act,<sup>170</sup> which prohibits the use of parklands unless no feasible alternative is available.<sup>171</sup>

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*Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 487-88 (1991).

166. The Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 203, 87 Stat. 576, 584-85 (1973) (codified as amended at 43 U.S.C. § 1652(d) (1988)), provided that the government need not consider an alternative plan for transporting oil from Alaska via an overland route, rather than via oil tanker at Valdez. If alternatives and effects of the pipeline had been analyzed under NEPA, perhaps the Exxon Valdez oil spill would have been less likely. See Sher & Hunting, *supra* note 165, at 440-41.

167. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544.

168. See Energy and Water Development Appropriation Act of 1980, Pub. L. No. 96-69, 93 Stat. 437, 449-50 (1979); H.R. 4388, 96th Cong. (1979); 125 CONG. REC. 20,979 (1979). The Tellico Dam rider prompted this response from the Supreme Court:

When 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. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not 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.

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190-91 (1978).

169. A last minute rider to the Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, §§ 601-607, 102 Stat. 4571, 4597-99, allowed for construction of three telescopes before completion of formal environmental reviews. See John Lancaster, *Endangered Squirrel Has Astronomers, Biologists at Odds*, WASH. POST, Mar. 8, 1990, at A8. It declared that section 7 of the Endangered Species Act "shall be deemed authorized" for the authorization of the first three telescopes, see Pub. L. No. 100-696, § 602, and NEPA "shall be deemed to have been satisfied," *id.* at § 607. See also *Mount Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991) (requiring the District Court to hear evidence on the adequacy of the monitoring program set up to protect the endangered Mt. Graham red squirrel in compliance with the Act).

170. See Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-591, § 114, 100 Stat. 3341, 3341-49 (1986).

171. See Department of Transportation Act § 4(f), 49 U.S.C. § 303(f) (1994) (allowing the Secretary of Transportation to approve projects that use public park lands only if there is no feasible alternative); see also *Stop H-3 Association v. Dole*, 870 F.2d 1419 (9th Cir. 1989) (upholding appropriations legislation that exempted the project from otherwise applicable environmental requirements).



The 104th Congress was particularly prolific in passing substantive riders, attaching more than fifty environmental riders to spending bills (although not all were enacted).<sup>172</sup> Among those signed into law was an environmental exemption of yet another stage of the Mount Graham project,<sup>173</sup> despite fears that the observatory and telescope facilities may have an adverse effect on the endangered red squirrel,<sup>174</sup> as well as on American Indian religious and cultural practices.<sup>175</sup>

Perhaps most alarming of all, the 104th Congress was able to enact an across-the-board moratorium on the listing of species and designation of critical habitat under the Endangered Species Act as a rider to the appropriations bill for the Department of Defense.<sup>176</sup> The moratorium was specifically criticized on the floor of the House as beyond the jurisdiction of the Appropriations Committee.<sup>177</sup> For more than a year, the rider withheld protections for species that were severely threatened and warranted listing.<sup>178</sup> It poses a striking example of the perils of enacting substantive environmental legislation through the appropriations process: a species entitled to protection under the Act could have been driven closer to extinction by a choice made while the Appropriations

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172. See Jim Nichols, *Republicans Back Off Touted Reform of Environmental Laws in Light of Polls Showing Support for Protection of Resources*, CLEVELAND PLAIN DEALER, Oct. 22, 1995, at 1B; Jerry Gray, *In House, Spending Bills Open Way to Make Policy*, N.Y. TIMES, July 19, 1995, at A16 (proposed spending bills "would revoke or substantially restrict nearly 20 environmental laws that have become anathema to big business").

173. See Omnibus Consolidated Rescissions and Appropriations Act, Pub. L. No. 104-134, § 335, 110 Stat. 1321 (1996).

174. See *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 555-56 (9th Cir. 1996) (describing history of Mount Graham project, and legislative reactions to controversy).

175. See Elizabeth A. Brandt, *The Fight for Dzil Nchaa Si An, Mt. Graham*, CULTURAL SURVIVAL Q., Winter 1996, at 55-57.

176. See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86. The moratorium was to expire on October 1, 1995, but continuing resolutions kept it in place well into 1996. See Pub. L. No. 104-31, 109 Stat. 278 (1995); Pub. L. No. 104-56, 109 Stat. 548 (1995); Pub. L. No. 104-94, 110 Stat. 25 (1996); Pub. L. 104-99, 110 Stat. 26 (1996); Pub. L. No. 104-122, 110 Stat. 876 (1996); Pub. L. No. 104-134, 110 Stat. 1321 (1996); see also *Marbled Murrelet v. Babbitt*, 918 F. Supp. 318, 320 (W.D. Wash. 1996).

177. See 141 CONG. REC. H4344, H4345 (daily ed. Apr. 6, 1995) (statement of Rep. Beilenson) ("We believe that the authorizing committee and not the Committee on Appropriations is the proper place to address this far-reaching and very critical issue.").

178. See *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867, 871-72 (9th Cir. 1995) (lack of appropriated funds prevented Secretary from listing the California red-legged frog).

Committee considered the military budget. This type of decision should clearly be made by wildlife management experts, not members of Congress embroiled in the fiscal minutiae of the armed forces.

### *B. Proposed Riders Would Have Had Far-Reaching Effects*

A number of additional riders were proposed in the 104th Congress that later failed to attain passage or were thwarted by the veto pen. If signed into law, they would have had severe consequences for natural resources and public lands.

#### *1. Riders in the 1996 Interior Appropriations Bill*

Numerous controversial riders were incorporated into the proposed appropriations bill for the Department of Interior and Related Agencies for Fiscal Year 1996.<sup>179</sup> Among them were provisions that would restrict protective measures for the newly created Mojave National Preserve,<sup>180</sup> increase logging in the Tongass National Forest,<sup>181</sup> liberalize hardrock mining on public lands,<sup>182</sup> and prohibit or severely curtail a multi-region Forest Service and BLM project for management of the Columbia River Basin Ecosystem.<sup>183</sup>

These riders were criticized as both unsound policy and dishonest politics. Representative George Miller, former chair of the House Natural Resources Committee, echoed the criticisms of many opponents of the riders when he labelled them "the most systematic and comprehensive assault on the environment and the environ-

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179. See H.R. 1977, 104th Cong. (1995).

180. See California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471, 4489-95 (codified at 16 U.S.C. §§ 410aaa-41 to 410aaa-59 (1994)).

181. See *infra* text accompanying note 185.

182. See James Gerstenzang, *White House Threatens Veto of Environmental Measure*, LOS ANGELES TIMES, Sept. 23, 1995, at A3.

183. See 141 CONG. REC. H9688 (daily ed. Sept. 29, 1995) (Rep. Furse criticized the restriction on the Columbia River Basin Ecosystem Project and other measures to protect fisheries habitat on national forest lands); *id.* at H9639, H9640 (daily ed. Sept. 28, 1995) (statement of Rep. Beilenson) ("The legislation cripples a joint Forest Service-BLM ecosystem management project for the Columbia River Basin in the Northwest, a project intended to allow a sustainable flow of timber from that region. This provision threatens the protection of salmon and other critical species and guarantees continued court battles over logging in that region.").

mental laws" in the history of the nation.<sup>184</sup> With respect to forest management, Representative Sidney Yates stated that

The conference report to be ratified here today will dramatically increase logging on our already overtaxed forests . . . . What's more, . . . [it] prevents all environmental law from being enforced in the Tongass . . . [and] prevents all citizens, environmentalists and private land owners alike, from exercising their rights to sue the Federal Government.<sup>185</sup>

The process employed to circumvent congressional rules was characterized by critics as, among other things, "a failure to uphold the deliberative process that underlies the American tradition of conservation."<sup>186</sup> Ranking members of authorizing committees expressed frustration that programs that they had recommended and that had been passed after full deliberation by both houses were being gutted by riders.<sup>187</sup> They argued that supporters of the original substantive laws "were not afraid to have open and honest debate during the years it took to get th[ese] measure[s] enacted. Opponents should allow for the same kind of exhaustive review if they believe they have the support to repeal it."<sup>188</sup>

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184. See David Helvarg, *Defoliating Our Green Laws: Congress Plans an American Clearcut*, NATION, Dec. 4, 1995, at 699. Secretary of Interior Bruce Babbitt called the riders "an assault . . . on our natural resources and environment . . . . The barbecue is now under way on natural resources." Hugh Dellios, *The \$1 Desert—Mojave National Preserve is Protected on Paper But Imperiled in a Battle Over Funding*, S.F. EXAMINER, Oct. 1, 1995, at A8; see 141 CONG. REC. H9689 (daily ed. Sept. 29, 1995) (statement of Rep. Boehlert) ("This bill represents nothing less than an assault on the environment . . . . [We] squander precious resources, robbing them from future generations . . . . [This bill] is intolerable").

185. See 141 CONG. REC. H9685 (daily ed. Sept. 29, 1995).

186. *Id.* at H9687-88; see *id.* at H9692 (statement of Rep. Miller) ("What [the bill] purports to do in the name of budget cutting is obscene. Not only is this appropriations bill packed with authorizing legislation in a spending bill—in clear violation of House rules—but, it also shamelessly and against the public interest runs rampant in overturning sound environmental policy").

187. See 141 CONG. REC. H9639, H9642 (daily ed. Sept. 28, 1995) (statement of Rep. Miller).

As an architect of the 1990 Tongass Timber Reform Act, I take special offense at this assault on our largest national forest. These permanent changes in law are not within the proper jurisdiction of the appropriations committees . . . . The Senate language is an ill-advised attempt to turn back the clock and to manage these public lands to favor a heavily taxpayer subsidized special interest over all other competing users of the forest.

See *id.*

188. 141 CONG. REC. H6994 (daily ed. July 13, 1995) (statement of Rep. Fazio,

In all likelihood, the riders, had they been proposed as independent bills, would not have passed:

[T]here is a simple reason these crucial policy decisions were tacked on to the Interior appropriations bill instead of being considered independently: these policies were added as riders because on their own, they do not stand up to scrutiny. This is bad policy based on distorted science and values. The American people do not support it. Such change would not be sustained in the heat of open debate.<sup>189</sup>

The Interior bill was also criticized for its perceived slant towards private interests at the expense of the public:

This legislation, which is based on pseudoscience, fails in terms of priorities, process, policy, and the pragmatic . . . [It] constructs a new set of priorities in which the rights of the American people to use and enjoy the public lands of our Nation finish dead last behind a wide variety of special interests, in essence the users who exploit public resources.<sup>190</sup>

Although Congress passed the bill, the President vetoed it,<sup>191</sup> as he had earlier threatened.<sup>192</sup> Efforts to override the veto failed.<sup>193</sup>

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regarding back-door efforts to dismantle the California Desert Act). Ironically, Sen. Wallop's efforts to change the area's status to a BLM-managed monument, subject to fewer restrictions, failed in committee and on the floor during consideration of the substantive bill that became the California Desert Protection Act, *see* 140 CONG. REC. D1058 (daily ed. Sept. 29, 1993); *id.* at S4129 (Apr. 12, 1994). For further criticism of the California Desert rider, *see* Dellios, *supra* note 184, at A8.

189. 141 CONG. REC. H9687 (daily ed. Sept. 29, 1995) (statement of Rep. Vento); *see also* Dellios, *supra* note 184, at A8 ("GOP lawmakers are trying to use the budget process to undo Democratic-backed laws and policies that the Republicans might not have the votes to reverse one by one." Secretary Babbitt remarked that congressional efforts to push forward with these environmental riders were "a cynical circumvention of the democratic process.").

190. 141 CONG. REC. H9687 (statement of Rep. Vento); *see also id.* (Rep. Yates stated that this was the first time he had refused to sign a conference report on an appropriations bill: "Why? . . . It turns over the Nation's wealth for the exploitation by special interests.").

191. *See id.* at H15,057 (daily ed. Dec. 18, 1995); *Clinton Vetoes Interior, EPA Spending Bills*, GREENWIRE, Dec. 19, 1995, at 4. The appropriations bill for the Department of Commerce, HUD, and EPA was vetoed on the same day. *See id.*; Warren P. Strobel & David R. Sands, *Spending Bill Vetoes Will Keep Workers Home*, WASH. TIMES, Dec. 19, 1995, at A1.

192. *See* Gerstenzang, *supra* note 182; Janet Hook, *House Rejects Funding Bills Over Abortion, Mine Issues*, LOS ANGELES TIMES, Sept. 30, 1995, at A1, A27; Dellios, *supra* note 184, at A8. *See generally* Nichols, *supra* note 172, at 1B (discussing points of contention in Interior and EPA funding proposals).

193. *See* 142 CONG. REC. H120 (daily ed. Jan. 4, 1996).

## 2. The Consolidated Rescissions and Appropriations Act of 1996

In the wake of the President's veto, appropriations for the Department of Interior, along with four other departmental appropriations that had been vetoed or had not passed both chambers,<sup>194</sup> became part of the Consolidated Rescissions and Appropriations Act of 1996. As initially introduced, the Interior provisions again generated controversy.<sup>195</sup>

Many of the proposed bill's environmental provisions were revised before the Act was passed and enacted in April 1996, with the federal government facing yet another partial shut-down.<sup>196</sup> In response to concerns raised by the Administration, several riders originally attached to the Interior bill were either significantly revised or omitted.<sup>197</sup> For example, a provision that would have

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194. See *id.* at S4161, S4167 (daily ed. Apr. 25, 1996) (statement of Sen. Hollings) (discussing the veto of the bill for the Commerce, Justice, and State Departments).

195. See *id.* at H1808, H1867 (daily ed. Mar. 7, 1996) (statement of Rep. Yates) ("[T]his is the same bill that . . . the President wisely vetoed . . . . It mandates increased logging . . . [and] contains a moratorium on adding new plants and animals to the endangered species list"); *id.* at H1869 (statement of Rep. Miller) ("The bill is riddled with punitive provisions which have little or nothing to do with the budget and everything to do with antienvironmental policies."); see also *id.* at S2302, S2304 (daily ed. Mar. 19, 1996) (statement of Sen. Boxer) (noting that she would vote against the bill because of riders that would "block new drinking water standards; prohibit the EPA from enforcing a rule on reformulated gasoline; . . . undermine wetland protection; prohibit the issuance of new energy efficiency standards; [and] limit the listing of new Superfund sites"; as well as riders that would prohibit abortion).

196. See Pub. L. No. 104-134, 110 Stat. 1321 (1996). When it became apparent that a bill was soon to pass that would likely be enacted, Senator Daschle remarked: "This has been a very long, difficult struggle. Seven months, two Government shutdowns and 13 continuing resolutions later, we resolved many of these extraordinarily difficult and contentious issues in a way that I feel has done a real service to the Senate." 142 CONG. REC. S4161 (daily ed. Apr. 25, 1996); see *id.* at S4169 (Sen. Murray stating that "It's unfortunate that it took two Government shut-downs, innumerable furloughs, and needlessly bitter partisan disputes, before we reached the path of resolution: serious bipartisan negotiations. . . . [The Federal Budget should not be balanced through] quick and dirty gimmicks.").

197. See 142 CONG. REC. S4156, S4158 (daily ed. Apr. 25, 1996). For a discussion of the negotiations and enactment of the Omnibus Act, see Jackie Calmes & David Rogers, *Historic Budget Battle Ends with a Whimper*, WALL ST. J., Apr. 26, 1996, at A14; *Congress Ends Bitter Fight Over FY '96 Bill*, GREENWIRE, Apr. 26, 1996, at 4. Throughout the negotiations, environmental riders proved to be the main problem with the omnibus bill according to White House Chief of Staff Leon Panetta. See *House OKs Short-Term CR; Omnibus Bill Talks Continue*, CONG. DAILY, Apr. 24, 1996, available in 1996 WL 10090671; see also 142 CONG. REC. S4169 (daily ed. Apr. 25, 1996) (statement of Sen. Murray) ("[T]his cleaner bill represents a victory for all of us who care about the health of our environment and protection of natural resources.").

extended the salvage rider was dropped,<sup>198</sup> and the scope of the Columbia River Basin Ecosystem rider was substantially limited.<sup>199</sup>

Several riders regarding EPA authority were also dropped, including one stripping the EPA of its ability to overrule Corps of Engineers decisions on wetlands.<sup>200</sup> The final Act did, however, contain some restrictions on EPA programs such as additional listings under CERCLA,<sup>201</sup> along with several significant non-environmental riders.<sup>202</sup>

The Consolidated Act is an unusual piece of legislation because it allowed the President to waive several of its riders if he determined that suspension was appropriate, based upon the public interest in sustainable environmental management or the protection of cultural, biological, or historic resources.<sup>203</sup> Riders subject to waiver included provisions that would prohibit the listing of species under the Endangered Species Act,<sup>204</sup> require the National Park Service to allow traditional multiple use practices historically condoned by the BLM on the Mojave National Preserve,<sup>205</sup> and allow certain timber sales to be offered in the Tongass National Forest

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198. See 142 CONG. REC. S4182-83 (daily ed. Apr. 25, 1996); see also *Final Deal Sealed: Key Riders Dropped*, GREENWIRE, Apr. 25, 1996, at 2.

199. As enacted, this provision simply prohibits the extension of the Project to activities on non-federal lands. See Pub. L. No. 104-134, § 314, 110 Stat. 1321 (1996); H.R. CONF. REP. NO. 104-402, Amend. 152 (1995); see also 142 CONG. REC. S4161, S4169 (daily ed. Apr. 25, 1996) (statement of Sen. Murray) ("Now, the Columbia Basin Ecosystem Project can go forward, providing resource managers with comprehensive, scientific information about how best to protect the land . . . and proactively address resource management before it [sic] we face a debilitating crisis."); *id.* at S4167 (statement of Sen. Craig) (expressing disappointment that provision did not pass as originally proposed).

200. See 142 CONG. REC. at S4159 (daily ed. Apr. 25, 1996) (regarding the proposed Veterans Administration and Housing and Urban Development appropriations bill); *id.* at S2302, S2307-08 (daily ed. Mar. 19, 1996) (detailing Sen. Chafee's objections to the wetlands rider).

201. The Act restricts the listing of additional facilities on the National Priorities List under CERCLA § 105, 42 U.S.C. § 9605 (1996), until legislation reauthorizing CERCLA is enacted, and limits the listing of toxicological profiles on the Toxic Substances and Disease Registry under CERCLA § 104(i), 42 U.S.C. § 9604(i). See Pub. L. No. 104-134, § 101, 110 Stat. 1321 (1996); Helvarg, *supra* note 184, at 699.

202. For example, it prohibits funding for most abortions and registration of unmarried domestic partners in the District of Columbia. See Pub. L. No. 104-134, §§ 131-132, 110 Stat. 1321 (1996); 142 CONG. REC. H3842, H3866 (daily ed. Apr. 25, 1996).

203. See Pub. L. No. 104-134, § 119(b), § 325(c), § 2901(c), 110 Stat. 1321, 159-60 (1996).

204. See § 2901.

205. See § 119.

"notwithstanding any other provision of law" and without opportunity for judicial review.<sup>206</sup> President Clinton suspended the operation of all three provisions.<sup>207</sup> Non-waivable provisions, on the other hand, impose a moratorium on the processing of patent applications under the general mining laws<sup>208</sup> and delay implementation of grazing reform regulations.<sup>209</sup>

### 3. *The Balanced Budget Act of 1995*

The Balanced Budget Reconciliation Act of 1995,<sup>210</sup> as passed by both chambers, contained a particularly objectionable provision opening the Arctic National Wildlife Refuge to oil and gas exploration and extraction.<sup>211</sup> In fact, the version of the rider that was reported by the House Committee on Budget exempted exploration and development in the Refuge from all environmental laws.<sup>212</sup> Ongoing debate over the classification and use of the Refuge has resulted in numerous unsuccessful proposals to open the Refuge's coastal plain to oil and gas drilling.<sup>213</sup> At least two such bills have failed in the past ten years.<sup>214</sup> Yet, the appropriations process al-

206. See § 325.

207. See Marla Cone, *Endangered Species List Ready to Grow*, LOS ANGELES TIMES, May 10, 1996, at A3; *Clinton Waives Three Riders; Some Riders Remain*, GREENWIRE, Apr. 29, 1996, at 6.

208. See Pub. L. No. 104-134, § 322.

209. See *id.*, § 329.

210. H.R. 2491, 104th Cong. (1995).

211. See H.R. CONF. REP. 104-350, at 100 (§ 5333) (1995).

212. See H.R. REP. No. 104-280, at 66 (vol. I § 9002(h)) (1995).

213. The ongoing debate over the Arctic National Wildlife Refuge has been characterized as

at its best, a part of the debate between differing values and visions for the future integrity of life on Earth. At its worst, it is a raging political struggle between one vision that seeks to develop sustainable ways to live with and protect our wild natural heritage as a fundamental underpinning to life on Earth and another vision that seeks to allow the unlimited acquisition and use of natural resources to feed market driven systems that have no innate sustainability toward [sic] the natural world.

*Arctic National Wildlife Refuge: Hearings on H.R. 2491 Before the Committee on Energy and Natural Resources*, 104th Cong. 70 (1995) (statement of G. Jon Roush, President, The Wilderness Society) [hereinafter *Statement of Roush*].

214. See Nichols, *supra* note 172, at 1B; Richard J. Fink, *The National Wildlife Refuges: Theory, Practice and Prospect*, 18 HARV. ENVTL. L. REV. 1, 33, nn.216-28 (1994); 141 CONG. REC. S6736, S6738 (daily ed. May 16, 1995) (statement of Sen. Wellstone); Allan Freedman, *Supporters of Drilling See an Opening*, 53 CONG. Q. WKLY. REP. 2440, 2440 (Aug. 12, 1995) ("The debate has sizzled ever since . . . 1980").

lowed the allies of two powerful congressmen from Alaska (chairmen of committees that had failed to pass the provisions) to avoid the spotlight and procedural safeguards of the normal legislative process,<sup>215</sup> making the Arctic National Wildlife Refuge rider one of the 104th Congress's most egregious example of legislative mischief.

The Arctic National Wildlife Refuge was created thirty-five years ago in northeast Alaska "to protect its unique wildlife, wilderness, and recreational values."<sup>216</sup> The rider would undoubtedly jeopardize the integrity of the refuge, which is "a world treasure of ecologically pristine wilderness"<sup>217</sup> containing a rich diversity of wildlife and its habitat.<sup>218</sup> The area that would be opened to exploration and development is "the biological heart . . . of the refuge."<sup>219</sup> It is also critical to the subsistence of the native Gwich'in peoples due to the presence of the Porcupine Caribou herd, an important subsistence resource.<sup>220</sup>

Although the public overwhelmingly opposes drilling in the Arctic National Wildlife Refuge,<sup>221</sup> the appropriations process en-

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215. See Freedman, *supra* note 214, at 2440 (reporting that the strategy of chairmen Young and Murkowski (R-Alaska) to put the measure in the omnibus bill "would give them an edge in the Senate because the reconciliation bill, which reconciles tax and spending policies with deficit-reduction goals, cannot be filibustered. It also could blunt a threatened veto from President Clinton.").

216. *Statement of Roush, supra* note 213, at 70. In 1980, Congress doubled the size of the protected area to over 19 million acres and designated 8 million acres as wilderness. See *id.* At that time, one and a half million acres of coastal plain, known as the 1002 area, were set aside for further study, protecting it until Congress passes an Act to either permanently protect it as wilderness or to develop whatever oil potential may exist in the area. See Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3142-3143 (1994).

217. *Statement of Roush, supra* note 213, at 69.

218. See *id.* Secretary of Interior Bruce Babbitt strongly opposed development in the Arctic National Wildlife Refuge because exploration and development would permanently alter the area. See Freedman, *supra* note 214, at 2441.

219. *Statement of Roush, supra* note 213, at 69.

220. "What happens to the Arctic Refuge is not only an environmental issue. It is a human rights issue too, because the survival of the Gwich'in culture depends on the protection of the birthplace of the Porcupine Caribou Herd [sic]. It is [about] the basic tribal right we have to carry on our tradition[al] ways." *Leasing of the 1002 Area of the Arctic National Wildlife Refuge to the Oil Exploration and Development Industry: Hearing on H.R.2491 Before the House Comm. on Resources*, 104th Cong. 60 (1995) (statement of Sarah James, Netsi Gwich'in, Arctic Village, Alaska). See also *Statement of Roush, supra* note 213 at 69 ("The Arctic National Wildlife Refuge is internationally recognized for the extraordinary values that sustain unique wildlife populations and the subsistence like ways of the Gwich'in Athapaskan Indians."). Regarding the position of Alaska Native corporations, see *Hearing on H.R.2491, supra*, at 60 (statement of Oliver Leavitt, Vice-President, Arctic Slope Regional Corporation).

221. See 142 CONG. REC. S5521, S5528 (daily ed. May 23, 1996) (statement of Sen.



abled a small handful of legislators to pervert the system to pass this rider.<sup>222</sup> It was characterized by its opponents as an irresponsible attempt to effectuate long-term prioritization of the nation's limited natural resources without public debate and full consideration by the appropriate authorizing committees and members of Congress.<sup>223</sup>

While it falls to representative government to responsibly balance out and resolve these conflicts through an open democratic process, we are far away from seeing that responsibility applied in how Congress is currently acting on the future of not only the Arctic Refuge, but all of our public lands . . . . The attempt to develop the Arctic Refuge [through the appropriations process] is a major symbol of that failure in public responsibility.<sup>224</sup>

Despite immense pressure to sign the Balanced Budget Act and avoid another government shut-down, the President vetoed it, based in large part on the Arctic National Wildlife Refuge provision.<sup>225</sup>

In May 1996, the House Budget Committee once again proposed budgetary reconciliation legislation that would open the Arctic National Wildlife Refuge for exploration.<sup>226</sup> The Senate's amend-

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Exon) (vast majority of Americans oppose development of the Refuge for oil and gas drilling).

222. Even members of the appropriations committees objected: "In sum, the majority's text—which has not been the subject of any public hearings—seeks to avoid environmental lawsuits and public process by exempting the [Arctic National Wildlife Refuge] leasing from environmental laws. It also exempts [the Refuge] from the basic laws governing oil and gas leasing . . . which apply even to less sensitive public lands elsewhere in the country." H.R. REP. NO. 104-280, at 990 (1995) (Minority, Additional and Dissenting Views to Title IX); see 141 CONG. REC. S16,014, S16,025 (daily ed. Oct. 27, 1995) (statement of Sen. Bradley) ("This approach relies on political myopia . . . and fails to withstand the straight face test. Only by railroading . . . [the Refuge rider] through the Senate, under the very restrictive and controlled conditions of budget reconciliation, would . . . [it] ever have a chance of becoming law.").

223. See 141 CONG. REC. S16,024 (daily ed. Oct. 27, 1995) (statement of Sen. Bradley) ("If we go ahead with the development of the Arctic National Wildlife Refuge, we damage probably irrevocably a unique, world-class ecosystem. We consume utterly a non-renewable resource. . . . I, frankly, reject any claim that our children will thank us for using up this oil and running oil rigs and oil pipelines across the Arctic Plain. . . . Our children are not asking us to sell off their collective inheritance.").

224. *Statement of Roush, supra* note 213, at 69.

225. See 141 CONG. REC. H14,136-37 (daily ed. Dec. 6, 1995) (President's veto message to Congress) ("I want to protect this biologically rich wilderness permanently. I am also concerned that the Congress has chosen to use the reconciliation bill as a catch-all for various objectionable natural resource and environmental policies.").

226. See Concurrent Resolution for the Budget for FY 1997, H. CON. RES. 178, 104th Cong. (1996) (establishing budget targets for FY 1998-2002).

ments to the bill omitted the Arctic National Wildlife Refuge provision,<sup>227</sup> but pressure to develop the Refuge continues.<sup>228</sup>

### *C. 1997 Appropriations Bills Contain Fewer Riders*

Congress once again failed to pass a general appropriations bill for the Department of Interior for fiscal year 1997. Interior appropriations had been under consideration as an independent bill<sup>229</sup> up until just a few days before the end of the fiscal year,<sup>230</sup> when it became apparent that passage was unlikely and that a Continuing Resolution or omnibus package would be necessary.<sup>231</sup> The House then wrapped the Interior bill with four others that had been stalled, in part due to controversial riders, in the Omnibus Consolidated Appropriations Act.<sup>232</sup>

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227. See S. CON. RES. 57, 104th Cong. (1996); 142 CONG. REC. H6247, H6268 (daily ed. June 12, 1996); 142 CONG. REC. S6167-86 (daily ed. June 13, 1996); *Congress Lays Plans for Another Reconciliation Bill (Arctic National Wildlife Refuge?)*, PUB. LANDS NEWS, June 27, 1996, at 6.

228. See 142 CONG. REC. S10,583-84 (daily ed. Sept. 16, 1996) (Sen. Murkowski suggested that the threat posed by Saddam Hussein, and the instability of Middle Eastern oil sources, justify opening domestic oil fields, including the Arctic National Wildlife Refuge). The conflict appears certain to be a significant one in the 105th Congress. Bills have recently been introduced in both the House and the Senate that would designate the Refuge as a wilderness area, see House Bill 900, 105th Cong. (1997) (proposed by Rep. Vento) and Senate Bill 531, 105th Cong. (1997) (proposed by Sen. Roth), but pro-development forces promise renewed legislation to allow leasing. See PUBLIC LANDS NEWS, April 17, 1997, at 8 (indicating that this could be proposed as a stand-alone bill or as a rider to an omnibus budget bill).

229. H.R. 3662, 104th Cong. (1996).

230. See 142 CONG. REC. D743 (daily ed. July 12, 1996). See also S. Rep. 104-319; 142 CONG. REC. S7886 (daily ed. July 16, 1996); *Panetta Issues Wish List as Spending Talks Start*, CONG. DAILY/AM, Sept. 17, 1996, available in 1996 WL 11367542 [hereinafter *Panetta Issues Wish List*].

231. See *Senate Fails to Act on Money Bill, Raising Omnibus Specter*, PUB. LANDS NEWS, Aug. 8, 1996, at 5; Eric Pianin, *Butting Heads Over Spending—Again*, WASH. POST, Sept. 16, 1996, at A9; Jessica Mathews, *Two Tasks for Congress*, WASH. POST, Sept. 10, 1996, at A15; *Panetta Issues Wish List*, *supra* note 230.

232. Pub. L. No. 104-208, 110 Stat. 3009 (1996). The Omnibus Act includes appropriations for Defense, Labor, Commerce-Justice-State, Foreign Operations, Interior, and Treasury-Postal-White House operations. It was passed on September 30, 1996, and signed into law just hours before FY 1997 began. See *Clinton Signs Spending Bill Following Passage in Senate*, CONG. DAILY, Oct. 1, 1996, available in 1996 WL 10091548 [hereinafter *Clinton Signs Spending Bill*]. Riders generated turmoil over most, if not all, of these bills. For example, the Treasury Department bill was shelved in Congress because of irreconcilable differences over provisions prohibiting abortion coverage for federal workers and health care "gag rules." See Stephen Barr & Eric Pianin, *Treasury Appropriations Bill is Put Aside in Divided Senate*, WASH. POST, Sept. 13, 1996, at A20; Stephen Barr & Helen Dewar, *Senate Continues Abortion Ban for Federal Workers Insurance*, WASH. POST, Sept. 12, 1996, at A6.

Prior to consolidation, the House version of the Interior bill had included substantially fewer legislative riders than the FY96 bill, a fact attributed both to eagerness to complete business and begin political campaigns,<sup>233</sup> and to the negative public reaction to the previous year's environmental attacks.<sup>234</sup> The House bill nonetheless contained large funding shortfalls for national parks, endangered species programs, implementation of the Northwest Forest Plan, energy conservation, and American Indian programs.<sup>235</sup> The Senate Appropriations Committee amended the bill to increase funding,<sup>236</sup> but added riders that would waive tribal sovereign immunity, allocate money directly to Indian tribes (bypassing the Bureau of Indian Affairs) and delay implementation of the Tongass Forest Plan.<sup>237</sup>

In addition to adding billions of dollars in additional domestic discretionary funding in response to the Administration's demands,<sup>238</sup> the final version of the Act dropped a number of riders that had been appended to the individual appropriations bills, including the two that governed tribal funding and sovereign immunity.<sup>239</sup> It also added some new riders, including one waiving the requirements of the Endangered Species Act and NEPA for construction of border fencing to control illegal immigration,<sup>240</sup> another creating the Opal

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233. See Eric Pianin, *Congress Finishes Major Legislation*, WASH. POST, Oct. 1, 1996, at A1.

234. See Nichols, *supra* note 172, at 1B.

235. See 142 CONG. REC. H6518, 6522 (daily ed. June 19, 1996) (statement of Rep. Beilenson) ("[T]he Republican leadership's spending priorities . . . shortchange . . . programs that protect our Nation's resources for our children and our grandchildren. . . . Th[e] bill . . . denies future generations the legacy we believe we would all like to leave behind: abundant natural resources, a clean and well-protected environment, and a cultural richness that all Americans can enjoy."). Secretary Babbitt recommended that the President veto the bill if it contained drastic funding shortfalls for Endangered Species Act programs and clean-up of abandoned mines. See *House Spending Bill Due for Veto; Money is a Major Issue*, PUB. LANDS NEWS, June 27, 1996, at 2; see also *Senate Interior Appropriations Bill Facing Veto Threat*, CONG. DAILY/AM, Sept. 16, 1996, available in 1996 WL 11367534 (predicting showdowns on grazing and other natural resources issues; Tongass rider attacked as an unconstitutional encroachment on executive authority).

236. See S. REP. NO. 104-319 (1996).

237. See *id.* at § 135-136 (Tongass rider), § 118 (tribal allocation), § 329 (tribal immunity).

238. See *Clinton Signs Spending Bill*, *supra* note 232.

239. The Act consists of over 2000 pages of legislation; some noted that it was doubtful whether a single member of Congress had read the entire bill, given its length and the short period of time in which it had been compiled. See 142 CONG. REC. S11,835 (daily ed. Sept. 30, 1996) (statement of Sen. Inhofe).

240. See H.R. CONF. REP. 104-863 at 567 (1996) (Div. C, Title I, § 102(c)); 142 CONG. REC. S11,711 (daily ed. Sept. 28, 1996) (statement of Sen. Simpson) (applauding

Creek Wilderness and Recreation Area,<sup>241</sup> and yet another transferring 5,000 acres of land to the Coquille Indian Tribe.<sup>242</sup>

V. APPROPRIATIONS RIDERS THREATEN THE INTEGRITY OF  
DEMOCRATIC GOVERNMENT BY PRECLUDING PUBLIC  
INVOLVEMENT AND INFORMED DEBATE ON CRITICAL POLICY  
ISSUES

As the riders explored above make clear, policy-oriented provisions added during the appropriations process can have a dramatic impact on the operation of targeted statutes. The inclusion of riders is not, of course, the only leverage appropriations committees have over the agencies they oversee. Appropriations committees' control over allocational decisions may give them almost as much influence over the implementation of federal programs as the legislative committees that authorized them.<sup>243</sup> However, the "power of the purse," while substantial, does not extend to the outright reversal of agency policy.<sup>244</sup>

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inclusion of border control rider so that presence of endangered species, such as the California gnat catcher, would not delay fence construction).

241. See H.R. CONF. REP. 104-863, at 538 (Div. B, Title I, § 104); Brent Walth, *Hatfield Gets Wish for Opal Creek*, PORTLAND OREGONIAN, Oct. 2, 1996, at A1 (Senator Hatfield, chairman of the Senate Appropriations Committee, insisted on the inclusion of several riders affecting lands in Oregon in the final budget bill. Hatfield's position "allowed him to slip the Opal Creek provisions into the final spending bill.").

242. See H.R. CONF. REP. 104-863, at 552 (Div. B, Title V, § 501); Courtenay Thompson, *Indian Tribes Face Hurdles on Land Shifts*, PORTLAND OREGONIAN, Oct. 2, 1996, at D1; see also Kathy Durbin, *Opal Creek is Blowing in the (Political) Wind*, HIGH COUNTRY NEWS, Sept. 16, 1996, at 2 (reporting that environmental groups withdrew support for the Opal Creek provision when Senator Hatfield tied it to the Coquille "giveaway").

243. See Stewart, *supra* note 164, at 1017. Appropriations committees have a degree of oversight "unmatched elsewhere in Congress." *Id.* at 1021. Just as agency programs do not become real until they are enforced, legislative measures lack substance until they are funded. See J. William Futrell, *The Administration of Environmental Law*, in ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY 71, 77 (Celia Campbell-Mohn et al. eds., 1993) [hereinafter *Administration*]. For example, the Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994), was effectively crippled by a lack of appropriations from 1982 to 1990, and the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994), went unauthorized for nearly a decade. See *id.*; Sher, *supra* note 4.

244. See LeBoeuf, *supra* note 163, at 475. It would appear that the Framers of our bicameral and tripartite system anticipated that appropriations allocations would provide a check on executive spending. See THE FEDERALIST No. 58 (James Madison). It is doubtful, however, that they intended for appropriations committees—separate and distinct from authorizing committees who are likely to be more conversant in their particular field—to wield such power over executive programs. See Oleszek, *supra* note 162, at

The use of policy-oriented riders, on the other hand, can effectively force an agency to take action contrary to its authorizing mandate. Because of the absence of safeguards in the appropriations process, such dramatic policy changes can be achieved with little opportunity for consideration or debate. Riders can also be employed to force the President to capitulate to the legislature's demands when normal legislative routes would be stymied by the threat of veto.<sup>245</sup>

This section examines the normal legislative processes for enacting legislation and finds that these processes provide procedural and substantive safeguards that are absent when riders are appended to appropriations bills. It concludes that the appropriations process is a poor vehicle for balancing competing interests and establishing national priorities.<sup>246</sup>

#### *A. Normal Legislative Processes Encourage Full and Informed Consideration of Substantive Policies and Priorities*

The normal process for the consideration of legislation in Congress—committee research, drafts, review, and recommendation, followed first by floor debate and passage in each chamber, then conference reports and bicameral adoption—provides many opportunities for public scrutiny and for consideration by members interested in the subject matter of the bill.<sup>247</sup> With respect to legislation that did not originate in their own committees, members are provided with their best (and sometimes only) opportunity to shape public policy through amendments and votes on the floor.<sup>248</sup> Floor debate, hearings, and committee consideration are the “components of the legislative process that are most likely to reveal misrepre-

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737–38 (quoting Senator Hubert Humphrey, disputing the view that the constitutional requirement that appropriations be “made by law” meant that they must be made by appropriations committees).

245. See Stewart, *supra* note 164, at 1015.

246. Parts III and IV, *supra*, demonstrate that appropriations riders are especially ill-suited for managing valuable, but limited, natural resources held in trust for the benefit of the public and future generations.

247. For a detailed discussion of the legislative process in Congress, see generally Stanley Bach, *Legislating: Floor and Conference Procedures in Congress*, in 2 *ENCYCLOPEDIA OF THE AMERICAN LEGAL SYSTEM* 701–20 (Joel H. Silbey ed., 1994); WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (4th ed. 1996).

248. See Bach, *supra* note 247, at 708.

sentations, false assumptions, and problems with ambiguous language."<sup>249</sup>

Initially, most policy matters are delegated to committees with jurisdiction over the issues involved.<sup>250</sup> Environmental issues are divided into a myriad of committees with often overlapping jurisdiction.<sup>251</sup> In the Senate, environmental and natural resources issues are governed by Committees on Energy and Natural Resources, Agriculture, Environment and Public Works, and, inevitably, Appropriations. In the House, relevant committees include Energy and Commerce, Agriculture, Merchant Marine and Fisheries, Science, Space and Technology, and Appropriations.<sup>252</sup>

The congressional process is strengthened by delegating the investigation and consideration of complex environmental issues to committees with expertise in a bill's specific subject matter.<sup>253</sup> Further, the distribution of authority among congressional committees creates numerous points of access to decisionmakers, and, arguably, greater accountability and response to feedback. The oversight of interested committees and subcommittees ensures that no single chairperson—subject to the local interests of his constituents and pressures of lobbyists and contributors—has a "lock" on environmental issues, and that various perspectives are heard, researched,

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249. Axline, *supra* note 54, at 638. See generally Sher & Hunting, *supra* note 165.

250. For a detailed discussion of the relationship between committees and their chambers, and the distribution and exercise of power in the decisionmaking process in Congress, see STEVEN S. SMITH AND CHRISTOPHER J. DEERING, *COMMITTEES IN CONGRESS* (2d ed. 1990).

251. See Futrell, *supra* note 243, at 75–77 (citing THEODORE J. LOWI, *THE END OF LIBERALISM* (2d ed. 1979)). For example, 11 House and 9 Senate committees, including nearly 100 separate subcommittees, oversee EPA. See Thomas L. Adams, Jr. & M. Elizabeth Cox, *The Environmental Shell Game and the Need for Codification*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,367 (1990).

252. See Futrell, *supra* note 243, at 75–77. Environmental issues have been the subject of specialization in the various House and Senate committees for decades. During the 1960s, in the Senate, the Subcommittee on Air and Water Pollution of the Environment and Public Works Committee asserted jurisdiction over air and water pollution, including oil pollution in navigable waters. See Muskie, *supra* note 26, at 176–78. House committees that governed air and water pollution and solid waste legislation included the Public Works Committee and Interstate and Foreign Commerce Committee, while the Merchant Marine and Fisheries Committee retained jurisdiction over oil pollution. See *id.* at 177–78. Meanwhile, the Interior Committees were responsible for management of natural resources. See *id.* Executive agencies are similarly situated: environmental regulation comes under the jurisdiction of EPA, while natural resources issues are handled by the Department of Agriculture (Forest Service) and the Department of Interior (Bureau of Land Management, National Park Service, and Fish and Wildlife Service). See Futrell, *supra* note 243, at 79–80.

253. See *id.* at 75–78.

and considered by legislators responsible for protecting the full range of public interests. The usual legislative process "improve[s] final legislative products and allow[s] dissenters to fine-tune language and challenge assumptions."<sup>254</sup>

This process is not immune from criticism. A common complaint is that public policy decisionmaking is sometimes piecemeal and uncoordinated.<sup>255</sup> One reason is the committee process itself, which can result in fragmented consideration of the issues. Dispersed authority can also result in infighting, competition and lack of cooperation, and can impede comprehensive strategic leadership.<sup>256</sup>

In addition, Congress's efforts have been described as static and unresponsive to the needs of the public.<sup>257</sup> To the chagrin of

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254. Axline, *supra* note 54, at 632.

255. See Adams & Cox, *supra* note 251, at 10,367; Muskie, *supra* note 26, at 172 (arguing that because "public concern and scientific knowledge first focused legislative and administrative attention on the environmental crisis in piecemeal stages, the patterns of congressional and executive jurisdiction have reflected that approach").

256. Committee consideration is further "complicated by regional and party alliances within each committee." Futrell, *supra* note 243, at 75. "As the importance of environmental protection becomes more obvious, its attractiveness as a political and legislative issue increases, and the muddy waters of committee jurisdiction in Congress become more muddy." Muskie, *supra* note 26, at 176. As a result, "jurisdictional disputes between committees could have a damaging effect on our efforts to solve the environmental crisis." *Id.* at 180; see also David W. Brady, *Constitutional and Political Constraints on Congressional Policy-Making: A Historical Perspective*, in 2 *ENCYCLOPEDIA OF THE AMERICAN LEGAL SYSTEM* 873, 876-78 (Joel H. Silbey ed., 1994).

257. One commentator accuses Congress of "seem[ing] to exhibit a persistent inability to legislate any major policy changes at all." Brady, *supra* note 256, at 873. It typically takes years for comprehensive environmental legislation to work its way through the authorizing committees and floor amendment and debate. For example, efforts to reauthorize the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund), 42 U.S.C. §§ 9601-75 (1994), for which funding authorizations expired in 1994, see Pub. L. No. 101-508 § 6301, 104 Stat. 1388-319 (1990) (codified as amended at 42 U.S.C. § 9611), have taken nearly three years, and the end to the debate is not yet in sight. For a sampling of the extensive deliberations that have taken place in authorizing committees and on the floor of both houses, see 140 CONG. REC. S1058-86 (daily ed. Feb. 7, 1994) (introducing Senate Bill 1834, 103d Cong. (1994)); *id.* at S12,216 (daily ed. Aug. 19, 1994) (referring Senate Bill 1834 to the Finance Committee); *id.* at D1151 (Finance committee reporting favorably on Senate Bill 1834); *id.* at S13,560 (daily ed. Sept. 28, 1994) (statement of Sen. Gorton, discussing history of congressional efforts and urgent need for reform); 142 CONG. REC. H4438 (daily ed. May 7, 1996) (statement of Rep. Gutknecht on urgency of reform); *id.* at H8029 (daily ed. July 18, 1996) (introducing House Bill 3849, 104th Cong. (1996)). Superfund's predecessor, the original CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980), expired in September 1985. Efforts to reform the statute in 1985-86 consumed the attention of seven different congressional committees over almost two years; a stopgap measure was required to keep the program intact while numerous hearings, debates, and conference committee meetings were held. See ALLAN J. TOPEL AND REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* 13-14

those in the majority, the hallmark of Congress has been “continuity, stability, and incremental policy development, not rapid and sweeping change.”<sup>258</sup> Indeed, the bicameral system established by the Founders and encapsulated in the Constitution<sup>259</sup> was a response to the concern that a hasty and potentially tyrannical majority in the House of Representatives would act “too quickly and chaotically”<sup>260</sup> if left to its own devices; the Senate, an indirectly elected upper house, would “use reason and judgment to temper the lower house’s expected haste and extremism.”<sup>261</sup>

However imperfect, these safeguards operate to encourage considered policymaking and public involvement. Although the duration and number of debates on a particular bill are not proof of its ultimate quality or long-term viability, extended discussions involving a range of perspectives provide at least some assurance that troubling issues will be resolved in a manner that protects the public interest.<sup>262</sup>

### *B. Public Involvement and Reasoned Decisionmaking Are Short-Circuited in the Appropriations Process*

Aspirations for comprehensive review, embodied in the legislative structure, are defeated when policy matters are decided through riders added to appropriations bills. Inadequate enforcement of existing rules, a willingness to waive rules, and the growing use of omnibus Continuing Resolutions in the appropriations process

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(1992). The Superfund Amendments and Reauthorization Act of 1986 was finally signed into law on October 17, 1986. See Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601–9675).

258. Brady, *supra* note 256, at 873–74; see *id.* at 878 (discussing why major policy changes rarely occur in Congress), *id.* at 879–82 (describing “electoral realignments,” which occur when popular voter revolution has a significant impact on the governing process, as the exception to the general premise, and suggesting that three realignments had occurred in American history prior to 1993 in response to slavery, industrialization, and the Great Depression and New Deal). Perhaps historians and constitutional scholars in future years will include the 1994 election and Republican “Contract with America” as a fourth realignment).

259. See U.S. CONST. art. I, §§ 1–3.

260. Brady, *supra* note 256, at 873–74.

261. *Id.* at 873.

262. Justice Louis Brandeis put it most aptly: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY* 89 (1995), cited with approval in *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), and Bruce Babbitt, *Springtime for Polluters*, WASH. POST, Oct. 22, 1995, at C2.



allow substantive riders to flourish, undermining the goal of deliberative government. This is particularly damaging when the appropriations process is used to dictate complex substantive issues, like environmental policy, that would greatly benefit from the give and take of the normal legislative process.<sup>263</sup> Even environmental legislation that is fairly discrete receives far greater consideration in committees and on the floor<sup>264</sup> than does an appropriations rider.<sup>265</sup>

### 1. Existing Rules Fail to Limit Abuse of Substantive Riders

Congressional procedures play a critical role in ensuring that issues are given informed consideration.<sup>266</sup> "The legislative procedures of the House and Senate are not merely the neutral mechanics of the lawmaking process; they can have important and sometimes decisive policy consequences."<sup>267</sup> Yet nothing in the Constitution expressly ensures that public policy matters are given full consideration by Congress. Congress is left largely free to govern itself;<sup>268</sup> each house may adopt its own procedural rules, and decide

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263. See *Bolduan*, *supra* note 59, at 370-72.

264. See discussion *supra* note 257 and accompanying text.

265. For example, the 1995 timber salvage rider was considered over a total of four months. It was first disclosed in the committee report for House Bill 1159, 104th Cong. (1995) (a forerunner to the Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194 (1995)) on March 8, 1995. See H. REP. 104-71 (1995). It was introduced on the House floor on March 14, see 141 CONG. REC. H3148-56 (daily ed., 1995), debated sporadically over the next two days, and passed by the full House on March 16. See *id.* at H3159. The rider received similar treatment in the Senate. See 141 CONG. REC. S4761 (daily ed. Mar. 29, 1995); *id.* at S5378-80 (daily ed. Apr. 6, 1995); see also *id.* at H5317-18 (daily ed. May 18, 1995); *id.* at S7371-81 (daily ed. May 24, 1995) (discussing conference report). House Bill 1158, 104th Cong. (1995)—the version emerging from the conference committee—was vetoed after passage. It was reintroduced in modified form as House Bill 1944, 104th Cong. (1995), which passed the full House on June 29, see 141 CONG. REC. H6643-44 (daily ed. June 29, 1995), was considered on the Senate floor on July 20-21, and passed the Senate on July 21, 1995. See *id.* at S10,462-67 (daily ed. July 21, 1995).

266. See Bach, *supra* note 247, at 702 ("[A]ssemblies that approve policies without the benefit of adequate and informed debate are properly derided as rubber-stamp bodies that merely ratify decisions made elsewhere.").

267. *Id.* at 718. The most important issue about a bill may actually be settled with the disposition of "an ostensibly procedural question" even before debate on the merits of the bill itself commences. *Id.* at 715. As a result, proposals to reform House and Senate procedural rules "can provoke floor debates as heated and vituperative as those over the most contentious issues of national or international policy . . . . Changes in the procedures . . . can redistribute the balance of power within the House or Senate in fundamental and lasting ways . . . [and] affect a wide array of policy choices not only for the present but for the unforeseeable future . . . ." *Id.* at 718.

268. In comparison, the vast majority of state constitutions contain fairly detailed procedural limitations on the legislative process. See Robert F. Williams, *State Constitu-*

how it will interpret and enforce them.<sup>269</sup> Each may also amend or repeal its rules, or waive or suspend them on any given bill.<sup>270</sup> As a result, "members remain in almost total control of how they conduct their business,"<sup>271</sup> ignoring, if they choose, mechanisms that provide for public input and informed deliberation.

Almost from the date of their inception,<sup>272</sup> appropriations committees have been criticized for overstepping their bounds and adding extraneous policy riders to their bills, which "undercut the prerogatives of other standing committees."<sup>273</sup> Indeed, current House and Senate rules provide that appropriations bills cannot contain new policy directives or modify existing substantive law.<sup>274</sup> This is

*tional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798-99 (1987). Many state constitutions prohibit the legislature from attaching substantive riders to general appropriations bills. *See, e.g.*, ALA. CONST. art. IV, § 71; ARIZ. CONST. art. IV, pt. 2, § 20; FLA. CONST. art. III, § 12; ILL. CONST. art. IV, § 8(d); LA. CONST. art. III, § 16(c); OKLA. CONST. art. V, § 56. Others strictly prohibit the inclusion of multiple subjects in bills. *See, e.g.*, CAL. CONST. art. IV, § 9; N.D. CONST. art. IV, § 33. Courts have invalidated substantive appropriations riders under such single subject provisions. *See Cal. Labor Fed'n AFL-CIO v. Occupational Safety and Health Standards Bd.*, 5 Cal. App. 4th 985 (Cal. Ct. App. 1992).

269. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings."). The standing rules adopted by the Senate remain in force from year to year until the Senate affirmatively decides to revise them, but the House adopts its rules anew at the beginning of each Congress. *See* Bach, *supra* note 247, at 701.

270. *See* Bach, *supra* note 247, at 702.

271. *Id.* at 701. For the few examples of general legislative requirements, *see* U.S. CONST. art. I, § 4, cl. 2, *amended by* U.S. CONST. amend. XX, § 2 (Congress shall assemble at least once a year); *id.* at § 7, cl. 1 (revenue bills must originate in the House of Representatives).

272. The House established an Appropriations and Banking Committee in 1865, and the Senate created its Appropriations Committee in 1867. *See* Oleszek, *supra* note 162, at 733.

273. *Id.* at 733. Past congresses attempted to use riders to deprive slaves of the right to vote (by prohibiting the use of federal troops to protect them at the polls) and to rid the federal government of "subversive" employees suspected of Communist affiliations. *See* LeBoeuf, *supra* note 163, at 471-72 (riders that would have affected voting rights were vetoed by President Hayes, and the Supreme Court, in *United States v. Lovett*, 328 U.S. 303 (1946), struck down the rider that targeted federal employees as a bill of attainder prohibited by U.S. CONST. art. I, § 9, cl. 3). The practice of "rider-tacking" has been employed even more frequently in recent years, in many important public policy areas. *See* discussion *supra* Parts IV.A-B.

274. *See* *Standing Rules of the U.S. Senate*, Rule 16(4), in COMMITTEE ON RULES AND ADMINISTRATION, SENATE MANUAL 624 (1995); *Rules of the House of Representatives*, Rule XXI(2), in CHARLES W. JOHNSON, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES 624 (1995). *See generally* C. CANNON, PROCEDURE IN THE HOUSE OF REPRESENTATIVES § 1834 (1936). The provision barring substantive riders was reaffirmed by the House in the 104th Congress, and a provision was added that prohibits the attachment of non-emergency matters in an appropriations bill containing an emergency designation under the Budget Act. *See* *Rules of the House of Representatives*, Rule XXI(2)(e), *supra*; H.R. Res. 6, 104th Cong. § 215(b) (1995) (en-

a long-standing prohibition; it was initially adopted in the House in the late 1830s, and the Senate quickly followed suit.<sup>275</sup>

The distinction between substantive law and appropriations is intended to enable appropriations committees to concentrate on financial issues and, perhaps more importantly, "to prevent them from trespassing on substantive legislation."<sup>276</sup> Thus, the appropriations process is not to be used as a "vehicle . . . for legislative provisions that might not survive the scrutiny of the authorizing committees."<sup>277</sup>

However, while the House enforces its rules more strictly than does the Senate,<sup>278</sup> the House Committee on Rules may and often does waive or suspend rules with respect to appropriations bills.<sup>279</sup> When congressional rules are waived, riders may be attached to

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acted); 141 CONG. REC. H23, H29 (daily ed. Jan. 4, 1995). Although riders may be appended to bills, the report clearly states "it is not the intent of this rule to make in order any amendments not otherwise in order under the rules. Thus, any amendments to rescind or reduce direct spending must be germane to the bill as reported or be given special protection by way of a special rule reported by the Rules Committee and adopted by the House." 141 CONG. REC. H37.

275. See Oleszek, *supra* note 162, at 735. The House also has a rule requiring that amendments be germane to the topic of the bill they propose to affect; however, the Senate has no germaneness rule of general application. See Bach, *supra* note 247, at 707. Moreover, although the Senate does prohibit policy-based amendments to House-passed appropriations bills, its broad interpretive standards enable members to defend many issues as germane. See Oleszek, *supra* note 162, at 735-36.

276. *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979). See generally SMITH & DEERING, *supra* note 250, at 235-36.

277. See SMITH & DEERING, *supra* note 50, at 183; Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 458, 458-59 (the "incomplete" appropriations process should not be used to prevent authorizing committees from applying their expertise).

278. See Bach, *supra* note 247, at 711.

279. This happened with particular frequency in the 104th Congress. See, e.g., 142 CONG. REC. D629 (daily ed. June 18, 1996) (House Comm. on Rules waives points of order against legislative provisions in House Bill 3662, 104th Cong. (1996), the general appropriations bill for the Department of Interior and related agencies for FY 1997); 141 CONG. REC. H4344, 4345 (daily ed. Apr. 6, 1995) (House approves Rules Comm. resolution waiving all points of order against House Bill 889, 104th Cong. (1995), a defense measure that included a moratorium on Endangered Species Act listings). The House Committee on Rules approved the timber rider by waiving both House Rule XXI, which prohibits unauthorized legislative provisions in appropriations bills, and House Rule XVI, the germaneness rule. See H.R. REP. NO. 104-78 (1995); 141 CONG. REC. D347 (daily ed. Mar. 14, 1995). Waivers are easily obtained when the appropriations chair or the chair of the authorizing committee desires inclusion of a rider: "the Rules Committee is a generally dependable ally of the majority-party leadership." Bach, *supra* note 247, at 705; see also Stewart, *supra* note 164, at 1015 (noting that appropriations committees have been centers of power since inception); Axline, *supra* note 54, at 639 (discussing Senators Gorton and Hatfield's influence over the adoption of the salvage rider). Moreover, the House allows "limitation" riders, which restrict or limit the use of funds for any part of a program addressed in the bill. See Oleszek, *supra* note 162, at 736. Limitation riders

appropriations bills and move through the process with minimal public review and input, and without due consideration of the bills' implications by the authorizing committees with jurisdiction over the rider's subject matter.<sup>280</sup>

Moreover, the hasty process by which riders are appended to large appropriations bills provides little opportunity for non-members of the appropriations committees to read the rider's provisions, much less consider, question, or debate, the wisdom of its requirements and prohibitions.<sup>281</sup>

## 2. Continuing Resolutions Are Particularly Susceptible to Policy Amendments

The pitfalls of making sweeping policy decisions through the appropriations process are exacerbated when Congress fails to enact one or more of the thirteen regular appropriations bills by the start of the new fiscal year, and a continuing resolution is required to provide last minute stopgap funding and maintain government operations.<sup>282</sup> There are no congressional rules to hinder the inclusion of policy matters in a continuing resolution.<sup>283</sup> As a result, continuing resolutions may encourage appropriators "to pursue leg-

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inevitably make policy. See *id.* (citing abortion as a classic example); see also Devins, *supra* note 277, at 456-57.

280. See Allan Freedman, *For Sale: Government Assets To Reduce Budget Deficit*, 57 CONG. Q. WKLY. REP. 2889, 2890 (1995) (quoting Rep. George Miller, ranking minority member of the House Natural Resources Committee, expressing disgust at efforts to tack a rider allowing oil and gas drilling in the Arctic National Wildlife Refuge onto the Balanced Budget Act of 1995).

281. See Devins, *supra* note 277, at 458 ("Exacerbating this problem [of using the appropriations process to accomplish substantive ends], appropriations are often acted on quickly, providing little opportunity for thoughtful deliberation of the issues raised by such measures."); see also 141 CONG. REC. H6637 (daily ed. June 29, 1995) (statement of Rep. Obey) (sarcastically noting that it might be "kind of useful" to be allowed time to read the 1995 salvage timber rider before debating it); *id.* at H6638 (statement of Rep. Defazio) ("we are going to be asked to vote on [compromise language in the salvage timber rider] within 15 minutes . . . This is an . . . extraordinary outrage.").

282. See, e.g., Ruth Marcus, *Blame Checks and Balances*, WASH. POST, Nov. 15, 1995, at A23 (describing political jockeying to obtain substantive concessions in budget crises and fiscal "train wrecks" of the 104th Congress in late 1995); Eric Pianin & John F. Harris, *Clinton Signs Measures to Halt Shutdown*, WASH. POST, Jan. 6, 1996, at A1 (reporting that congressional resolutions had been signed that would bring an end to the three-week government shutdown but leave federal workers virtually ham-strung because operating funds were not provided for many agencies; congressional resolutions are a "goofy" and patchwork approach to restoring government services").

283. See SMITH & DEERING, *supra* note 250, at 210.

islative matters without the consent and cooperation of the affected authorizing committee.”<sup>284</sup>

The danger is particularly great because of the circumstances surrounding the passage of continuing resolutions.<sup>285</sup> Especially when Congress chooses to fund all or a number of the thirteen annual appropriations bills through a single omnibus resolution, the sheer size of the document is likely to ensure that only a handful of appropriations committee members understand the details contained within them.<sup>286</sup> In addition, because of their urgency, continuing resolutions are often virtually veto-proof.<sup>287</sup> Thus neither fellow members of Congress, or the President, are likely to serve as a check on continuing resolution riders.

Recent events clearly illustrate the risks of the appropriations process as it currently operates.<sup>288</sup> During the budgetary “train wreck” in 1995 and early 1996,<sup>289</sup> Senator Robert Byrd concluded that the

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284. *Id.* at 211.

285. See Stewart, *supra* note 164, at 1029. “Appropriations bills often pass at the eleventh hour as the federal government’s spending authority runs out, and tremendous pressures, unrelated to a rider’s substance, push toward passage.” Sher & Hunting, *supra* note 165, at 479. For this reason, Senator McCain recently introduced the Government Shutdown Prevention Act, S. 228, 105th Cong. (1997), which would set Fiscal Year 1998 spending at 98% of FY 1997 levels if appropriations bills are not completed on time. See 143 CONG. REC. S3017, 3018 (daily ed., Apr. 10, 1997).

286. See Stewart, *supra* note 164, at 1029. Stewart notes that the omnibus continuing resolution for FY 1987 weighed 30 pounds. See *id.*

287. See, e.g., *Statement by President on Signing H.R. 1643 Continuing Resolution*, U.S. NEWswire, Washington, D.C., Jan. 6, 1996, available in 1996 WL 5618883 [hereinafter *Statement by President*] (noting the adverse effects of three-week government shut-down, President Clinton signed two continuing resolutions, although they contained a provision that “single[d] out poor women by prohibiting the use of District [of Columbia] funds for providing abortion services” and failed to fund significant activities, such as EPA enforcement of environmental laws); see also Michael Rappaport, *The President’s Veto and the Constitution*, 87 Nw. U. L. Rev. 735, 784 n.198 (1993) (describing President Hayes’ “heroic resistance to tacking” by vetoing appropriations bills that contained riders); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 Nw. U.L. Rev. 437, 476 (1990) (arguing that legislative bundling of unrelated measures vitiates the veto power).

288. See discussion *supra* Parts III.B–C., IV.A–B.; see also NFRC v. Glickman (NFRC II), 97 F.3d 1161, 1163 (9th Cir. 1996); SAS v. Robertson, 914 F.2d 1311 (9th Cir. 1990) (substantive legislation through appropriations bills is inappropriate), *rev’d*, 112 S. Ct. 1407 (1992).

289. During the 104th Congress, the government shut down twice, for a week in November and again for 21 days in December and January. According to the General Accounting Office, prior to 1995 there had been nine occasions since 1981 when funding gaps of one to three days occurred, usually over a weekend. See *Statement by Sen. Robert C. Byrd on Government Shutdown*, GOVERNMENT PRESS RELEASES, Nov. 15, 1995, available in 1995 WL 12677684 [hereinafter *Statement by Sen. Byrd*]. “Not one of these occasions approached the cost or the severity, not to mention the gross irresponsibility, of our present situation.” *Id.* The 1995–96 shutdowns were estimated to have cost the government, and

cause of the failure to complete congressional action on eight remaining appropriations bills was "the fact that virtually all of them contain at least one controversial legislative rider—issues such as public housing reform, EPA regulatory issues, mining law reform, California desert protection, National Endowment for the Arts, prison reform, abortion and rewriting the 1994 Crime Bill."<sup>290</sup> Senator Byrd surmised that "the grand strategy of the Republican majority in Congress is to threaten to shut down the government and to force a default on our debt in order to coerce the President . . . ."<sup>291</sup>

In January, as the second shutdown reached the end of its third week and as appropriations for several departments and agencies still had not neared completion, Congress began to pass "mini" continuing resolutions, funding pet projects one by one, as constituents felt the pinch of suspended government contracts and closed national parks.<sup>292</sup> Finally, in April—seven months after the start of the fiscal year—a consolidated spending bill was enacted to fund programs that were still without general appropriations bills.<sup>293</sup>

### *C. Riders Subvert the Integrity of a Republican, Representational Legislature*

Although standard legislative procedures sometimes fail to achieve informed decisionmaking reflective of the public interest, that ideal is utterly unattainable when procedural safeguards are ignored or unavailable.<sup>294</sup> To include provisions that change or obviate

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the taxpayers, about \$1 billion. See Dan Morgan & Stephen Barr, *When Shutdown Hit Home Ports, GOP Cutters Trimmed their Sails*, WASH. POST, Jan. 8, 1996, at A1.

290. Statement by Sen. Byrd, *supra* note 289; see Morgan & Barr, *supra* note 289, at A1 ("Conservatives have loaded appropriations bills with legislative provisions on abortion, labor law and environmental regulations that are unacceptable to President Clinton or Senate Democrats, so the measures are stalled.").

291. Statement by Sen. Byrd, *supra* note 289.

292. See Morgan & Barr, *supra* note 289, at A1; Statement of President, *supra* note 287; Pianin & Harris, *supra* note 282, at A1.

293. See Pub. L. No. 104-134, 110 Stat. 1321 (1996); discussion *supra* Part IV.B.2.

294. Professor Rappaport states that the "modern tactic of legislating by massive Continuing Resolutions . . . makes a travesty of the ideal of a deliberative Congress." Rappaport, *supra* note 287, at 743 n.21. Presumably, he would agree, then, that the practice of tacking substantive policy items to omnibus appropriations bills, which may provide even less opportunity for debate, would also make a travesty of a democratic legislature.

public policy and law in an appropriations bill or continuing resolution seriously undermines the integrity of the process and circumvents the public will as expressed in those pre-existing substantive laws. Riders erode 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.<sup>295</sup>

[Riders do not provide the public with] . . . an adequate opportunity to examine the policy path that is being advanced, much less members of Congress. This is not in keeping with the American tradition of representative government: the American people have a right to know that significant policy changes are being made and they have a right to know the direction of the new policy path.<sup>296</sup>

In effect, the inclusion of riders in the appropriations process provides a mechanism for Congress to avoid confronting fundamental conflicts in public values. Elected officials need not take controversial positions when they vote on lengthy appropriations bills that include virtually undetectable riders. The result is that hard choices are not made, and accountability falls by the wayside.<sup>297</sup> When riders dictate policy in the environmental area, the results "highlight the disparity between the far-reaching statement of protection asserted in NEPA and other environmental laws and the political realities that encouraged Congress to eviscerate the statutes' substantive impact."<sup>298</sup>

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295. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 46-47, 89-90 (Harv. Univ. Press 1980) (arguing that under the basic democratic theory of government, the fundamental role of Congress is to represent the consensus of the citizens, while the role of the Constitution is to ensure adequate process so that the voices of the people may be heard).

296. 141 CONG. REC. H9687-88 (daily ed. Sept. 29, 1995) (statement of Rep. Vento on the proposed Interior appropriations bill for FY 1996).

297. See Pamela L. Zielske, Recent Case, 5 WIDENER J. PUB. L. 741, 742-43, 756 (1996) (noting that Pennsylvania constitution includes a prohibition on substantive riders and other "pernicious customs" of the legislature in an effort to avoid procedural abuses and promote governmental honesty and accountability); see also Williams, *supra* note 268, at 798 (noting that, in response to perceived legislative abuses, virtually all state constitutions contain procedural limitations that strive to require open and deliberative processes so that the merits of legislative proposals may be addressed "in an orderly and rational manner"). For further discussion of approaches to the rider problem at the state level, see *infra* note 314, 314.

298. Sher & Hunting, *supra* note 165, at 476. This is the very reason that implied repeals or waivers of pre-existing substantive laws are "especially disfavored when the claimed repeal relies on an appropriations act." *NFRC v. Glickman* (NFRC II), 97 F.3d

Not only does the use of appropriations riders curtail full debate and public involvement, riders typically foreclose judicial challenge to agency actions as well.<sup>299</sup> Appropriations riders that limit opportunities for judicial review are doubly suspect. Such riders are especially likely to compromise non-economic resources by encouraging agencies to "violate statutory requirements with impunity,"<sup>300</sup> thereby fostering—even encouraging—shortsightedness.

The use of riders to exempt specified activities from environmental requirements and to limit judicial review eviscerates a "fundamental premise of federal environmental policy"<sup>301</sup>—that the laws apply uniformly to agencies across the country, and require rational decisionmaking that considers the action's broader implications on the public welfare, guided by substantive standards, informed by public participation, and enforceable by the judiciary.<sup>302</sup> Such riders "undermin[e] the integrity of the laws and our judicial system,"<sup>303</sup> creating a compelling case for a forceful and effective remedy.

#### VI. THE MANIPULATION OF THE LEGISLATIVE PROCESS THROUGH SUBSTANTIVE RIDERS NECESSITATES A CONSTITUTIONAL RESPONSE

Commentators have suggested a variety of remedies to the problem of Congressional appropriations riders. A president, espe-

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1161, 1166 (9th Cir. 1996) (citing *Tennessee Valley Auth. v. Hill*, 437 U. 153, 190 (1978)). Further, the legislative history of such enactments may provide no reliable interpretive guidance, because such bills are not subjected to committee review and full floor debate. See Devins, *supra* note 277, at 481–82 (noting that, because riders rarely contain clear policy statements, they often result in interpretive difficulties). But see *United States v. Dickerson*, 310 U.S. 554, 556–57 (1940) (relying heavily on legislative debates to interpret rider that prohibited previously authorized bonuses for Army re-enlistees).

299. See discussion *supra* Part III.B.2.

300. Bolduan, *supra* note 59, at 364. Accordingly, "when economic concerns and environmental law conflict, the law should be reviewed, not circumvented." 135 CONG. REC. S12,983 (daily ed. Oct. 7, 1989) (statement of Sen. Biden).

301. See Sher, *supra* note 4, at 10,470.

302. See *id.*; 135 CONG. REC. S12,983 (statement of Sen. Biden) (this "disturbing trend . . . continues a wrong-headed and potentially devastating practice of using legislation approved with no public review to undermine environmental laws that were developed through a lengthy public process").

303. Sher, *supra* note 4, at 10,469. "[T]he right to hold government action accountable before an independent judiciary" is part of "the very essence of civil liberty." *Id.* (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)); see Sher & Hunting, *supra* note 34, at 481–82.



cially one armed with textual veto authority,<sup>304</sup> might be able to correct or veto abusive bills.<sup>305</sup> The courts might, by imposing a stricter standard of review on agency action permitted or mandated by a provision in an appropriations rider, reassert the primacy of legislation resulting from a truly deliberative process.<sup>306</sup> The House and Senate might be persuaded to apply existing rules concerning riders more strictly,<sup>307</sup> or to enact super-legislation<sup>308</sup> that would protect the appropriations process by enforcing germaneness rules. Finally, the creation or recognition of a constitutional right to a sustainable environment could prevent encroachment by legislative riders.<sup>309</sup>

After considering each of these alternatives, this Article suggests that yet another option would best foster integrity and responsiveness in our republican form of government, as well as protect natural resources and the environment: a process-oriented constitutional amendment precluding the enactment of substantive law through the appropriations process.<sup>310</sup>

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304. See *infra* note 314 and accompanying text.

305. See Rappaport, *supra* note 287, at 784 (arguing that to deter rider-tacking, the President should make a public pledge to veto appropriations bills that include substantive provisions).

306. Bolduan, Sher, and Hunting propose stricter standards than regular Administrative Procedure Act "arbitrary and capricious" review. See Bolduan, *supra* note 59, at 373-80; Sher & Hunting, *supra* note 165, at 479-82. See generally JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* (1971).

307. See Axline, *supra* note 54, at 613, 638-39. Professor Axline does not suggest how to accomplish this objective, which is unfortunate considering the serious impediment presented by the House and Senate's long-standing authority to govern their own internal procedures with virtually no influence, let alone oversight, by the other two branches of government or the public. See Bach, *supra* note 247, at 701-02. Indeed, although the Constitution says very little about the nuts and bolts of the business of legislating, it specifically provides that "[e]ach House may determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2.

308. "Super-legislation" is used here to describe a statutory rule that could only be waived by a super-majority vote in the Senate or House.

309. See Sher & Hunting, *supra* note 165, at 482-85 (arguing that a constitutional right would "insulate environmental values from legislative erosion" and justify heightened scrutiny of congressional conduct on environmental issues); Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181 (1994) (arguing that an amendment is necessary to protect rights of current and future generations to benefits of natural resources and to prevent legislation or agency action that would harm ecological systems).

310. This option is presented here in response to the need to curtail hasty public policy legislation involving environmental issues, particularly riders, such as the 1995 timber rider, which diminish the separation of powers between political branches. However, an amendment need not be limited to environmental matters; instead, it should apply to all legislation that makes substantive policy.

A. *Other Proposed Solutions Would Not Sufficiently Restrict the Use of Appropriations Riders*

1. *The Line Item Veto Act, Even if it Were Constitutional, Would Not Prohibit Substantive Riders*

The recently enacted Line Item Veto Act allows the President to excise "(1) any dollar amount of discretionary budget authority; [or] (2) any item of new direct spending" from a bill or joint resolution.<sup>311</sup> The Act is a "reduction only" veto,<sup>312</sup> which grants the Executive limited authority to reduce specific dollar amounts. Even members of Congress agree that the Act "will be helpful in imposing budget discipline . . . [and] in preventing unsupportable spending projects from being added to spending bills without public notice, debate, or hearings . . . ."<sup>313</sup>

Although the line-item veto provides a much needed mechanism to subject pork-barrel projects to the veto pen without jeopardizing an entire budget or appropriations bill, its narrow grant of authority does not address the problem of substantive legislative riders.<sup>314</sup> Further, line-item veto powers, even narrowly tailored reduction-only veto provisions, may well violate Articles I and III by improperly delegating legislative powers to the Executive, thereby upsetting the balance of powers.<sup>315</sup> In fact, a federal district court

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311. See Pub. L. No. 104-130, § 2(a), § 1021(a), 110 Stat. 1200 (1996) (codified at 2 U.S.C.A. § 691(a) (1997)).

312. See Antony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 480-81 (1994).

313. 142 CONG. REC. S4250, S4251 (daily ed. Apr. 25, 1996) (statement of Sen. Dorgan) ("Congress has a bad habit of spending money on projects that we have not reviewed in committee hearings or permitted in authorization bills . . . . The bill will help the President control spending abuses, especially unauthorized projects in appropriations bills.").

314. Over 40 states allow some form of line-item veto. See Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175 (1993). Some of the state provisions that do not explicitly limit the veto authority to dollar amounts or spending items have been interpreted to allow textual redlining, see Petrilla, *supra* note 312, at n.42, and accompanying text, but most state courts have refused to give such expansive interpretation. See Diane-Michele Krasnow, *The Imbalance of Power and the Presidential Veto: A Case for the Item Veto*, 14 HARV. J.L. & PUB. POL'Y 583, 597 n.271 (1991) (citing cases).

315. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1838 (1996) (an expansive line-item veto authority "dramatically fails the test of balance"); Briffault, *supra* note 314, at 1174 ("By putting asunder what the legislature has put together [through negotiation and compromise] the item veto results in laws the legislature never passed" thereby challenging the view that legislation is the domain of the legisla-

has recently found the Act unconstitutional on such grounds.<sup>316</sup> Thus, any legislative attempt to expand the Line Item Veto Act to allow the President to make changes (or deletions) in the substance of bills would be constitutionally suspect.<sup>317</sup>

Even if courts were to allow the line-item veto to be expanded in this way, this approach would not solve other problems created by substantive riders. An executive veto, which of course occurs at the end of the legislative process, is no substitute for proper investigation and consideration by the authorizing committee and floor debate by members of both political parties, nor does it replace opportunities for public scrutiny and input that are possible during normal legislative consideration.<sup>318</sup> Finally, like other legislation, the line-item veto could easily be rescinded in future congressional sessions.<sup>319</sup>

## 2. Stricter Judicial Scrutiny Would Not Be Immune from Legislative Erosion

A number of commentators have suggested that stricter judicial review of agency actions derived from substantive riders could

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ture.). In *National Treasury Union v. United States*, a federal labor organization alleged violations of the Article I, § 7 Presentment Clause, which gives the Executive the authority to veto bills, Article III checks and balances, and Article I, § 5, which gives each house authority to establish its own procedural rules. See 929 F. Supp. 484, 486 (D.D.C. 1996). The claims were dismissed for lack of standing. See *id.* at 490.

316. See *Byrd v. Raines*, 97-0001-TPJ, 1997 WL 169409 (D.D.C. Apr. 10, 1997). In *Byrd v. Rains*, the court held that the presentment clause of the Article I prevents Congress from ceding basic legislative authority, such as cancellation or repeal of a statutory provision, to the President. See *id.* at \*10. The court found the Act's cancellation provision analogous to the legislative veto issue in *INS v. Chadha*, 462 U.S. 919 (1983), stating that "[j]ust as Congress could not delegate to one of its chambers the power to veto select provisions of law, it may not assign that authority to the President." *Id.* at \*10 (citing *Chadha*, 462 U.S. at 954). The Clinton administration has stated its intent to appeal the decision to the Supreme Court. See Peter Baker, *Clinton Plans Quick Line-Item Veto Appeal*, WASH. POST, Apr. 12, 1997, at A6.

317. See J. Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498, 1501 (1995); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 100 n.170 (1994). Thus, there have been many advocates of establishing a line-item veto by constitutional amendment. See, e.g., Sidak, *supra*, at 1503-04; Calabresi, *supra*, at 72 n.119.

318. See Flaherty, *supra* note 315, at 1838 (arguing that the line-item veto impedes joint accountability by permitting enactment without approval of different branches representing different manifestations of the public will).

319. See Sidak, *supra* note 317, at 1500 (indicating that future congresses could "repeal, suspend or otherwise circumscribe line-item veto authority conferred . . . by statute").

lessen the Congress's ability to use this means of legislating policy. In fact, the Court has long recognized that heightened scrutiny may extend to substantive legislation that lacks the opportunity for public input and full congressional investigation and debate. In *U.S. v. Carolene Products Co.*,<sup>320</sup> the case often credited as the origin of the strict scrutiny test of constitutional review,<sup>321</sup> the Supreme Court found that the challenged law<sup>322</sup> did not violate the Fifth Amendment because Congress had a rational basis for its enactment, as demonstrated by review of reports of committee hearings in which Congress considered extensive investigations and expert testimony.

At the same time, the Court acknowledged that legislation affecting commercial transactions *could* be found unconstitutional if it is "of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."<sup>323</sup> Arguably, if heightened scrutiny were applied to environmental riders such as section 2001, and the self-serving statements of the bills' sponsors were properly discounted, such riders could be found to exceed Congress's authority under the Property Clause<sup>324</sup> or Commerce Clause.<sup>325</sup> In fact, the courts have consistently embraced this concept to a limited degree, holding that appropriations riders, as a "disfavored" mechanism for legislating, will be interpreted to amend or waive the underlying authorizing statute only if such an interpretation is clearly intended.<sup>326</sup>

However, while the need for judicial oversight is compelling, strict review would not be immune from legislative erosion. The United States and its agencies have long enjoyed sovereign immunity from lawsuits,<sup>327</sup> although Congress chose to waive this immunity in a limited fashion through the enactment of the Administra-

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320. 304 U.S. 144 (1938).

321. *See id.* at 152 n.4.

322. The Filled Milk Act, ch. 262, 42 Stat. 1486 (1923) (codified at 21 U.S.C. §§ 61-63 (1994)).

323. *Carolene Products*, 304 U.S. at 152.

324. U.S. CONST. art. IV, § 3, cl. 2.

325. U.S. CONST. art. I, § 8, cl. 3.

326. *See, e.g., Seattle Audobon Society v. Robertson*, 503 U.S. 429, 440 ("[R]epeals by implication are especially disfavored in the appropriations context, [although] Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly.") (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978)).

327. *See Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Administrative Action: Some Conclusions from the Public Lands Cases*, 68 MICH. L. REV. 867 (1970).

tive Procedure Act.<sup>328</sup> Even after the passage of the APA, citizen enforcement was not assumed, leading Congress to create citizen suit provisions in most major environmental statutes.<sup>329</sup>

Finally, these rights to sue, given by statute, may just as easily be taken away by statute. They may even, as the timber rider cases make all too clear, be limited or eliminated by rider language that directs projects to be found compliant, or directs action to be taken in the agency's "sole discretion."

### *3. Super-Legislation Requiring Germaneness, While Perhaps a Step in the Right Direction, May Be Constitutionally Infirm, as Well as Subject to Repeal*

As previously noted, there is no independent mechanism to enforce the rules of Congress; members are left to comply voluntarily.<sup>330</sup> The unfortunate result of this lack of outside enforcement is that waivers and exemptions, particularly on environmental issues, easily become the rule, not the exception. To prevent this, an approach that ensures (or at least allows) external enforcement and ensure compliance is necessary. One approach would involve the passage of "super-legislation," which could only be revoked by more than a simple majority.<sup>331</sup> Such super-legislation could encapsulate House and Senate rules barring substantive legislation through the abbreviated budget process. If a member were to challenge an appropriations provision on germaneness grounds, a supermajority would be required to override the objection and pass the rider.<sup>332</sup>

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328. See 5 U.S.C. § 704 (1994); *Cabais v. Egger*, 690 F.2d 234, 239-40 n.11 (D.C. Cir. 1982); *Beller v. Middendorf*, 632 F.2d 788, 796 (9th Cir. 1980). Prior to that waiver, it was very difficult, if not impossible, to subject executive agencies' decisions to judicial review. In fact, it was not until the Supreme Court handed down *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), that informal agency action was subjected to rigorous judicial review.

329. See, e.g., Clean Water Act § 505, 33 U.S.C. § 1365 (1994); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1994); Comprehensive Environmental Response, Compensation and Liability Act § 310, 42 U.S.C. § 9659 (1994).

330. See Bach, *supra* note 247, at 701-02; U.S. CONST. art. I, § 5.

331. The Senate's rule for terminating filibusters illustrates the difficulty of capturing more than a simple majority vote in Congress. The Senate may not vote on a measure if any senator seeks recognition to speak on it. In this way, the minority has power to indefinitely stall legislation, unless at least three-fifths of the senators agree to limit debate by invoking cloture—a significant obstacle to forcing a vote on any particular bill. See Bach, *supra* note 247, at 703 ("[T]he danger of filibuster is almost omnipresent."). Notably, senators may not filibuster appropriations bills. See *id.*

332. Similarly, members of the 104th Congress proposed to protect the *economic*

In fact, the Constitution jealously guards the right of majority rule, requiring supermajorities for only five kinds of measures: presidential impeachment, expulsion of House or Senate members, ratification of treaties, overriding a veto, and amending the Constitution.<sup>333</sup> The Framers believed that, although super-legislation might inhibit hasty and ill-conceived measures, the resulting power in the hands of the minority generally outweighed the benefits. “[T]he fundamental principle of free government would be reversed. It would no longer be the majority that would rule . . . . [A]n interested minority might take advantage of [supermajority requirements] to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences.”<sup>334</sup>

To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) . . . has an effect the reverse of what is expected . . . [i]ts real operation is . . . to substitute the pleasure, caprice, or artifices of an insignificant, turbulent or corrupt junto to the regular deliberations and decisions of a respectable majority.

If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must then conform to the views of the minority . . . . Hence tedious delays; continual negotiations and intrigue; contemptible compromises of the public good.<sup>335</sup>

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interests of constituents by requiring a supermajority to pass tax increases. *See* 142 CONG. REC. H3256 (daily ed. Apr. 15, 1996). Interestingly, proponents believed that economic issues justified a mechanism to “temper simple majoritarianism,” *id.* at H3259 (statement of Rep. Solomon) (arguing that tax increases are “at least as significant as ratification of a treaty”), so that Congress would either cut spending or look to economic stimulants to raise revenues instead of the peoples’ pocketbooks. *See id.* (citing columnist George Will).

333. Opponents to the tax proposal, discussed in note 332 *supra*, argued that “the Founding Fathers were willing to accept the fact that Congresses in the future might use poor judgment at times and pass harmful laws by a majority vote—but they believed so deeply in the principle of majority rule, that they placed that principle above whatever personal concerns they had that the majority at times would act in a manner contrary to their own feelings.” *Id.* at H3260.

334. THE FEDERALIST NO. 58 (Alexander Hamilton or James Madison) (cited in 142 CONG. REC. H3256, H3260 (daily ed. Apr. 15, 1996)).

335. THE FEDERALIST NO. 22 (Alexander Hamilton); *see* 142 CONG. REC. H3260 (statement of Rep. Beilenson) (arguing that the Framers’ reluctance to include supermajority provisions in the Constitution “was largely due to the ineffectiveness of the Articles of Confederation which . . . required a supermajority for both taxing and spending, and the fact that it was so difficult to pay off [Revolutionary War] debts . . . and to pay for

Arguably, requiring supermajorities to enact *waivers* of existing law through appropriations riders does not present the same concerns. Such legislation would simply make it more difficult to pass such waivers. The status quo, which, while imperfect, does provide environmental and procedural safeguards, would likely be preserved; the "pertinacious minority" would be discouraged from making "contemptible compromises" of the public interest.

Although such legislation may be a workable solution, or at least a step in the right direction, it does not rest easily within the existing constitutional framework, and would seem to directly contradict Article I, Section 5 of the Constitution.<sup>336</sup> Indeed, legislation that imposes procedural requirements on the internal workings of Congress may be subject to constitutional challenge.<sup>337</sup> Moreover, like the line-item veto, a legislatively enacted provision of this kind could too easily be repealed by later legislation.

## *B. A Constitutional Amendment Is Warranted*

### *1. The Erosion of Legislative Safeguards Justifies Amendment*

Constitutional amendments should not be proposed lightly. Indeed, the process of amending the Constitution<sup>338</sup> is "so cumbersome that it can serve as a safety valve only under the most extreme conditions."<sup>339</sup> Amendment is justified, however, when the political process is systemically malfunctioning, as it has been in recent years with the advent of sweeping changes in substantive law through appropriations riders.

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the regular national expenditures thereafter . . . . For that reason, the Philadelphia Convention chose to reject proposals to impose supermajorities in legislative fields of even special sensitivity and concern, reserving them for the five specific and special areas").

336. "Each House may determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2; see also Paul R.Q. Wolfson, Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 855 (1987) (arguing that a "house's power to exercise its ancillary functions cannot be abridged by a statute").

337. See, e.g., *Nat'l Treasury Employees Union v. United States*, 929 F. Supp. 484 (D.D.C. 1996) (challenging constitutionality of line-item veto).

338. See U.S. CONST. art. V.

339. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1057 (1984) (referring to the difficulty of using constitutional amendments to reverse Supreme Court decisions); see also Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 694 (1996) (arguing that the Constitution should be amended "only reluctantly and as a last resort").

One might argue that the examples of failed rider attempts discussed above provide evidence that our current constitutional regime is functioning properly.<sup>340</sup> After all, the riders incorporated into the 1996 Interior Appropriations Bill,<sup>341</sup> the 1996 Consolidated Rescissions and Appropriations Act,<sup>342</sup> and the Balanced Budget Act of 1995<sup>343</sup> either failed in Congress or were vetoed. However, the persistence demonstrated by the President and minority party during the highly unusual standoff on the 1996 budget is unlikely to recur under more typical circumstances.<sup>344</sup> On balance, the increasing manipulation of the appropriations process to shift the balance of powers and all but preclude the President's veto power, to short-cut full consideration by lawmakers, and to sidestep public participation in legislative decisionmaking has created a crisis that may require constitutional action. Legislative proposals and other non-constitutional proposals to limit the abuse of the appropriations process simply do not go far enough to safeguard the public interest and are too easily subverted by powerful appropriations committees or future congresses.

The Federalist Papers provide ample evidence that the Framers of the Constitution believed that under certain conditions, a change in preexisting constitutional principles may be warranted.<sup>345</sup> Indeed, amendments are in order when the Framers' objectives "have been attenuated by political developments."<sup>346</sup> An amendment to

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340. See discussion *supra* Part IV.B.

341. See discussion *supra* Part IV.B.1.

342. See discussion *supra* Part IV.B.2.

343. See discussion *supra* Part IV.B.3.

344. See discussion *supra* Part IV.A. For example, the public perception that the Republican Congress was to blame for the budgetary "train wreck" gave the Clinton administration an unusual freedom to exercise the veto power. This perception itself resulted from the unique, and in retrospect ill-advised, efforts of the Republicans to turn a narrow mandate into a "revolution."

345. See THE FEDERALIST NO. 40, at 261 (James Madison) (Cooke ed., 1961); Ackerman, *supra* note 339, at 1021-22; Sidak, *supra* note 317, at 1504-05. "[L]aws and institutions go hand in hand with the progress of the human mind . . . . With the change of circumstances, institutions must advance also to keep pace with the times." 142 CONG. REC. H3256 (daily ed. Apr. 15, 1996) (statement of Rep. Mcinnis, quoting Thomas Jefferson). "Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust chance and violence." *Id.* (quoting Constitutional Convention statement of Colonel Mason).

346. 142 CONG. REC. at H3256, H3259 (statement of Rep. Solomon, quoting George Will); see Sullivan, *supra* note 339, at 703 (arguing that although there is a strong presumption against amending the Constitution, amendment may be justified "when changes consistent with its broad purposes are unlikely to be implemented by ordinary legislative means").



renew the integrity of congressional deliberation and legislative accountability would not be a radical innovation; instead it should be viewed as an attempt to revitalize the original values of the Constitution.<sup>347</sup>

Heightened constitutional protection for citizen participation in the legislative process and for congressional accountability is justified under this theory for several reasons. First, although it has become common practice in modern times, "tacking policy items onto budgetary legislation would have been viewed with extreme distaste" by the Framers.<sup>348</sup> Excessive rider-tacking has seriously eroded the integrity of the tripartite, republican democracy established by the Framers, who envisioned the legislature not only as a representational body, but also as a deliberative body—not only reflective of trends in public opinion but also mindful of the long-term public good.<sup>349</sup>

The use of riders to direct environmental policy highlights the need for amendment because powerful forces working against environmental stewardship cannot be checked without constitutional

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347. See 142 CONG. REC. H3256, H3258–59 (statement of Rep. Solomon in support of an amendment to require a supermajority to enact tax increases). Machiavelli predicted that "all human Constitutions are subject to Corruption and must perish, unless they are timely renewed by reducing them to their first Principles." GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, 34 (1969) (cited in Krasnow, *supra* note 314, at 583).

348. Marcus, *supra* note 282, at A23 (citing Professor Michael McConnell, University of Chicago, and Professor Douglas Kmiec, University of Notre Dame); see also LeBoeuf, *supra* note 163, at 460 ("[T]he Framers could not possibly have envisioned the position appropriations riders occupy today."); Krasnow, *supra* note 314, at 607 (arguing that the Framers, though aware of the rider-tacking procedure, did not foresee the extent to which it has now evolved); Sidak & Smith, *supra* note 287, at 471 (arguing that although some bill-bundling was probably anticipated, in all likelihood the Framers "did not contemplate legislative bundling on the scale that Congress indulges in today"; the first appropriations bill contained only four items of expenditures and no substantive riders); Thomas Schroeder, Note, *Original Understanding and Veto Power: Are the Framers Safe While Congress is in Session?*, 7 J.L. & POL. 757 (1991). Professor Rappaport, however, argues that the Framers were familiar with the practice of rider-tacking but thought that the Executive and the Senate held sufficient powers to prevent most instances of abuse. See Rappaport, *supra* note 287, at 740, 764–66; see also Wolfson, *supra* note 336, at 840–44 (arguing that, based on British and colonial experience, the Framers realized that the Executive could only veto appropriations bills, even those with non-germane riders, with great difficulty); Marcus, *supra* note 282, at A23 (noting that, at least as of the first day of the past year's lengthy and unprecedented government shutdowns, Professor Laurence Tribe believed that rider-spawned gridlock was simply a sign of checks and balances at work; forcing the President's hand by including irrelevant matters in bills "would not have struck [the Framers] as a flaw in the constitutional design").

349. See Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberations in Congress*, 21 GA. L. REV. 217, 235 (1986); discussion *supra* Part II.C.

protection. The short-term monetary and political gain that attends the exploitation of natural resources is compelling.<sup>350</sup> But such instant gratification comes at the expense of the long-term health of the ecosystem,<sup>351</sup> which, like future generations who will be most affected by depletion of public resources, cannot speak for itself, nor can it wield influence through political favors.<sup>352</sup>

## 2. Riders that Upset Constitutional Checks and Balances Underscore the Need for an Amendment

The Appropriations Clause<sup>353</sup> reflects the Framers' ideal that the "arbitrariness of government action" be restrained by a requirement that public spending be subjected to the rule of law.<sup>354</sup> The Clause also reflects the desire to avoid concentrations of political power by dividing functions between governmental entities.<sup>355</sup> Appropriations riders often fly in the face of the Executive's constitutional responsibilities to veto objectionable laws and to enforce laws that are enacted.<sup>356</sup> Further, riders that direct executive action

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350. See GORE, *supra* note 39, at 275 (discussing "competing imperatives" that create incentives to maximize short-term profit and ignore long-term needs, now-Vice President Gore noted that our society is marked by a dysfunctional way of thinking—a "ravenous, insatiable consumption, its dogma, and the mechanisms by which ever more resources are obtained."); Plater, *supra* note 45, at 734 ("Environmental law, reflecting a paradigm shift in how we perceive the world, has emerged over the past three decades as one of the primary realms in which society attempts to insert short and long-term public civic values into practical economic affairs. This role inevitably makes environmental law a political battlefield."); see also Schlickeisen, *supra* note 309, at 197–201, 209 (arguing that an environmental right is necessary to ensure posterity of future generations because statutory law will not provide adequate protections in the face of overwhelming incentives to maximize short-term gain); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 117–20 (1991) (arguing that international safeguards should be imposed on domestic decisionmaking, given the high short-term costs resulting from environmental protection and the resulting political disfavor).

351. See Axline, *supra* note 54, at 637 ("The sponsors of the salvage logging rider are willing to sacrifice entire species if necessary to preserve, even for a short time, a limited number of jobs at mills that are subsidized by federal timber.").

352. See GORE, *supra* note 39, at 275. The use of riders to affect environmental affairs dissolves intergenerational equity, providing an especially compelling justification for constitutional amendment. See Sidak, *supra* note 317, at 1499, 1505.

353. U.S. CONST. art. I, § 9.

354. See J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1167. Requiring a showing of legal authority to draw funds "ensures that the public will have notice of spending decisions." *Id.*

355. See LeBoeuf, *supra* note 163, at 458–59 ("Perhaps more perfectly than any other provision in the Constitution, the Appropriations Clause embodies the notion of separation of powers.").

356. See LeBoeuf, *supra* note 163, at 472–73; U.S. CONST. art. I, § 7, art. II.

contrary to final judgments entered by the courts suffer an additional defect that justifies constitutional amendment: they upset the checks and balances provided by Article III.<sup>357</sup> Appropriations riders frequently venture into these forbidden territories.<sup>358</sup>

The United States Constitution is distinguished from other, less durable democratic frameworks because it separates governmental power into three branches,<sup>359</sup> and provides for judicial review to uphold the integrity of this structure against the pressures of normal politics.<sup>360</sup> No one branch of the federal government is to exercise the functions of another branch;<sup>361</sup> Congress "cannot be judge, jury and executioner under our Constitution."<sup>362</sup>

The separation of powers principle "operates as a complex machine which encourages each official to question the extent to which other constitutional officials are successfully representing the People's true political wishes."<sup>363</sup> The three branches of government are designed to "check each other's defects, and thereby yield a whole more 'representative' than any of its constituent parts."<sup>364</sup> Legislation that blurs the distinction between the branches, as riders often do, is particularly offensive because it undermines those safeguards.<sup>365</sup>

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357. See LeBoeuf, *supra* note 163, at 464-65, 475.

358. See *id.* at 474.

359. See U.S. CONST. arts. I-III. "The genius of the Constitution is we have three branches of the Federal Government [legislative, executive, and judicial]" 141 CONG. REC. S13,814, S13,828 (daily ed. Sept. 19, 1995) (statement of Sen. Bumpers). See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

360. "Given the danger that normal government will be captured by partisans of narrow special interests," the Framers "consolidate[d] the Revolutionary achievements of the American people through the institution of judicial review." Ackerman, *supra* note 339, at 1029-30 (discussing THE FEDERALIST NO. 78 (Alexander Hamilton)).

361. See *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928); THE FEDERALIST, NO. 48 (James Madison) ("[N]one of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.").

362. 141 CONG. REC. S13,828 (daily ed. Sept. 19, 1995) (statement of Sen. Bumpers, questioning constitutionality of congressional efforts to undermine the decisions of Department of Agriculture Undersecretary James Lyons by zeroing out Lyons' salary in FY 1996 appropriations bill).

363. Ackerman, *supra* note 339, at 1028; see *id.* at 1067.

364. *Id.* at 1028 n.35.

365. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 442-43 & n.5 (1977) (noting that, while the three branches are not expected to operate in complete isolation from one another, "where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution [ ] are subverted," (citing THE FEDERALIST NO. 47, at

*a. Interference with the Judiciary*

Laws that retroactively command the courts to open final judgments, or that direct the outcome of pending litigation, offend the separation of powers doctrine by invading the judicial function.<sup>366</sup> In *Plaut v. Spendthrift Farm, Inc.*, the Supreme Court invalidated legislation that directed that “dismissed causes of action . . . shall be reinstated.”<sup>367</sup> If implemented, the effect of the legislation would have been to breathe new life into cases dismissed with prejudice under the law in effect at the time of the dismissal. The Court found the law unconstitutional, because once a court issues a final judgment in a case, “a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.”<sup>368</sup>

The 1995 timber rider directed a result that is equally troubling—it retroactively revived executive actions that were finally and conclusively found to have violated the law.<sup>369</sup> Further, it defeated judicial mandates requiring that the objectionable action be

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325–26 (James Madison) (Cooke ed., 1961)); thus, the separation of powers inquiry turns on the extent to which the exercise of power by one branch prevents another from “accomplishing its constitutionally assigned functions”; cf. THE FEDERALIST NO. 28 (Alexander Hamilton) (discussing the need to maintain distinct separation of powers between the federal and state governments to facilitate mass mobilization when necessary for the common good, such as the mobilization that resulted in the Declaration of Independence and the Constitution itself); THE FEDERALIST NO. 46 (James Madison) (making the same point).

366. See *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1451 (1995); *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723 (9th Cir 1995); see also Bill Miller, *Congress Votes to Let Morgan, Daughter Return: Rep. Wolf’s Intervention Clears Way for D.C. Surgeon Who Fled U.S. Over Custody Case*, WASH. POST, Sept. 19, 1996, at A1, A15 (arguing that this rider, which directed results contrary to a judicial order, was “a direct assault on the independence of the judiciary” and an unprecedented and “frightening example of congressional excess”) (citing Representative Sensenbrenner and Professor Jonathon Turley, George Washington University National Law Center).

367. *Plaut*, 115 S. Ct. at 1451 (striking as unconstitutional a limitations provision of the Securities and Exchange Act, 15 U.S.C. 78aa-1 (1994)).

368. *Id.* at 1457; see *Hayburn’s Case*, 2 Dall. 411, 413 (1792) (revision of Article III judgments is “radically inconsistent” with independence of the judicial power vested in the courts); THE FEDERALIST NO. 81 at 545 (Alexander Hamilton) (Cooke ed., 1961) (“A legislature, without exceeding its province, cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.”).

369. See Pub. L. No. 104-19, § 2001(b),(d),(k), 109 Stat. 194 (1996); *Plaut*, 115 S. Ct. 1451; *U.S. v. Klein*, 80 U.S. 128 (1871).

permanently enjoined,<sup>370</sup> and prevented the Executive from implementing final court orders, as required by Article II.<sup>371</sup>

Other environmental riders have blurred the lines between political branches, but, unlike the 1995 timber rider, have not blatantly dismantled final judgments without providing new standards or circumstances. The courts have been reluctant to invalidate such riders on separation of powers grounds.<sup>372</sup> In fact, the Supreme Court rejected an Article III challenge to the Hatfield/Adams rider<sup>373</sup> in *Robertson v. Seattle Audubon Society*.<sup>374</sup> That rider was drafted in response to litigation pending at that time, including two cases specifically mentioned in the statute.<sup>375</sup> The Ninth Circuit held that it directed the outcome of pending litigation, and therefore violated Article III.<sup>376</sup> The Supreme Court reversed, reasoning that, even though the rider was obviously intended to resolve the two named cases, it "compelled changes" in the law by specifying new environmental requirements applicable to the underlying lawsuits, but did not direct specific findings or results under old law.<sup>377</sup>

Unlike the Hatfield/Adams rider at issue in *Robertson*, the 1995 timber rider affected not only pending cases, but final judgments and permanent injunctions as well, overstepping the author-

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370. See *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992); see also *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

371. See Devins, *supra* note 277, at 475-76; see also discussion *infra* Part VI.B.2.b.

372. Courts are required to "adopt a constitutional reading when such an interpretation is reasonable," but interpretations given to riders are sometimes more strained than reasonable. See *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 557-58 (9th Cir. 1996) (citing *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)); *id.* at 558 (Noonan, J., concurring); see also *Northwest Forest Resource Council v. Glickman* (NFRS II), 97 F.3d 1161 (1996). Perhaps courts are reluctant to strike appropriations legislation on constitutional grounds because of the short duration of these bills, see, e.g., Pub. L. No. 104-19, § 2001(a)(2) (defining the "emergency period" as ending September 30, 1997) and § 2001(j) (providing that the authority provided by subsections (b) and (d) shall expire on December 31, 1996), consistent with the premise that constitutional issues should not be reached if a case can be resolved on other grounds. However, constitutional violations, even those that last for only a moment, should not be condoned. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (even momentary violations of first amendment freedoms constitute "irreparable injury").

373. See Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989).

374. 503 U.S. 429 (1992).

375. See *id.* at 431.

376. See *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1316-17 (9th Cir. 1990).

377. See 503 U.S. 429, 437-39 (1992); *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994) (holding that Congress did not exceed its legislative authority because it replaced laws underlying pending litigation with new requirements).

ity that has been granted to the judicial branch.<sup>378</sup> Further, unlike the Hatfield/Adams rider, the 1995 rider provided no new environmental safeguards in lieu of existing laws.<sup>379</sup> Thus, it upsets the separation of powers because it does not simply prescribe rules governing future conduct but, instead directs specific results by reference to past actions taken by executive agencies, without changing the underlying laws.<sup>380</sup>

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378. Article III gives the judiciary the "province and duty . . . to say what the law is' in particular cases and controversies." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1451, 1453 (1995) (citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). It therefore gives federal courts "the power, not merely to rule on cases, but to decide them" by rendering dispositive judgments reviewable only by superior courts in the judicial hierarchy. *Id.* However, some courts have implied that a distinction could be made, for the purposes of Article III analysis, based on whether the final judgment involved money damages or injunctive relief, inferring that laws that affect injunctions may be less objectionable. In *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 557 (9th Cir. 1996), the court refused to interpret a rider governing the Mount Graham telescope project as "undoing past judgments," and instead found that it could be read to merely alter the prospective effect of past injunctions. It is true that, unlike awards for damages, "altered circumstances sometimes make alterations in an injunction inevitable," *id.* at 559 (Noonan, J., concurring); it is also true that Congress itself may effectuate changed circumstances, *see id.* (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) (in which Congress directed that a bridge, previously enjoined as a nuisance and obstruction to navigation, was a necessary route for the mails)). However, when Congress deprives an injunction of its effect by directing a result contrary to a court's final order *without* changing the underlying circumstances or creating new legal rights, that congressional mandate is as offensive to separation of powers principles as is interference with a monetary judgment. Nothing in Supreme Court precedent indicates otherwise. *See Plaut*, 115 S. Ct. at 1455-56 (citing cases, and noting that President Lincoln refused to interfere with the infamous *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (in which the Court held that an African man who had been born a slave was not a citizen and therefore could not bring suit in federal court to establish his freedom or remedy an assault by his former owner), due to separation of powers concerns, believing that "the evil effect following it, being limited to that particular case . . . can better be borne than could the evils" of interference by other political branches); *Alaska Wilderness Recreation Ass'n v. Morrison*, 67 F.3d 723, 733 (9th Cir. 1995) (refusing to vacate order enjoining timber harvest for NEPA violations in spite of sufficiency language in salvage timber rider, Pub. L. 104-19, § 503 (1995)). Thus, the established principle that courts retain equitable powers to modify their own injunctive orders to ensure that such orders are not "turned through changing circumstances into an instruments of wrong," *System Fed'n v. Wright*, 364 U.S. 642, 647-651 (1961), does not necessarily extend to legislation having retroactive application. *Cf. Brown v. Califano*, 627 F.2d 1221, 1234 (D.C. Cir. 1980) (indicating that a rider's antibusing restriction would be unconstitutional under equal protection principles if it deprived injunctive remedy of its effectiveness).

379. *See Robertson*, 503 U.S. at 437-39. Further, while the Court in *Systems Federation*, 364 U.S. at 651, found judicial modifications to be warranted because changes in the law had brought the previous order's terms into direct conflict with statutory objectives, such was not the case with the timber rider. Previously entered injunctions affected by the rider were not rendered inequitable or contrary to objectives set forth in extant environmental law.

380. *See Plaut*, 115 S. Ct. at 1456-57; *Robertson*, 503 U.S. at 437-38; *see also* *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 733 (1995)

*b. Interference with the Executive Function*

In addition, appropriations riders frequently evade checks and balances by undermining the executive powers granted by Articles I and II of the Constitution. The 1995 timber rider, like other riders that require executive action notwithstanding other existing laws, blatantly offends Article II of the Constitution: the President "shall take care that the laws be faithfully executed."<sup>381</sup> The timber rider trespassed into the prerogatives of the executive branch by forcing sales that do not comply with the Northwest Forest Plan—a Plan that was strongly supported by the President and had been given judicial blessing as satisfying existing environmental laws<sup>382</sup>—to be released.<sup>383</sup> In doing so, the rider significantly eroded the division between the executive and legislative branches, raising both constitutional and prudential concerns.<sup>384</sup> To allow Congress to direct the implementation of pre-existing substantive laws through appropriations riders contravenes Article II, and would "subvert the entire notion of separation of powers. The concept of the rule of law requires those who enact legislation to refrain from executing it. Only then is the risk of a tyrannical legislature averted."<sup>385</sup>

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(holding that a rider that provided that an EIS was deemed sufficient did not override the judicial decision that, in fact, the EIS did not satisfy NEPA; rider did not purport to change the underlying law, nor did it offer any new statutory standards). However, in *Northwest Forest Resource Council v. Glickman* (NFRC II), 97 F.3d 1161 (1996), the court summarily rejected the argument that section 2001(k)(1) violates separation of powers, citing *Robertson*, without further analysis.

381. U.S. CONST. art. II, § 3.

382. See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

383. See Bradley Declaration, *supra* note 131, at 2–3 (discussing action on BLM sales required to be released under section 2001(k)); Williams Declaration, *supra* note 132, at 3 (discussing Forest Service sales that had been enjoined and suspended). The Northwest Forest Plan itself was crafted in response to a number of previous injunctions; it reserved sensitive areas from harvest to avoid running afoul of those court orders, and to comply with the ESA, NFMA, and other environmental laws. See discussion *supra* Part III.A. Many of the sales that must be released under section 2001(k) are located within the Plan's reserves. See Williams Declaration, *supra*, at 3–4 and Table I.

384. "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (citing *INS v. Chadha*, 462 U.S. 919, 958 (1983)). In *Bowsher*, the Court found a provision of the Gramm-Rudman-Hollings Act, Pub. L. 99-177, 99 Stat. 1038 (1985), which gave Congress the power to remove the Comptroller General, an officer charged with Executive duties, to be unconstitutional. See 478 U.S. at 733–34.

385. LeBoeuf, *supra* note 163, at 473; see Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1379 (1980); cf. Devins, *supra* note 277, at 458–59. While noting that "riders that prohibit the Executive

Appropriations riders, by posing the specter of government shutdown, also undermine the President's authority to veto objectionable legislation, in contravention of Article I.<sup>386</sup> The Presentment Clause, a mechanism to protect against "ill-conceived legislation,"<sup>387</sup> was included to ensure that the President, the representative of national interests, has a voice in the legislative process, which would otherwise reflect only the more parochial interests of members of Congress.<sup>388</sup>

However, the modern-day budget process has skewed the balance by shifting a significant amount of control from the President to Congress.<sup>389</sup> The use of omnibus appropriations bills with non-germane riders has "made a mockery of the President's ability to exercise the veto power"<sup>390</sup> and "corrupted the delicate structure of shared powers."<sup>391</sup> This fundamental shift has created a constitutional crisis.<sup>392</sup>

In the absence of judicial invalidation of the timber rider and similar riders, constitutional amendment is warranted so that Congress is not again tempted to "ride" over the functions of the other two branches. The crisis created by the expansive use of appropriations riders to contravene separation of powers principles justifies a reaction of constitutional dimension.<sup>393</sup>

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from launching regulatory initiatives—without altering the underlying authorizations statute—unduly limit the Executive's policymaking responsibilities," Devins urges not an end to the practice, but merely that Congress be "more sensitive to the implications of appropriations-based oversight." *Id.* at 500.

386. See U.S. CONST. art. I, § 7, cl. 2; Sidak & Smith, *supra* note 287, at 475–76 (arguing that rider-tacking vitiates the presentment clause).

387. Krasnow, *supra* note 314, at 613; see Sidak & Smith, *supra* note 287, at 446 (indicating that the veto power was expected to "prevent the enactment of harmful laws").

388. See Petrilla, *supra* note 312, at 471. The Framers intended to "protect the President from legislative usurpation by empowering him with an institutional weapon to wield in the legislative process." Krasnow, *supra* note 314, at 595.

389. Krasnow, *supra* note 314, at 586, 601; Petrilla, *supra* note 312, at 471.

390. Krasnow, *supra* note 314, at 584. Not only does the attachment of riders onto appropriations bills have a chilling effect by placing a high political price tag on the use of the veto, vetoes of budgetary legislation are far more likely to be overridden than other vetoes. See Petrilla, *supra* note 312, at 477, 479 (noting that the Congress has overridden budgetary vetoes approximately 35% of the time, while overriding regular (non-budgetary) legislation only about 7% of the time).

391. See Krasnow, *supra* note 314, at 613.

392. See *id.* at 601, 607 (arguing that the congressional encroachment on the veto power is a crisis); Sidak & Smith, *supra* note 287, at 476 (arguing that art. I, § 7, cl. 3 (the residual presentment clause, extending the executive veto to congressional orders and resolutions) evinces the Framers' desire to prevent Congress from devising creative ways to avoid the presentment requirement; and arguing that bill-bundling does not seem any less offensive than labeling a bill a resolution).

393. Interbranch struggles such as those experienced in recent years over the fate



C. A Constitutional Amendment Should Be Process-Oriented

1. A Substantive Environmental Right Does Not Fit Well within the Existing Constitutional Framework, Nor Would it Be Immune to Erosion by Rider

In spite of the lofty policy statement included in the nation's preeminent environmental law, NEPA—"each person should enjoy a healthful environment"<sup>394</sup>—there is no enforceable right to environment or sustainable natural resources. In response, a number of commentators have argued for the creation, by amendment or judicial implication, of a constitutional right of this kind.<sup>395</sup> However, the creation of a new substantive right through constitutional amendment finds little support in existing federal or international law. In addition, proposals to discover or create an environmental right might not dissuade Congress from utilizing the appropriations process to effectuate changes in the law.<sup>396</sup>

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of the environment "signal the existence of a profound constitutional debate," Ackerman, *supra* note 339, at 1069, and further justify radical transformation. A constitutional amendment that effectuates resolution of the "sustained period of extraordinary institutional conflict," *id.* at 1053, inflicted on the nation and its public lands is a legitimate reaction. *See id.* at 1022-23, 1029 (arguing that public mobilization to effectuate fundamental change occurs "during rare periods of heightened political consciousness" that results in a "collective effort to renew and redefine the public good"); *see also* Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1453-54 (1995) (noting that pre-revolutionary assemblies' interference with court judgments was one of the concerns that led to Philadelphia Convention to decide to develop a constitution).

394. 42 U.S.C. § 4331(c) (1994).

395. *See, e.g.,* Sher & Hunting, *supra* note 165; Schlickeisen, *supra* note 309. For example, a right to environment might be implied as an essential value of a modern society: fully informed decisionmaking based upon free choice; recognition of the intrinsic value of each individual member of society; and patrimonial duties toward future generations not to limit their freedom of choice and self-destination. *See* Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93, 96 (1990). Environmental interest groups have also argued that the right to a healthy environment is an individual right protected by the equal protection clause. *See* U.S. CONST. amend. XIV; *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1421-23, 1438 (9th Cir. 1989). Although the court acknowledged that the importance of a healthy environment has been found to create legally cognizable interests, *see id.* at 1430 n.21 (citing *U.S. v. Students Challenging Regulatory Procedures ("SCRAP")*, 412 U.S. 669 (1973)), it did not find it necessary to resolve the issue. *See* *Stop H-3 Ass'n*, 870 F.2d at 1430-32.

396. For example, freedom of reproductive choice, which is not an explicit right but has been found in the "penumbras" of the Bill of Rights, *see* *Roe v. Wade*, 110 U.S. 113 (1973), has come under attack repeatedly in proposed legislative riders. *See, e.g.,* 142 CONG. REC. H1942, H1946 (daily ed. Mar. 7, 1996) (discussing abortion rider contained in earlier version of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, enacted as Pub. L. No. 104-134, 110 Stat. 1321 (1996)).

Proposals to tack on new constitutional provisions that reflect the current social values of the time are inherently problematic. Arguably, "preserving fundamental values is not an appropriate constitutional task."<sup>397</sup> The Constitution is "intended to regulate the general political interests of the nation,"<sup>398</sup> rather than to detail particular rights. We should, then, resist "the temptation to clutter up [the Constitution] with . . . amendments relating to substantive matters."<sup>399</sup>

It is most telling that the few attempts the Framers made to elevate substantive values of the time by designating them for special protection in the Constitution "have been ill-fated, normally resulting in repeal, either officially or by interpretive pretense."<sup>400</sup> For example, slavery, which was protected in the original document,<sup>401</sup> was outlawed, after much bloodshed, by the Thirteenth Amendment.<sup>402</sup> Another notable amendment that attempted to encapsulate a "fundamental" value was the eighteenth—temperance—which was repealed fourteen years later by the Twenty-First Amendment.<sup>403</sup>

Similarly, the 1994 Republican Revolution brought a wave of "amendment fervor,"<sup>404</sup> but recent efforts to amend the constitution

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397. ELY, *supra* note 295, at 88.

398. THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (Cook ed., 1961).

399. Lon Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEG. EDUC. 457, 463–64 (1954); *see also* Sullivan, *supra* note 339, at 696 (arguing that "[a]mendments politicize a constitution to the extent that they embed in it a controversial substantive choice").

400. ELY, *supra* note 295, at 88. Even the First Amendment's guarantee to free speech and association is directed toward ensuring that political processes work. *See id.* at 93–94. With respect to the religion clauses of the First Amendment, Ely argues that the establishment clause serves, at least in part, a separation of powers function, not inconsistent with the other procedural protections of the Constitution. *See id.* at 94. The free exercise clause serves an equal protection-like function that safeguards minority religions and requires decisionmakers to take the interests of all those their decisions affect into account; therefore, its inclusion in the Bill of Rights is also "entirely appropriate to a constitution." *Id.* at 100. Other substantive provisions, e.g., rights to bear arms and to enter into contracts, are, arguably, historic anomalies that have been effectively repealed by judicial construction. *See id.* at 100–01.

401. *See* U.S. CONST. art. I, § 9, cl. 1.

402. *See id.* at amend. XIII.

403. *See id.* at amends. XVIII, XXI; Sullivan, *supra* note 339, at 696 (noting that "the only modern amendment to enact a social policy . . . [Prohibition] is also the only modern amendment to have been repealed").

404. Michael Doyle, *Growing Drive to Amend the Constitution: Congress Turns Increasingly to this 'Last Step,'* SACRAMENTO BEE, Dec. 15, 1996, at A3; *see* Sullivan, *supra* note 339, at 691, 693 (noting that the 104th Congress has considered more amendment proposals than at any other time in recent memory: "the current proliferation of proposed constitutional amendments is striking"). Senator Bumpers recently complained, "Sometimes there are so many changes proposed around here on the Constitution

to encapsulate moral values, including environmental rights,<sup>405</sup> have failed. Some of the weightiest social issues of our time have been the subject of proposed amendments, but none has attained passage by two-thirds of Congress, as required by Article V, much less ratification by the states:<sup>406</sup> equal rights based on gender;<sup>407</sup> balanced budget;<sup>408</sup> flag desecration;<sup>409</sup> abortion;<sup>410</sup> and school prayer.<sup>411</sup>

Political expediency has frequently been the motivation behind these amendment proposals—many are popular, but largely unconsidered, reactions to issues that happen to be in vogue at the

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you would think it was just a rough draft, and that we were charged with the responsibility of finishing it." 141 CONG. REC. S13,814, S13,828 (daily ed. Sept. 19, 1995).

405. Rep. Morris Udall proposed at least one environmental amendment, and several others have also been proposed, but none has received serious consideration. *See Four Plans to Add a Nature Amendment to the U.S. Constitution*, EARTH ISLAND J., at 11 (1990). Most recently, a coalition of 37 state legislators announced that they would propose a constitutional amendment to guarantee the right to a clean and healthy environment to all present and future generations. *See Conservationists Hail Call for Environmental Amendment to U.S. Constitution*, U.S. Newswire, Sept. 25, 1996, available in 1996 WL 12123062.

406. Article V requires ratification by the legislatures of three fourths of the states. *See* U.S. CONST. art. V. An alternative procedure calls for a convention for proposing amendments on applications of the legislatures of two-thirds of the states, *see id.*, but this provision has never been used. *See* H.R. REP. 104-3 (1995) (Judiciary Committee report recommending passage of the Balanced Budget Amendment).

407. Senator Kennedy has consistently proposed that the Judiciary Committee report an Equal Rights Amendment. *See* S.J. Res. 40, 103d Cong. (1993), S. REP. 104-343, at 79 (1996); S.J. Res. 3, 102d Cong. (1991), S. REP. 103-30, at 78 (1993); S.J. Res. 1, 101st Cong. (1989), S. REP. 102-17, at 69 (1991).

408. The Balanced Budget Amendment has been a special favorite of the Republican majority in the 104th and 105th Congresses, and is one of the seven constitutional amendment proposals of the party platform. *See* Jonathan Alter, *The Passion Gap*, NEWSWEEK, Aug. 19, 1996, at 49 (reporting that others include the imposition of congressional term limits, protection for school prayer and victims' rights, and prohibitions on flag burning, abortion, and citizenship for illegal aliens). Although recommended to the House and Senate by their respective judiciary committees, it has not achieved passage. *See* H.J. Res. 1, 104th Cong. (1995), H.R. REP. 104-3 (1995); S.J. Res. 1, 104th Cong. (1995), S. REP. 104-5 (1995); Eric Pianin & Helen Dewar, *Budget Amendment Barely Loses in Senate*, WASH. POST, Mar. 5, 1997, at A1. Similarly, in the 103d Congress, a balanced budget amendment, S.J. Res. 41 (1993), was reported favorably by the Senate Judiciary Committee, but overwhelmingly defeated on the floor. *See* S. REP. 104-343 at 79.

409. An amendment to prohibit desecration of the American flag has been proposed several times in both houses, and the House Judiciary Committee recommended its passage in the 104th Congress. *See* H.J. Res. 79, 104th Cong. (1995), H. REP. 104-151 (1995). Three committee members dissented, objecting to the elevation of the flag "over other cherished symbols" by embedding the proposal into the Constitution. *See id.* at 15.

410. *See* S.J. Res. 37, 103d Cong., S. REP. 103-30, at 78 (1993); S.J. Res. 3, 101st Cong. (1989), S. REP. 102-17, at 69 (1991).

411. An amendment allowing school prayer has been proposed numerous times in recent years, but has not been recommended for passage. *See* S.J. Res. 9, 103d Cong. (1993), S. REP. 104-343, at 79 (1996); S.J. Res. 15, 103d Cong. (1993), S. REP. 103-30, at 78 (1993); S.J. Res. 144, 101st Cong. (1989), S. REP. 17, 102d Cong. at 69 (1991).

moment. For example, a proposal to amend the Constitution to require a supermajority to pass tax increases, which came up for consideration on the House floor on April 15, 1996, was labelled by some as "showboating pure and simple," "a legislative fiasco,"<sup>412</sup> and a "public-relations stunt."<sup>413</sup> Similarly, one of the most recent proposals, the Victims' Rights Amendment, was politically attractive during the 1996 election year, and drew considerable support from both parties.<sup>414</sup> The proposal seemed to have sunk into post-election obscurity but "Victim's Rights Week" (April 13–19, 1997) has generated renewed interest.<sup>415</sup>

On the other hand, enduring post-Bill of Rights amendments all protect procedural rights. Several deal with the franchise,<sup>416</sup> to protect and open political processes to all citizens on an equal basis.<sup>417</sup> Others also provide representational safeguards, through electoral qualifications,<sup>418</sup> compensation of members,<sup>419</sup> popular election process,<sup>420</sup> presidential succession,<sup>421</sup> and presidential term limits.<sup>422</sup> Thus, the United States Constitution is distinguished as pro-

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412. 142 CONG. REC. H3256, H3258 (daily ed. Apr. 15, 1996) (statement of Rep. Moakley) (the Constitution is "no place for political theater").

413. *Id.* at H3260 (statement of Rep. Beilenson). Ironically, although internal House rules were changed during the 104th Congress to require a three-fifths vote for tax increases, the rule was waived every time the issue came up. *See id.* at H3258.

414. *See* John Harris, *Clinton Backs Crime Victims' Amendment*, WASH. POST, June 26, 1996, at A1 (reporting that President Clinton supports a victims' rights amendment, although he has rejected other proposals to amend the Constitution); Editorial, *Tinkering with the Constitution*, WASH. POST, June 26, 1996, at A20 (suggesting that the amendment had the backing of both parties' presidential candidates simply because of its "political irresistibility" during an election year).

415. *See* *Kyl's Victims' Rights Amendment Gets Senate Judiciary Hearing*, Press Release, Apr. 16, 1997 (noting that Attorney General Janet Reno had testified in support of the Amendment, which would, among other things, allow victims to be present at judicial proceedings in their case and be told of the offender's release or escape). For a more critical view of proposal, *see* Stephen Chapman, *Constitutional Clutter: The Wrongs of the Victims' Rights Amendment*, CHI. TRIB., Apr. 20, 1997, at A21.

416. *See* U.S. CONST. amends. XV, XIX, XXIV, XXVI.

417. *See* ELY, *supra* note 295, at 99.

418. *See* U.S. CONST. amends. XVII, XXIII.

419. *See* U.S. CONST. amend. XXVII.

420. *See* U.S. CONST. amend. XVII; *see also* amend. XIV.

421. *See* U.S. CONST. amends. XX, XXV.

422. *See* U.S. CONST. amend. XXII. There have been numerous proposals to impose congressional term limits through constitutional amendment. *See* John E. Yang, *Term Limits Fail Again in the House*, WASH. POST, Feb. 13, 1997, at A1. Recently, in the wake of abuses that occurred during the 1996 elections, another proposal that would provide procedural safeguards—campaign finance reform—has gained widespread momentum, more or less across party lines. *See* Stephen Green, *Constitutional Amendment Sought for Campaign Reform*, SAN DIEGO UNION-TRIB., Nov. 26, 1996, at A2.

viding a "process of government, not a governing ideology";<sup>423</sup> otherwise, it would not survive through the ages. By ensuring adequate process and "a durable structure for the ongoing resolution of policy disputes,"<sup>424</sup> the Constitution protects representational, republican democracy. The guarantees of life, liberty, and happiness are assured "not by trying to define them for all time, but rather by attending to the government processes by which their dimensions would be specified over time."<sup>425</sup>

In sum, instead of creating a new substantive right, an amendment that protects public participation and full and complete deliberation and accountability in the legislative process, particularly with respect to issues that are subjected to extreme political and economic pressures, such as environmental protection, would be more consistent with the spirit and structure of the Constitution.

## *2. A Process-Based Constitutional Amendment Prohibiting Substantive Legislation by Appropriation Would Be the Most Effective Solution*

The Constitution protects fundamental values through procedural protections that ensure that "in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decisionmakers held to a duty to take into account the interests of all those their decisions affect."<sup>426</sup> However, the procedural protections of representative government have broken down in recent decades. The nation's political system currently

reflects an emphasis on expediency and a failure to nurture our capacity for self-determination. We have not paid adequate attention to the serious problems undermining the accountability of government and the confidence citizens have in it . . . . [I]n order to redeem the promise of democratic government, we must make all these [governmental] institutions more accountable.<sup>427</sup>

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423. ELY, *supra* note 295, at 101.

424. *Id.* at 90. Indeed, its very impetus was that the colonists were not being adequately represented in Parliament. *See id.* at 89.

425. *Id.* at 89.

426. *Id.* at 100.

427. GORE, *supra* note 39, at 180-81.

The case for a process-oriented right to protect the environment is particularly compelling under the representational democratic framework of the United States. "The largest promise of the democratic idea is that, given the right to govern themselves, free men and women will prove to be the best stewards of their own destiny . . . . But now a new challenge—the threat to the global environment—may wrest control of our destiny away from us."<sup>428</sup>

It is generally recognized that due process rights—access to information, education, participation, recourse, and sanctions—are a necessary component of maintaining a decent and sustainable environment.<sup>429</sup> Access to information is the bedrock upon which participatory rights are founded. Indeed, "informed public opinion is the most potent of all restraints upon misgovernment."<sup>430</sup> With regard to environmental issues:

Unrestricted public access to adequate information is a condition *sine qua non* to the participation by everyone in the protection and improvement of the environment. Without appropriate data, the general public cannot answer the following very fundamental question: is the environment clean and balanced or not?<sup>431</sup>

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428. *Id.* at 276–77. The deprivation of choice and, consequently, self-destiny, impairs a fundamental interest: "[e]ach generation exercises power over its successors: and each, in so far as it modifies the environment bequeathed to it . . . limits the power of its predecessors." Sax, *supra* note 81, at 102 (citing C.S. LEWIS, *THE ABOLITION OF MAN* 36–37 (1947)). "The impoverishment of the earth and its resources limits the choices available to future generations, and makes future human beings 'the patients of . . . [our] power.'" *Id.* at 103 (citing LEWIS, *supra*).

429. See Janusz Symonides, *The Human Right to a Clean, Balanced, and Protected Environment*, 20 INT'L J. L. INFO. 24, 29–37 (1992). In the international forum, although substantive environmental rights have not been recognized, "regional and international human rights bodies are developing a practice whereby the *procedural* bases for enforcing the right to a satisfactory environment are becoming more firmly established." UNITED NATIONS, ECONOMIC AND SOCIAL COUNSEL, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, HUMAN RIGHTS AND THE ENVIRONMENT, SECOND PROGRESS REPORT PREPARED BY MRS. FATMA ZOHRA KSENTINI 37, ¶ 123, U.N. Doc. E/CN.4/Sub.2 (1993) (emphasis added).

430. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

431. Symonides, *supra* note 429, at 29. The consideration and exchange of environmental information is anticipated by a number of international agreements. See, e.g., Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. IX (2), S. TREATY Doc. No. 100-10 (1987), 26 I.L.M. 1541, (entered into force Jan. 1, 1989); United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Princ. 17, U.N. Doc. A/Conf. 151/PC/WG.III/Rev. 1 (1992) (declaring that "environmental impact assessments . . . shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment").

Information alone, however, is not enough. Individuals must be provided with "both the information to comprehend the enormity of the [environmental] challenge and adequate political and economic power to be true stewards of the places where they live and work."<sup>432</sup> Such stewardship necessarily requires the availability of appropriate political tools, including the opportunity to participate meaningfully through our elected representatives.<sup>433</sup>

In a broader sense, use of the appropriations power to establish public policy—environmental and otherwise—and to circumvent the long-term priorities of the public has undermined meaningful representation and seriously corrupted the political process, to the extent that it is no longer deserving of the citizenry's trust.<sup>434</sup> Accordingly, an amendment to protect participatory rights in representational government, which would prohibit the enactment or waiver of substantive legislation through the abbreviated budget process,<sup>435</sup> warrants consideration as a possible solution.<sup>436</sup>

This Article does not purport to define the proposed amendment in detail, and instead takes the position that a process-oriented amendment deserves further consideration. As a starting point, a constitutional provision could require all appropriations

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432. GORE, *supra* note 39, at 277.

433. Senator Leahy noted that American citizens have the right to participate and express their interest in the management of public lands, and that the Senate should not accept a provision that denies this right. See 141 CONG. REC. S4876 (daily ed. Mar. 30, 1995).

434. Malfunction in democracy occurs "when the *process* is undeserving of trust." ELY, *supra* note 295, at 103. In fact, mistrust of state assemblies, where bribery and corruption were frequently the norm, resulted in the amendment or incorporation of provisions in many state constitutions that restrict the content of appropriations bills to non-substantive, budgetary matters. See Zielske, *supra* note 297, at 742 & n.7.

435. State courts have struggled with the interpretation of anti-rider provisions; for example, the distinction between substantive and non-substantive measures has not been clearly defined. See Zielske, *supra* note 297, at 745-46 (detailing judicial interpretations of Pennsylvania provision that states that general appropriations bills "shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools").

436. Without doubt, some will continue to argue that process alone is not enough to ensure environmental protection. Professor Sax has concluded that the implicit principle underlying the procedural mandate of NEPA—that federal programs would become less environmentally damaging when agencies are required to consider alternatives and publicly describe adverse environmental effects—has not been fulfilled. See Joseph L. Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239 (1973). But see Hungerford, *supra* note 62, at 1433-34 (arguing that the issuance of the Northwest Forest Plan in response to the spotted owl injunctions provides evidence that NEPA has influenced environmental policy in far-reaching ways, by forcing the executive branch to rethink public lands management).

measures to be germane to the spending bill under consideration, consistent with existing law, and limited to the life of the appropriations bill itself.<sup>437</sup> In addition, an amendment should likely include a provision to allow for waiver, perhaps by a supermajority of both houses of Congress, in case of actual emergency.<sup>438</sup> The experience of states that do have constitutional prohibitions on riders is a plausible place to look for guidance.<sup>439</sup>

## VII. CONCLUSION

Fundamental constitutional change is justified when special interest factions have successfully and repeatedly manipulated the political structure to pursue their own narrow interests, as a small group of extractive resource users has done in recent years. It is justified when "ordinary irresponsibilities of normal politics . . . begin to offend in a special way,"<sup>440</sup> as is the case when elected representatives routinely manipulate the legislative process to coerce the executive branch to forego its veto authority, or to take action contrary to directives from the judiciary, thereby eroding constitutional checks and balances. It is justified when judicial review is severely curtailed by appropriations riders. The assault on the public interest and the environment has precipitated a constitutional crisis. A collective effort to renew and redefine the public good by fine-tuning the legislative process is in order.

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437. See Zielske, *supra* note 297, at 742–745 (discussing the Pennsylvania Constitution).

438. See Devins, *supra* note 277, at 459.

439. States have long been considered "laboratories of democracy," a conception particularly relevant in this area. See Briffault, *supra* note 314, at 1171; see also *supra* note 268 (providing a partial list of state constitutions that include limitations on riders). In interpreting their own constitutions, state courts have gained substantial experience with the difficulty of giving content to terms like "germaneness" and distinguishing between "substantive" and "non-substantive" measures. See Zielske, *supra* note 297, at 745–46.

440. Ackerman, *supra* note 339, at 1040.